Chapter 34

TURKEY

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I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Turkey is a unitary republic with a single nationwide legal system. It is a civil law country, as this term is generally understood in Continental Europe. Codified law, as the main source of law, adheres to a hierarchical system. The Constitution is naturally at the very top, with which no law can be at odds. International treaties that are duly ratified and put into effect carry the force of law, pursuant to Article 90 of the Turkish Constitution. Moreover, such international treaties are immune to a constitutionality review by the Constitutional Court. International treaties in the field of fundamental rights and freedoms enjoy even higher degrees of deference as Article 90 stipulates that provisions of human rights treaties shall prevail over any conflicting domestic laws. Statutes (i.e., laws) enacted by the National Assembly and decree-laws passed by the President come next in the ranking. These are followed by regulations, by-laws and communiqués passed by various public authorities.

From a historical perspective, enactment of major statutes was largely an exercise of translating some of the leading European laws of the era, with necessary adaptations in view of the society's traditions and customs. Specifically, present day Turkish law finds its roots in the Swiss civil, German commercial and Italian criminal codes. These European systems continue to influence Turkish law despite enormous legal reforms that have taken place in Turkey, especially in the past decade.

While an overwhelming majority of disputes that cannot be resolved through amicable negotiations are adjudicated in the courts, mediation continues to gain prominence in Turkish law. Almost six years after the enactment of the Code on Mediation, the Law on Labour Courts has made it mandatory for parties to conduct mediation proceedings before applying to a court for certain types of lawsuits, such as employment receivable claims and reinstatement cases. Similarly, Law No. 7155 on the Procedures to Initiate Debt Collection Proceedings for Receivables Arising out of Subscription Agreements, which was enacted in December 2018, will make it mandatory to apply to mediation before filing commercial lawsuits for receivable or compensation claims from 1 January 2019 onwards. An exception to the mandatory mediation requirement is that parties who choose to settle their disputes via arbitration do not have to undergo the mandatory mediation process.

The Turkish court system is structured horizontally by subject matter jurisdiction into two sets of general divisions and one set of specialised divisions:

a the civil and criminal judiciary;

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b the administrative judiciary; and

c other specialised High Courts, which include:
- the Constitutional Court;
- the Court of Jurisdictional Disputes;
- the Court of Accounts; and
- the Supreme Electoral Council.

Under the horizontal structure, the civil and criminal judiciary and the administrative judiciary are also structured vertically into three tiers, which include from lowest to highest: courts of first instance, regional courts, and High Courts known as the Court of Cassation and the Council of State, depending on the subject matter. However, the specialised High Courts are stand-alone courts, empowered only to hear cases on specific matters, and they contain no vertical structure.

The civil and criminal judiciary is organised into three vertical tiers. These vertical tiers are the civil and criminal courts of first instance, the civil and criminal regional courts, and the Court of Cassation. Under the three-tier court structure, the type and the amount of the subject matter of a lawsuit or criminal complaint determines whether judgments rendered by the civil and criminal courts of first instance are appealable, and if so, which court will be the final body of appeal.

All civil law disputes are heard by civil courts, guided by the Civil Procedure Code. For civil disputes, the Turkish courts of first instance are organised according to subject matter jurisdiction. In this respect, there are the general courts of first instance and specialised courts. The Civil Court of First Instance and the Civil Court of Peace hear all civil law disputes that do not fall into the subject matter jurisdiction of specialised courts. The specialised courts of first instance, on the other hand, have their own founding legislation based on unique subject matter, such as the commercial courts, consumer courts and labour courts.

In a similar vertical structure, all criminal disputes are heard by criminal courts and guided by the Code of Criminal Procedure. In criminal disputes, the courts of first instance are also organised according to subject matter jurisdiction. In this respect, the criminal court of first instance is the general court for criminal cases and the High Criminal Court hears cases related to crimes carrying sentences and sanctions in excess of certain benchmarks regulated under the law. Furthermore, the Criminal Peace Judicature, which is responsible for making judicial decisions during ongoing investigations, undertakes the necessary steps to implement such decisions and evaluate objections to such decisions. In addition, there are specialised criminal courts of first instance, such as the Juvenile Court, the Juvenile High Criminal Court, the Criminal Court for Intellectual and Industrial Property Rights, and the Criminal Execution Court.

Organised by region, civil and criminal regional courts function as courts of second instance. They contain both civil and criminal chambers, and have only been operational since 20 July 2016, following a period of 12 years in which they existed on paper but not in reality.

Civil and criminal regional courts expedite adjudication by functioning as appeals courts that also offer truly de novo review. They not only have the authority to reverse decisions of the civil and criminal courts of first instance and resolve cases by rendering partial or full and final decisions on matters of law, but also to examine new evidence or re-examine old evidence at their discretion in order to rule on matters of fact. For this purpose, they are empowered to conduct hearings, appoint expert witnesses for examination of evidence, and

hear direct witness testimony when necessary. Their authority to hear cases on questions of both fact and law allows them to act as a buffer between the civil and criminal courts of first instance as the first trier of fact, and the Court of Cassation, hearing appeals on matters of law only.

The highest court in the civil and criminal system is the Court of Cassation, which serves as the final appellate body and is further divided into two sets of chambers, plus an assembly for harmonising conflicting decisions. The Court of Cassation has the authority for legal review only, meaning that it does not hear evidence and does not perform factual re-examination. However, the Court of Cassation had previously discharged both appellate and cassation functions until the civil and criminal regional courts became operational. The Court of Cassation has been operating exclusively as a body for legal review since 20 July 2016, as provided by law. Strictly speaking, decisions rendered by the chambers of the Court of Cassation do not create binding precedents for each other, the courts of first instance or the regional courts. However, decisions rendered by the Plenary Assembly of the Court of Cassation are binding on all chambers of the Court of Cassation, as well as all lower courts.

Similar to the civil and criminal judiciary, the administrative judiciary is also organised into three vertical tiers, which are the administrative courts of first instance, the administrative regional courts, and the Council of State.

All disputes arising out of administrative actions, as well as acts between public authorities, and between a private party and a public authority acting with public power are heard by administrative courts of first instance, under the Code of Administrative Procedure. As with the civil and criminal regional courts, administrative regional courts also hear cases on questions of fact and law and are empowered to conduct de novo judicial review under certain circumstances. They can also render three types of decisions: upholding the judgment of the administrative court of first instance, remanding the case to the administrative court of first instance for further examination, or hearing the case anew as if it were itself a court of first instance. The Council of State operates as the final body of appeal in the administrative court system. In its role as an appellate body, the Council of State primarily conducts re-examination on issues of law, similar to the Court of Cassation. However, with regard to administrative disputes subject to emergency procedures, the Council of State can also re-examine facts and grant final decisions without remanding the disputes to the administrative courts of first instance or the regional administrative courts. In addition, as the Plenary Assembly of the Court of Cassation does, the Plenary Session of the Council of State harmonises opinions of its chambers and issues decisions that are binding on all chambers and lower courts of the administrative system.

There are other specialised courts such as the Constitutional Court, the Court of Jurisdictional Disputes and the Supreme Electoral Council. On 23 September 2012, the Constitutional Court became, for the first time in its modern history, a further level above the Court of Cassation and the Council of State available to the parties through the 'right of individual application'. This new level is considered separately in Section III, below.

II THE YEAR IN REVIEW

This year Turkey amended multiple codes to improve the investment climate. Perhaps most significant among these developments was the passage of the Law Amending the Enforcement and Bankruptcy Law and Certain Other Laws No. 7101, which was published in Official

Gazette No. 30361 on 15 March 2018. It abolished the device of the deferral of bankruptcy, which had not been providing the benefits expected of it. In addition, amendments were made to the provisions on composition with creditors to make this process more functional.

Following the effective date of these amendments, there has been a significant increase in requests for composition with creditors by companies unable to pay their debts. Composition with creditors is now a popular option for financially troubled debtors as it allows them to sustain their business activity while spreading their repayments to lenders over longer terms.

In that the past year, Turkey has also prohibited prices in certain agreements from being denominated in foreign currency, with Presidential Decree No. 85 amending Decree No. 32 on the Protection of the Value of Turkish Currency (the Decree) , which went into effect on 13 September 2018. The Decree prohibited the agreement price and any other payment obligation arising from sale and purchase agreements and lease agreements for movable and immovable assets executed by and between persons residing in Turkey from being denominated in or indexed to foreign currency, with certain limited exceptions. Details regarding how the Decree would be enforced, and certain exemptions from the rule established in the Decree, were clarified in the Communiqué Amending the Communiqué Regarding Decree No. 32 on the Protection of the Value of Turkish Currency (the Communiqué), which was published in the Official Gazette on 6 October 2018A. A subsequent amending communiqué was issued on 16 November 2018 to provide further clarity on the subject, and ended up eliminating most of the restrictions. The Ministry of Treasury and Finance also published a question and answer chart on its website regarding the most common issues involved in the enforcement of the Communiqué, in order to clarify how this new regime will be imposed.[2]

Other than these amendments, the conditions for application to Turkish citizenship by way of real estate ownership were recently softened by a number of amendments to the Regulation on the Implementation of Law of Turkish Citizenship, which were published on 19 September 2018. These amendments lowered the threshold purchase price for eligibility from US$1 million to US$250,000. The threshold required to acquire Turkish citizenship by way of investment was also reduced. As for acquiring Turkish citizenship by creating employment opportunities, the minimum number of employees that need to be employed was lowered from 100 to 50. With a new amendment to the same regulation, which was published on 7 December 2018, it will now be possible to apply for Turkish citizenship on the basis of a mere promise to sell agreement, rather than having acquired ownership of the real estate in question, so long as at least US$250,000 or its equivalent is paid in advance, and the agreement is recorded at the land registry with the undertaking not to assign or deregister it for a period of three years.

In the past year, Turkey has also amended multiple codes for the facilitation of investment. The Code Amending Certain Codes for the Purpose of Ameliorating the Investment Environment No. 7099 was published on 10 March 2018. All of its provisions entered into force as of 10 September 2018 at the latest. This new legislation has amended provisions of several codes, most notably certain provisions of Turkish Commercial Code No. 6102 (TCC) and Code on Pledges over Movables by Commercial Operations No. 6750 (the Movable Pledge Code). According to these amendments, privately-held companies will no longer be required to have a corporate representative present at their general assembly

2 This section was based, with the necessary modifications and updates, on publications of Hergüner Bilgen Özeke Attorney Partnership.

meetings. Also, when founding new limited liability companies, incorporators will no longer be required to pay 25 per cent of the share capital prior to registration with the local trade registry. Finally, company incorporation will be simplified by removing some formalities.

In the same vein, amendments to the Movable Pledge Code have softened the procedure for deregistering pledges. The term granted to pledgees to deregister movable pledges once the secured receivables have ceased to exist has been increased from three business days to 15 business days for Turkish pledgees and to 30 business days for foreign pledgees. The administrative fine for non-compliance remains the same, but the relevant registries will only consider cases of non-compliance if a complaint is filed against a pledgee by a pledger or a borrower. There have also been changes in the law that were aimed to facilitate SMEs access to financing opportunities.

The past year has also witnessed the simplification of title deed transactions. Land Registry Code No. 2644 has been amended to permit registration of mortgage transactions involving real estate that has been supplied as collateral in credit arrangements, without the need to execute official mortgage deeds. This amendment not only impacts banks but clearly applies to all credit institutions.[3]

Code on the Organization and Functions of the General Directorate of Land Registry and Cadastre No. 6083 was amended to allow registration, cancellation and annotation to be made electronically upon the request of the related judicial authority or the competent institution and organisation.[4]

Condominium Code No. 634 was amended to permit registrable notarised condominium ownership and construction servitude agreements to be registered with the land registry upon consignment of contracts by a notary.[5]

Finally, in order to minimise temporary storage costs in international trade, Customs Code No. 4458 was amended as follows: a maximum price limit was set for shipment, warehousing, clearance and other expenses that can be collected by the customs authority, and a fine was introduced to sanction violations of this rule.[6]

Finally, there have been several procedural amendments to Civil Procedure Code (CPC) No. 6100 and to other laws that have collectively aimed to accelerate dispute resolution. These amendments will be explained below in related sections.

Overall, as these recent amendments have lowered the thresholds for acquiring Turkish citizenship and generally improved the investment climate, it can be expected that there will be more interactions and foreign investment demand in the near future.

III COURT PROCEDURE

i Overview of court procedure[7]

Turkish court procedures used to look peculiar, cumbersome and frustratingly slow under the old litigation system established under the 1927 Civil Procedure Code. The new CPC,

3 Id.

4 Id.

5 Id.

6 Id.

7 This section was based, with the necessary modifications and updates, on publications of Hergüner Bilgen Özeke Attorney Partnership; see 'Civil Procedure Reform in Turkey: Gone Are the Archaic Practices, Now Embracing the All-New Code', originally published in *The American Lawyer*, October 2011 issue.

which entered into force on 1 October 2011, marked the beginning of a new era in Turkish litigation. The new procedure regime was intended to eradicate outdated and archaic methods of the old procedure and the CPC introduced many fresh concepts and mechanisms. Among the many changes, drafters of the CPC addressed two of the most problematic aspects of civil litigation in Turkey: the length of proceedings and the partial outsourcing of judicial duties to court-appointed experts.

The CPC endeavours to turn civil litigation into a time-efficient, practical and simple process. For instance, plaintiffs are now required to pay, at the outset, not only court fees but an estimated 'advance for costs'. In the past, they could avoid depositing even insignificant fees earmarked for official notifications, court-appointed experts or on-site fact-finding until specifically ordered to do so by the judge at a hearing, which, in turn, meant that a full hearing or two would simply be wasted.

Another issue was the parties' reluctance to submit their full case together with documentary evidence. They would procrastinate, sometimes as a tactic but often owing simply to disorganisation, until the judge set a final deadline for submission of evidence. This of course would occur long after full rounds of written pleadings had been exchanged. Both parties would then make additional submissions – a practice that actually had no place in the legislation – once they had received the other's exhibits. Parties would also delay submitting briefs until the next hearing, again costing valuable time. It is now mandatory to submit full claims, counterclaims and defences at the outset, together with all documentary evidence available. A trial will not be set in motion until the full sequence of written pleadings is complete.

Once all pleadings are exchanged, the judge will schedule a preliminary examination hearing. This procedural stage is new in Turkish litigation, and is most welcome. With a complete understanding of factual and legal questions at issue, courts will now address preliminary objections early on in the process. The nightmare scenario of a case being fully tried on its merits only to be ultimately dismissed for being time-barred should no longer happen. Also, judges are now specifically authorised to urge the parties to settle or resort to ADR mechanisms as early as during this preliminary examination stage.

A very significant change that the CPC of 2011 introduced is with regard to court-appointed legal experts. The CPC aims to put an end to an anomaly in Turkish civil litigation whereby courts would appoint legal experts who practically decided the fate of a dispute. Until the new CPC was enacted, review and analysis of the merits of a case were virtually subcontracted to third-party experts, including practising lawyers, as courts had little time or resources to do review and analysis themselves. Astonishingly, this review went beyond technical matters to factual and legal issues. Although the old Civil Procedure Code itself prohibited the use of legal experts, most judges were too overwhelmed with their caseloads to observe that rule. These 'legal experts' would draft an analytical report, suggesting a fully reasoned outcome that judges would pass into judgment unless manifestly erroneous or unreasonable.

This practice withstood intense criticism as the Court of Cassation and the Justice Ministry turned a blind eye, acknowledging the sheer volume of cases before the understaffed judiciary.

While the new CPC re-emphasises the prohibition of appointing legal experts, this prohibition is also supported by the provisions that entered into force under the Expert Law enacted in 2016.

In addition, the CPC limits the roster of experts to those enlisted with the Justice Ministry. Presumably the Ministry will reserve the list for persons with technical or scientific expertise, thereby excluding lawyers. As trials are now structured so as to be finalised much faster, backlogs are expected to be reduced, giving judges more time to deal with legal issues themselves.

The CPC has introduced dozens of other changes. While some of them are novel, most are in the form of clarification, refinement and fine-tuning, rather than major reforms. We have addressed only the most significant changes.

ii Procedures and time frames

Contrary to popular belief in Turkey, there used to be six, and not three, types of case management procedures in civil proceedings, although three to four of them were largely unused in practice. The new CPC simplifies these down to two: written procedure and simple procedure. Simple procedure relies on oral proceedings and is akin to Anglo-American summary proceedings where a fast-track resolution is sought; commercial lawsuits with values of less than 100,000 Turkish lira must follow the simple procedure in order to ensure timely resolution.

Written procedure is the more commonly used method in civil litigation. A case is initiated by the plaintiff filing a statement of claim with the relevant court. The clerk's office then serves it to the defendant. Before the entry into force of the new CPC, various procedural deadlines were set as a given number of days. The new CPC discards the 'day' basis in favour of weeks, which is much easier to commit to memory. For instance, the defendant's period to make defence submissions (and counterclaims, if any) used to be 10 days and is now two weeks. Then the claimant gets two weeks to reply and the defendant gets another two weeks to rejoinder. As discussed above, once all pleadings are exchanged, a preliminary examination hearing will be held to deal with preliminary issues such as jurisdiction, prescription periods, etc.

Until the new CPC, oral hearings were not exactly fruitful exercises. Most hearings would be spent with the judge flipping through the case file – with which he or she hardly found the time to familiarise him or herself – to see if documentary evidence summoned from third parties had arrived, whether court-appointed experts had submitted their reports, etc. Counsel, in turn, had the luxury of showing up at hearings without much preparation, uttering perhaps a few words as they watched the judge wrap things up hastily and set a new hearing date a few months in the future. Counsel would have very limited time, if any at all, to examine factual witnesses. Cross-examination existed on paper, but was dispensed with in practice as courts had little patience in waiting for the truth to unfold slowly through witness testimony. In fact, hijacking counsel's role, judges themselves would often question witnesses directly, unless counsel was overly assertive, at the cost of irritating the judge. The new CPC specifically provides for fact and expert witness examination and cross-examination by counsel. Expert witness examination, in particular, is novel in Turkish procedure. In the past, expert witnesses did not have to appear in hearings for examination by counsel.

A set of amendments made to the CPC in 2018 will require expert witness opinions to be submitted to the court within a two-month time period in a simple procedure, which courts may extend by two months, for a total that must not exceed four months. The shortening of the total period from six months to four months was made in an effort to ensure that legal proceedings are completed within a reasonable time.

iii Class actions

In Turkish law, class action litigation does not exist as it does in the Anglo-American tradition. There has always been a mechanism by which parties could join other parties in a case as co-plaintiffs or co-defendants. But this mechanism is technically 'multiparty litigation', and should be distinguished from class action.

For the first time in Turkish civil procedure, the new CPC introduced a mechanism referred to as 'collective action', which is perhaps the closest concept to class action available in Turkey. Pursuant to Article 113 of the CPC, associations and other legal entities can now file a case on behalf of their members or the persons that they represent or act for the benefit of. Hence, there is still no mechanism whereby an individual can be certified by a court to define, invite and act on behalf of a large number of fellow litigants who would otherwise take action individually. The other difference from a US class action remedy is that Article 113 does not lend itself to compensation claims. It is merely a plea for the determination of certain rights, prevention of unlawful acts and future damages in relation to the relevant persons. It is expected to serve a large number of customers who, for instance, challenge a unilateral action of their service provider. They will not be able to claim a cumulative sum of compensation to be shared among them eventually, but at least they will not have to sue the same defendant individually.

iv Representation in proceedings

In civil litigation, parties can represent themselves or freely hire one or more attorneys. In criminal cases, however, an attorney will be appointed to persons who are considered particularly vulnerable, such as minors.

Legal entities can self-represent through their authorised bodies, such as their board members. They may also appoint attorneys of course. The attorney must be a member of a Turkish Bar to appear at trial.

v Service out of the jurisdiction

Service of process outside Turkey can be either straightforward or very cumbersome, depending on the domicile of the recipient. As Turkey is a party to the Hague Convention on Civil Procedure of 1954, any service to a person domiciled in one of the Member States is subject to the well-established procedures of the Convention. The Convention specifically reserves the validity and applicability of bilateral (and multilateral) treaties on service of process.

For instance, Turkey is party to such a bilateral treaty with the United Kingdom: the Convention Regarding Legal Proceedings in Civil and Commercial Matters, signed in 1931 and ratified in 1933.[8] Turkey has also ratified treaties for service of process with other countries, including Algeria, Austria, Bulgaria, Egypt, Germany, India, Iraq, Jordan, Macedonia, Pakistan, Poland, Romania, Switzerland, Tunisia and Ukraine.

For countries that are not party to the Hague Convention, the principle of reciprocity applies. Generally, this entails service through the local authorities on the basis of a request by the Turkish diplomatic corps at the place of domicile of the addressee.

8 The Convention was later supplemented by a Supplementary Convention Regarding Legal Proceedings in Civil and Commercial Matters, signed in 1939 and ratified in 1941, with regard to territorial applicability.

Turkish law does not distinguish natural persons from legal entities in international service procedures.

vi Enforcement of foreign judgments

The Code on Private International Law and Law of Civil Procedure (Law No. 5718) regulates the procedure for the recognition and enforcement of foreign civil or commercial judgments.

An enforcement decision rendered by a competent Turkish court is required for the execution of a foreign court judgment in Turkey. The enforcement decision gives the foreign judgment legal effect, as if rendered by a Turkish court.

Law No. 5718 provides that a foreign judgment must fulfil certain requirements for a Turkish court to render an enforcement decision without a review of its merits. Under Article 54 of this Code, a judgment rendered by a foreign court would be enforced by Turkish courts without re-examination of the merits, if the following conditions are satisfied:

a the judgment must have become 'final and binding' with no recourse to appeal or similar review process under the laws of the relevant foreign country. In this regard, interim judgments and preliminary injunction orders do not qualify for enforcement;

b there must be *de facto* or *de jure* reciprocity between Turkey and relevant country;

c the subject matter of the judgment must not fall under the exclusive jurisdiction of Turkish courts. For instance, under Article 12 and 13 of the CPC, Turkish courts enjoy exclusive jurisdiction over disputes regarding real estate matters;

d due process must have been observed. As such, the party against whom the enforcement is sought must have been 'duly served' or made fully aware of the proceedings, and given the full opportunity to represent or defend him or herself;

e the judgment must not be incompatible with a judgment of a Turkish court in a lawsuit between the same parties and relating to the same subject matter, or, in certain circumstances, with an earlier foreign judgment that satisfies the same criteria and is enforceable in Turkey; and

f the judgment must not be clearly contrary to Turkish public policy.

The public policy rule, in particular, is quite vague and difficult to clearly define. Turkish courts tend to interpret foreign judgments by considering the possible effects of their enforcement in Turkey. In our experience, while evaluating a foreign court judgment, the courts take into account all legal, economic and social implications. Both the legal grounds and the factual grounds of the foreign judgment are of significance. While Turkish courts cannot re-evaluate the legal and factual grounds, they seek a clear connection between the foreign judgment and the facts on which such judgment is based.

vii Assistance to foreign courts

Turkey is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 October 1970, which is the main multiparty treaty that provides for rules and procedures in this area. Turkey signed the Convention in 2000 and ratified it in 2004 and incorporated it into Turkish domestic law.

The Convention allows for collection of evidence in Turkey by local courts and authorities in aid of foreign legal proceedings, pending or future, before a court of another signatory to the treaty.

viii Access to court files

In principle, court hearings and court files are open to the public. While the parties to the proceeding have full access to the case file, the judge may order that certain information be kept confidential, such as trade secrets. The judge may also order that a certain hearing, or all hearings of a specific case, be held in private to protect confidences or public policy.

Any Turkish bar member can access court files physically and review them. However, only the actual parties to the case and their counsel can take copies thereof.

ix Litigation funding

There is no statutory regulation that governs litigation funded by disinterested third parties. In the absence of a specific regulation, there should be no concern about the validity and enforceability of third-party funding agreements, unless a given agreement is against Turkish public policy or is otherwise invalid.

While it is debateable whether it is technically a form of disinterested party funding, a similar practice can be found in attorneys taking a financial risk tied to the outcome of a case. Article 164 of the Attorneys Code authorises attorneys to take on a case on a contingency fee basis, which can go up to 25 per cent of the monetary value of what is at stake. The 25 per cent rule operates as a ceiling by disregarding any percentage that exceeds it. A 40 per cent success fee arrangement, for instance, would not be void entirely. The court would enforce it as 25 per cent instead.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Turkish law's approach to and understanding of conflicts of interest in the legal profession is not as extensively regulated or fine-tuned by courts as one would find in the Anglo-American tradition, among others. In fact, statutory regulation of conflicts for attorneys hinges around one not-so-clearly drafted provision: Article 38/b of the Attorneys Code. According to this provision, attorneys must refuse to take on (or drop) any work if they have represented or advised a party with opposing interests in the same work.

The operative part of the provision seems to be 'in the same work'. Evidently, this qualification is restrictive, at least on the face of it. It would be helpful to consider a typical scenario in which an attorney represents a claimant in a lawsuit and completes the brief. Two years later the defendant approaches the attorney for a separate lawsuit. This would not constitute any conflict of interest because the earlier client's work is long finished. But if the attorney is approached by an unrelated party asking to sue that previous client in a separate matter, would this be a conflict of interest? That would arguably be problematic in an Anglo-American setting and the attorney would feel ethically obliged to disqualify himself or herself or, at a minimum, seek the previous client's consent. On the contrary, this latter scenario would not pose a legal problem in Turkish law, to the extent that Article 38/b is interpreted literally. What would certainly be prohibited is when the attorney represents a client at the trial court level but switches sides on appeal, for instance. This would squarely fit in the 'in the same work' criterion.

Fortunately for both attorneys and their clients, Turkish court precedents as well as Bar ethics committees interpret Article 38/b more broadly. Engagement in work not exactly the same but 'related' is also deemed to trigger a conflict of interest.

In addition, Article 38/c stipulates that a person who has previously been involved as a judge, prosecutor, expert witness, fact witness or civil servant in a proceeding, cannot be engaged with it as an attorney at a later stage.

According to the High Court of Cassation, courts must consider and apply Article 38/b *sua sponte* since conflicts of interest in the Attorneys Code is a matter of Turkish public policy.

Finally, attorneys cannot represent any party if they are relatives of the relevant judge or prosecutor (see Article 13 of the Attorneys Code).

We will now turn to information barriers as a means to deal with conflicts of interest. With the rise of global law firms with dozens of offices worldwide and thousands of lawyers on board, an intriguing working method has emerged in the form of information barriers being placed within the firm so as to enable attorneys under the same corporate roof to advise or represent conflicting interests without jeopardising any of them.

These procedures, commonly known as 'Chinese walls', are maintained to restrict the flow of information and provide legal services in a proper manner. However, Article 38, referenced above, makes it clear that conflict-of-interest rules contained therein are equally applicable to partners as well as associates of a firm subordinate to them. As this provision is understood in the Turkish legal profession today, it does not seem possible for a law firm's litigators to sue a company that their M&A colleagues have already been advising in a transaction, for instance. Having said that, this presumption is yet to be tested as court precedents and Bar disciplinary rulings on the issue are virtually non-existent. A relatively liberal interpretation allowing for Chinese walls procedures in the legal profession should not be ruled out categorically. In fact, we are aware that these types of procedures are in practice among stock traders and investment banks in Turkey and the relevant regulator, the Capital Markets Board, allows them a certain leeway. Similarly, our verbal contacts with the Turkish Competition Authority as well as the Energy Market Supervisory Authority revealed that these authorities implement Chinese wall procedures within their respective bodies.

ii Money laundering, proceeds of crime and funds related to terrorism

In recent years, Turkey has continued to empower its legal framework for the prevention of the laundering of criminal proceeds.

The first money laundering legislation was passed in 1996: Law No. 4208 on the Prevention of Money Laundering. This law established the Financial Crimes Investigation Board (MASAK) as the main administrative body monitoring compliance with anti-money laundering requirements.

However, things became somewhat confusing in 2005 with the entry into force of the new Turkish Criminal Code. This Code penalised for the first time 'laundering of crime proceeds' as a separate type of crime. This resulted in two separate laws defining and regulating money laundering: Law No. 4208 and the Turkish Criminal Code.

To overhaul existing legislation and to put an end to this duality, Law No. 5549 on the Prevention of Laundering of Crime Proceeds (the AML Code) was enacted in 2006, as a coherent anti-money laundering legislation.

2008 saw the enactment of the Regulation on Measures to Prevent the Laundering of Criminal Proceeds and the Financing of Terrorism (the Regulation on Measures) and the Regulation on the Programme on Compliance with the Obligations to Combat Money Laundering and Terrorism Financing.

While the two regulations explain the process for dealing with money laundering and financing of terrorism, certain difficulties still occur in implementing the procedures they describe. MASAK thus periodically issues and revises certain other regulations for clarification.

The AML Code and the Regulation on Measures encompass a group of 'liable persons'. Liable persons, and not any random person, are required to whistle-blow and cooperate with the authorities if they notice any suspicious transactions. Liable persons include real persons, legal entities and even unincorporated entities acting as intermediaries to certain types of businesses. This includes, in particular, persons who operate in regulated fields such as banks, brokerage companies, insurance and private pension companies, persons engaged in the purchase and sale of precious metals, stones, antiques, works of art, etc. In addition, (1) sole-practitioner attorneys whose activities are limited to the 'sale and purchase of real property' or 'incorporation, management and acquisition of companies, foundations and associations'; (2) sole-practitioner certified general accountants and CPAs; (3) independent audit institutions; and (4) sports clubs. In January 2010, the list was made more comprehensive to include branches, agencies, representatives and similar units affiliated with a liable person.

Liable persons must report suspicious transactions – deposits, withdrawals, transfers, and so on – of large monetary sums with no plausible explanation. Simply, if there is any reason to suspect that a transaction (conducted or attempted by or through a liable person) stems from illegal or terrorist activity, or is used for illegal or terrorist activity or by terrorist organisations, this must be reported to MASAK. Liable persons must not disclose suspicious transactions to anyone other than authorised bodies or the court. Violation of such confidentiality duty may result in imprisonment and criminal fines. On 29 July 2016, a new regulation entered into force regulating the procedures and principles for the suspension and prevention of suspicious transactions.

There is also a periodic reporting requirement. The AML Code requires a liable person to report transactions of which it is a part, or in which it acts as an intermediary, exceeding an amount determined by the Ministry of Finance. However, until the Ministry of Finance determines such amount, liable persons are obliged to report only suspicious transactions.

Liable persons are also required to establish risk management systems, together with training, internal audit and control systems that will help achieve full conformity with the obligations under the AML legislation. The AML Code also requires liable persons to appoint a compliance officer, obliging liable persons whose internal regulations do not feature such a requirement (brokerage houses, for example).

As regards sanctions, the AML Code refers solely to administrative and judicial sanctions for failure to comply with AML legislation, but defers to the Turkish Criminal Code in criminal activities. Although the AML Code provides for imprisonment of persons who violate its provisions on keeping suspicious-transaction reporting confidential, and providing, retaining and submitting information and documents, the Turkish Criminal Code essentially regulates the money laundering offence and the sanction of imprisonment for these violators.

iii Data protection

Constitutional principles and court precedents were the only source of law on data protection in general prior to passage of Data Protection Code No. 6698 (DPC) on 24 March 2016, which has become the main piece of legislation in Turkish law on the processing of personal

data. The DPC became fully effective on 7 October 2016 following the end of a grace period in relation to the enforcement of certain provisions. The DPC follows the general structure of the European Union Data Protection Directive on processing of personal data.

Subsequently, the Regulation on the Registry of Data Controllers (the Registry Regulation) was published in the Official Gazette on 30 December 2017 and entered into force on 1 January 2018. The Registry Regulation sets forth the principles and procedures for the establishment and management of the official registry information system of data controllers (VERBIS), and for the registry records. According to the Registry Regulation, data controllers are legal or real persons who are responsible for determining the purposes and means of processing personal data, and are responsible for establishing and managing the personal data retention system at their organisation. The Registry Regulation requires data controllers to be registered with VERBIS. As per the decision of the Personal Data Protection Board (the Board) dated 18 August 2018, the registration period started on 1 October 2018 through VERBİS. Data controllers who reside abroad are also required to be registered with VERBIS by way of a representative before processing personal data.

The Board has exempted certain groups of people and entities from the registration requirement through decisions adopted this year. In this respect, notaries public; attorneys; associations; certain types of foundations and unions; political parties; certified public accountants; customs brokers; mediators; and data controllers with fewer than 50 employees and with an annual balance sheet of less than 25 million Turkish lira, whose field of operation is not the processing of sensitive data, are exempted from this obligation.[9] Data controllers who fail to register with VERBIS or who fail to comply with the contents of the Registry Regulation may be subject to administrative fines of 20,000–1 million Turkish lira, at the Board's discretion.

Additionally, the Regulation on the Deletion, Disposal, or Anonymization of Personal Data (the Destruction Regulation), which establishes the procedures and principles governing the destruction of personal data through deletion, disposal, or anonymisation, and the preparation of internal policies regarding the preservation and destruction of personal data, entered into force on 1 January 2018.[10]

Apart from the above, a few other resolutions were rendered by the Data Protection Board. For instance, on 16 May 2018, the Data Protection board addressed the transfer of data overseas, and announced a number of guidelines that must be followed in international data transfers.

Again, on 31 May 2018, another resolution of the Data Protection Board was published in relation to personal data being processed by employees of data controllers. In this respect, data controllers need to take all the necessary precautions to assure the proper level of security of the personal data being processed. The data controllers are required to take technical and administrative measures in order to prevent any violations caused by their employees.

9 The Attorneys Code imposes a general duty of confidentiality on lawyers as explained below. Although this general duty does not specifically address processing of personal data, it is the first and foremost guide for lawyers to share personal data with other law firms or legal processing outsourcers both nationally and internationally.

10 This section was based, with the necessary modifications and updates, on publications of Hergüner Bilgen Özeke Attorney Partnership.

iv Other areas of interest

In a major break with past procedural practice, Turkey has recently overhauled its rules on how notices can be served. A new Electronic Notification Regulation took effect as of 1 January 2019 (the Electronic Notification Regulation), which calls for the establishment of a National Electronic Notification System (UETS), which will be operated and secured by the national postal service (PTT).

The Electronic Notification Regulation will require joint stock companies and limited liability companies, along with certain other public and private persons, to use electronic notifications. These persons will need to apply to the PTT within one month from the effective date of the Electronic Notification Regulation and obtain an electronic notification address, which will then be made available for proper authorities to serve notifications.[11]

An additional amendment is expected to be made in the structure of execution offices in the near future. There are signs that the Ministry of Justice is currently working on the privatisation of the execution offices. Pilot execution offices are being dedicated to service in order to increase the work efficiency and improvement of execution proceedings. According to the statements of Ministry of Justice officers, amendments will be made to related legislation to decrease the workload of execution offices and attorneys.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The legal framework governing privilege as regards lawyers is contained in the Attorneys Code. Article 36 of the Code provides for a duty of professional secrecy and confidentiality. According to this provision:

a it is prohibited for an attorney to disclose information communicated in the course of his or her representation (unless expressly permitted by the client);

b even when the client grants permission, the attorney may still decline to disclose any such information;

c an attorney cannot be forced to be a witness involving his or her client's confidences; and

d an attorney cannot be subjected to any legal or criminal liability for refusing to be a witness.

Articles 37(a)–(b) of the Professional Rules of the Turkish Bar Association stipulate a parallel duty of professional secrecy and confidentiality. The law does not distinguish between outside and in-house counsel. Hence, rules of privilege should normally apply to in-house counsel equally. However, this issue is being debated and court precedents have not yet provided an authoritative answer.

Despite a long-running misconception among – at least a small minority of – lawyers in Turkey, foreign lawyers are not entirely prohibited from practising law in Turkey. This was made possible by an amendment to the Attorneys Code in 2001, which states that, subject to certain conditions such as reciprocity, foreign lawyers may advise on international law and foreign law matters. Hence, it must be accepted that, by analogy, the rules governing privilege and client confidentiality are applicable to foreign lawyers as well.

11 Id.

ii Production of documents

As a follower of the European continental civil law tradition, Turkish law does not allow for extensive document production or discovery. The basic principle of civil procedure is that each party is obliged to impart the facts on which his or her claim is based and propose evidence to establish those facts. This being said, document production is possible, subject to certain conditions.

The revised CPC slightly broadened document production in civil litigation. Article 326 of the old CPC listed the types of documents that needed to be produced. The new Article 219, however, uses broader language: 'all documents that are relied on as evidence by either party must be submitted to court'. The same article also stipulates that digital documents be submitted as printouts and conserved electronically to be examined at a further stage.

For document production to be possible, the following conditions must be met:

a the judge must be convinced that the particular document production request is lawful and the relevant document must be necessary to prove a certain fact; and

b the other party (from whom document production is sought) must either admit to having that document in his or her possession or remain silent on the issue, or the existence of the document must be gleaned from official documents or records, or acknowledged in other documents.[12]

If the party fails to produce that document within the time limit granted by the judge or to show some rational cause as to his or her inability to do so, the judge may draw negative inferences in favour of the party that requested the document production.

Third parties can also be subject to document production requests issued by a competent court. The same criterion applies here (i.e., the document must be necessary for the proof of a certain fact). The third party must comply with the request unless he or she can explain, with some evidence, why he or she is unable to do so. If the judge is not satisfied with that explanation, he or she can summon the third party as a witness.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Considering the heavy workload of the Turkish courts and long-lasting adjudication processes, there is an increasing tendency for both natural and legal persons to resolve their disputes through alternative dispute resolution methods. The two most preferred methods are arbitration and mediation.

Upon going into effect, the International Arbitration Code and the Code on Mediation have collectively caused a significant increase in the number of disputes that are subject to alternative dispute resolution methods. It is expected that the number of arbitration proceedings and mediation processes will continue to rise as both mechanisms are periodically refined.

12 Or that this fact is evident from official documents or that he or she admitted in another document that it is in his or her possession.

ii Arbitration[13]

International arbitration

The main piece of legislation governing international arbitration in Turkey is the International Arbitration Code No. 4686 (the International Arbitration Code). This Code entered into force in 2001 and was modelled on the UNCITRAL Model Law (1985) and the international arbitration section of the Swiss Federal Private International Law of 1987.

The International Arbitration Code governs arbitrations seated in Turkey that involve a foreign element. Even if the seat of arbitration is not Turkey, the parties can contractually subject the arbitration to the International Arbitration Code, to the extent that the 'foreign element' condition is present.

The following circumstances are considered to constitute a foreign element under Article 2 of the Code:

a the usual residences, domiciles or places of business of the parties to the arbitration agreement are located in different countries;

b the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country not the place of arbitration designated in the arbitration agreement or determined on the basis of this agreement;

c the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country not the place where the majority of the obligations under the main agreement will be performed or the place to which the subject of the dispute is primarily connected;

d at least one of the shareholders of a company that is a party to the main agreement containing the arbitration clause has injected foreign capital into the company under applicable foreign investment legislation, or it is required to execute a loan or a guarantee agreement in order to bring foreign investment to Turkey for performance of the relevant agreement; and

e the main agreement or legal relationship constituting the basis of the arbitration agreement calls for the flow of capital or goods from one country to another.

Domestic arbitration

Domestic arbitration among local parties that does not involve any foreign element is addressed within the scope of the CPC. The arbitration section of the CPC resolved long-standing conflicts between the International Arbitration Code and the arbitration section of the now defunct Civil Procedure Code of 1927. The current CPC aligned itself with the International Arbitration Code and, in turn, the UNCITRAL Model Law. Its arbitration section regulates domestic arbitral procedures and the enforcement of domestic arbitral awards in an attempt to encourage domestic arbitration in Turkey.

Foreign arbitration and enforcement of foreign arbitral awards

The recognition and enforcement of foreign arbitral awards is regulated separately, under the Code on International Private Law and Procedure (Law No. 5718). Law No. 5718 entered into force in 2007 and replaced the old International Private Law and Procedure No. 2675, which had been in force since 1982.

13 This section is partially based on the submissions of Hergüner Bilgen Özeke Attorney Partnership to the *CMS Guide to Arbitration* (Turkey chapter) published in 2012.

The main difficulty associated with arbitration in Turkey has long stemmed from the fact that international and domestic arbitration and the enforcement of international and domestic arbitral awards are all addressed under separate legal frameworks with conflicting regulations. This problem has recently been addressed by the legislature through drafting domestic arbitral procedures and enforcement mechanisms in line with the provisions of the International Arbitration Code and the Law No. 5718.

Arbitral institutions

The Istanbul Chamber of Commerce Arbitration Centre (ITOTAM) and the Istanbul Arbitration Centre (ISTAC) are the major arbitral institutions in Turkey.

ITOTAM provided its first Arbitration Rules in 2014 and updated them in 2016. ITOTAM considered the UNCITRAL 2010 Arbitration Rules and other modern arbitration rules such as the International Chamber of Commerce (ICC) Arbitration Rules (2012), the VIAC Rules of Arbitration, and the Swiss Rules of Arbitration when drafting its rules.

ITOTAM announced the Arbitration Rules for Emergency Arbitration and Arbitration Rules for Small Claims (expedited arbitration) as of 14 April 2016. Despite the existence of an institutional arbitration mechanism before ITOTAM, the government decided to adopt a new approach towards arbitration in 2014 and attributed great importance to the establishment of a new international arbitration institution, known as ISTAC.

In line with the approach adopted by the government, the Code on the ISTAC was passed into law on 20 November 2014, published in the Official Gazette on 29 November 2014 and entered into force on 1 January 2015. The general assembly of ISTAC consists of 25 members from 14 various governmental organisations such as the Capital Markets Board, the Union of Chambers and Commodity Exchanges of Turkey, the Union of Turkish Bar Associations, and non-governmental organisations.

ISTAC introduced the ISTAC Arbitration and Mediation Rules on 26 October 2015, which is also based on several international arbitration rules such as the ICC, AAA and LCIA Rules. ISTAC arbitration also provides emergency arbitration and fast track arbitration.

Arbitral tribunals' jurisdiction and courts' interference

Arbitral tribunals may rule on their own jurisdiction, including any objections regarding the existence or validity of the arbitration agreement.[14] A plea that the arbitral tribunal does not have jurisdiction must be raised in, or prior to the submission of, the statement of defence.[15] A party is not precluded from raising such plea by the fact that he or she has appointed, or participated in the appointment of, an arbitrator. The arbitral tribunal will rule on the above-mentioned plea as a preliminary question and, if it should decide that it has jurisdiction, it will resume the arbitral proceedings.[16] Such a decision by the arbitral tribunal cannot be appealed to the courts.

Court interference with the arbitral process is very limited. A court may only intervene in any dispute referred to arbitration to the extent permitted by the provisions of the International Arbitration Code (to the extent it is an international arbitration subject to that Code). If the parties agree to refer the dispute to arbitration pending a court case on

14 Article 7 of the International Arbitration Code.

15 Id.

16 Id.

the same subject matter, the court would stay the adjudication proceedings and send the file to the related arbitrator or arbitral tribunal.[17] If court proceedings in a dispute that is subject to arbitration are initiated, the other party may raise an arbitration objection with the court. If the arbitration objection is accepted, the court will dismiss the lawsuit on procedural grounds.[18] If any of the parties requests the court to impose a preliminary injunction or provisional attachment prior to, or during the arbitral proceedings, this will not constitute a breach of the arbitration agreement.[19]

If any of the parties fail to abide by a preliminary injunction or provisional attachment rendered by the arbitrator or arbitral tribunal, the other party may request the competent court to issue an order for preliminary injunction or provisional attachment.[20]

The parties may file a request for interim protective measures in accordance with the CPC and the Turkish Execution and Bankruptcy Code at any stage of the proceedings.[21] The arbitrator or arbitral tribunal may seek assistance of the court of first instance to collect evidence.

Challenging and appealing an award through the courts

The Turkish arbitration legislation (be it international arbitration as governed by the International Arbitration Code or domestic arbitration as governed by the CPC) excludes the possibility of any appeal on the merits of the dispute.[22] It only provides for the setting aside of an award under the limited grounds of procedure, arbitrability and public policy.

Per a recent amendment put into place by the Law Amending the Enforcement and Bankruptcy Law and Certain Other Laws No. 7101 on 15 March 2018, the civil regional courts in the seat of arbitration have been authorised to hear applications for the setting aside of awards, rather than the courts of first instance, which had previously held this authority. Further, depending on the subject of a dispute, the civil courts or commercial courts of first instance in the place of the arbitration will be the competent courts to undertake any actions to be taken by courts during the course of arbitration until the final award is granted, rather than the civil regional courts, which previously held this jurisdiction.[23] If the defendant's usual residence, domicile or place of business is located outside Turkey, the Istanbul Civil Court of First Instance will have jurisdiction to hear such an application.

An arbitral award may be set aside by the court if:

a a party to the arbitration agreement lacks the necessary competence;

b the arbitration agreement is invalid under the applicable law or, if the applicable law is not agreed by the parties, under the law of Turkey;

c the arbitrator or the arbitral tribunal was not appointed in accordance with the procedure agreed between the parties or in accordance with the International Arbitration Code;

d the award was not rendered within the agreed or statutory term for arbitration;

e the arbitrator or the arbitral tribunal did not have jurisdiction to hear the dispute;

17 Article 5 of the International Arbitration Code.

18 Id.

19 Article 6 of the International Arbitration Code.

20 Id.

21 Id.

22 See, e.g., Article 15 of the International Arbitration Code, which is based on the same principles as Article 5 of the New York Convention.

23 Article 15 of the International Arbitration Code.

f the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, the award contains decisions on matters beyond the scope of the submission to arbitration, or the arbitrator or the arbitral tribunal has exceeded its competence;

g the arbitral proceedings were not carried out in accordance with the procedures agreed between the parties or, failing such agreement, in accordance with the procedures of the International Arbitration Code and this failure had an impact on the merits of the award;

h the principle of equality of the parties was not respected;

i the subject matter of the dispute is not capable of settlement by arbitration under Turkish law; or

j the award is in conflict with Turkish public policy.[24]

An action for setting aside the award should be filed before the regional court within 30 days from delivery of the award or, as case may be, of the correction or interpretation of a complementary award.[25] The court will give priority to this action and conclude it urgently.

In addition to that, pursuant to the International Arbitration Code, the parties may partially or fully waive their right to file an action to set aside the award.[26] However, parties residing abroad may only fully waive their right to file a setting-aside action by an express declaration in writing or as provided by the arbitration agreement.[27]

Power to order interim measures

Upon request by one of the parties, the arbitral tribunal may issue a preliminary injunction or attachment during the arbitral proceedings. Since the possible damages that the other party might incur because of a preliminary injunction or attachment should be secured, the International Arbitration Act permits the arbitral tribunal to demand an appropriate guarantee or security from the requesting party prior to rendering a preliminary injunction or attachment.[28]

The International Arbitration Act limits the arbitral tribunal's authority to order a preliminary injunction or attachment by prohibiting it from issuing preliminary injunctions or attachments that are solely enforceable by governmental authorities. For example, real property owned by the defendant may not be seized based on a preliminary attachment ordered by an arbitral tribunal because the seizure of real property requires the involvement of execution officers. Similarly, the arbitral tribunal may not order the customs authority to prevent the defendant from taking its assets out of the country.

The arbitral tribunal is prohibited from issuing preliminary injunctions or attachments that are binding on third parties because a third party may not participate in the arbitral proceedings and could not properly object to the decision rendered by the arbitral tribunal.[29]

If one of the parties refuses to comply with a preliminary injunction or attachment rendered by the arbitral tribunal, the other party may request the assistance of the competent

24 Id.
25 Id.
26 Id.
27 Id.
28 Article 6 of the International Arbitration Code.
29 Id.

court, which may enforce the arbitral tribunal's decision by issuing a preliminary injunction or attachment. If necessary, the competent court may authorise another court to issue the injunction or attachment as rogatory, when geographical concerns justify it.[30]

Recognition and enforcement of awards

As to the recognition and enforcement of arbitral awards in Turkey, the definition of 'foreign arbitral award' is vital, because foreign and domestic arbitral awards are subject to different regimes under Turkish law.

Domestic awards

Domestic awards are awards issued in Turkey in arbitral proceedings conducted in accordance with applicable provisions of the CPC. These awards are also subject solely to the setting-aside procedures.[31]

A review of the request will be carried out on file and will not suspend the execution of the award unless the claimant pays a security deposit.

Foreign awards

The provisions of the New York Convention of 1958 have the same force in Turkey as Turkish statutory provisions, and are treated as part of the domestic legal system. In terms of enforcing foreign arbitral awards, Turkish law gives precedence to the application of the New York Convention over Law No. 5718. If the award is rendered in the territory of a state other than the Turkish Republic and if the award is not deemed a domestic award under Turkish law, the New York Convention applies.

Turkey enacted the New York Convention with two reservations, which means that the enforcement of foreign awards will be subject to the New York Convention if the award was rendered in another signatory state and the relevant dispute is defined as commercial under the TCC.[32] If these requirements are not fulfilled, the recognition and enforcement of foreign arbitral awards will be governed by Law No. 5718.

Law No. 5718 and the New York Convention provide similar grounds for refusal of recognition and enforcement of an arbitral award, but there is one distinction. Pursuant to Article VI of the New York Convention, enforcement of an award may be refused if the party against whom the award is invoked proves the existence of any grounds for refusal of enforcement. By contrast, Law No. 5718 provides that enforcement of an award must be refused if the party against whom the award is invoked proves the existence of any grounds for such refusal. Therefore, while under the New York Convention it is at the discretion of the enforcing court to decide whether the award will be enforced, under Law No. 5718, the enforcing court is obliged to refuse enforcement if one of the refusal grounds is proven. Under both the New York Convention and Law No. 5718, the burden of proof lies with the party arguing for refusal of enforcement. However, there are two grounds for exemption from the burden of proof requirement: violation of public policy and inarbitrability. The enforcing court may consider these two grounds on its own volition.

30 Article 6 of the International Arbitration Code.

31 Article 439 of the CPC.

32 Turkey limited the enforcement of foreign arbitral awards to those of a commercial nature by reserving its rights under Article 1(3) of the New York Convention.

The grounds for refusal of enforcement of foreign arbitral awards under Law No. 5718 are as follows:

a the award is not yet binding, or has been set aside or suspended by a court;
b the subject matter of the dispute is not arbitrable; or
c the award is a violation of public policy.[33]

Violation of public policy is grounds for refusing recognition or enforcement of foreign arbitral awards.[34] The New York Convention stipulates that recognition or enforcement of an award will be refused if recognition or enforcement of the award would be contrary to the public policy of the country where recognition and enforcement are sought. Law No. 5718 stipulates that recognition or enforcement shall be refused if the award is contrary to public policy or public morality.

Public policy is often regarded as a vague concept. It is interpreted by Turkish courts on a case by case basis. Turkish courts face a dilemma between the goal of protecting the state's authority to refuse enforcement of awards that contravene domestic values in terms of public policy and the desire to respect the finality of foreign arbitral awards (*révision au fond* prohibition). In this respect, Law No. 5718 stipulates that only explicit violations of public policy can be considered grounds for refusing enforcement, including:

a lack of due process;
b invalidity of the arbitration agreement under the law of the country to which the parties have subjected it;
c improper arbitral procedure or composition of the arbitral tribunal;
d inarbitrability of the subject matter; and
e lack of reciprocity.[35]

Law No. 5718 refers to the principle of reciprocity in the recognition and enforcement of foreign arbitral awards, meaning that the enforcement of awards will be recognised in Turkey if they were granted in a country:

a that is party to a reciprocity agreement, whereby it undertook to enforce and recognise arbitral awards made in Turkey; or
b that is obliged to recognise and enforce arbitral awards made in Turkey pursuant to its domestic laws or the established practice of its courts.[36]

iii Mediation

Mediation is the second type of proceedings in which the dispute may be terminated by mutual agreement. Mediation for civil disputes was highly debated within the Turkish judiciary and was codified in the Code on Mediation.

The Code on Mediation was passed into law in June 2012, and its substantive provisions entered into effect a year later, in June 2013. The Law proved to be a divisive factor in the National Assembly as well as civil society. The government presented it as an effort to alleviate

33 Article 61 of Law No. 5718.
34 See Law No. 5718, Article 62.1(b); and the New York Convention, Article V.1 and 2.
35 Article 61 of Law No. 5718.
36 Turkey brought the requirement of reciprocity by reserving its right under Article 1(3) of the New York Convention.

the burden on the courts already struggling under a massive docket backlog. Critics were concerned that communities from different cultural perspectives would distribute justice according to their own interpretations.

That mediation is now mandatory prior to filing suit in certain cases has resulted in mediation being sought considerably often in the past year. According to results generated by Ministry of Justice Mediation Department, 127,845 mediators were assigned between 2 January 2018 and 27 May 2018. A total of 65 per cent of mediation proceedings were resolved amicably, whereas 35 per cent of the proceedings ended up with disagreement of the parties. It appears that the provision on mandatory mediation in employment cases has indeed changed the way that these cases are litigated. [37]

The scope of mediation is defined as civil law matters, including those with foreign elements, as long as the resolution thereof is subject to the parties' discretion. The mediator does not render a decision on behalf of the parties, but encourages an amicable solution by facilitating communication between them. Litigants may agree to apply for a mediator prior to or during litigation; in the latter case, pending lawsuits will be adjourned for three months and can be extended by the parties' agreement. The procedure is very flexible. The parties are free to appoint one or more mediators and to agree on the mediation method to be used.

Similarly to the provisions of Law on Labour Courts of 2017, which required mediation prior to filing suit in such cases as receivable claims and reinstatement demands, Law No. 7155 on the Procedures to Initiate Debt Collection Proceedings for Receivables Arising out of Subscription Agreements has made it mandatory, as of 1 January 2019, to seek mediation prior to filing commercial lawsuits for damages or to collect receivables. If a party files a lawsuit without fulfilling this requirement, the court will dismiss the case on procedural grounds. In these cases, mediators must conclude the mediation process within six weeks of their assignment; the mediators may extend this period for no more than two weeks where exigencies require an extension.

Another issue that must be highlighted is the focus of the Code on Mediation on confidentiality and its imposition of a strict confidentiality requirement on both the mediators and the parties, unless the parties agree otherwise. The Code on Mediation restricts the presentation of the following documents and statements as evidence before a court or arbitral tribunal on the same dispute:

a the invitation to mediate by one party, or either party's willingness to participate in the mediation process;
b comments and proposals made by either party to resolve the dispute through mediation;
c proposals made by a party, or acceptance of a claim or factual matter during the mediation process; and
d documents drafted solely for the mediation process.

Even if the above-mentioned documents are submitted to the court as evidence, the court will not consider this when rendering its judgment. However, such information may be disclosed where it is required by law, or to the extent that it may be necessary to implement or enforce the agreement reached at the end of the mediation.

The Law, fortunately, did not leave mediation without teeth. The Code on Mediation provides the structure for execution of a settlement through mediation. After a settlement at the end of mediation proceedings, the parties and the mediators must sign a minutes of

37 This section was based on the results generated by Ministry of Justice Mediation Department.

settlement. The parties may request the court to endorse the executed minutes of settlement. The court provides an 'execution endorsement' for the minutes of the settlement in order for the settlement to be officially enforceable. However, as per the Law on Labour Courts and the amendments made to the TCC with the Law on the Procedures to Initiate Debt Collection Proceedings for Receivables Arising out of Subscription Agreements, settlements will not require a court endorsement to be directly enforceable.

For mediations commenced after filing of a lawsuit, the settlement minutes are filed with the court hearing the principal claim. In cases where the mediation is commenced before the lawsuit, endorsement may be requested from the court that would hear the dispute if a lawsuit was initiated. The court will conduct a limited examination as to whether the dispute is sufficient for mediation and execution. Mediation settlement minutes having an execution endorsement are deemed to have equal effect as a court judgment.

The Law foresees specific training for prospective mediators and registration with the Ministry of Justice. It stipulates that only law degree holders with a minimum of five years of legal experience can become mediators.

The CPC also encourages ADR mechanisms. According to the CPC, once all pleadings are exchanged, the judge will schedule a preliminary examination hearing at which he or she is specifically authorised to urge the parties to settle the dispute or resort to ADR mechanisms before continuing with litigation.

iv Other forms of alternative dispute resolution

Mediation and arbitration are the only dispute resolution methods that are embraced in the Turkish practice as alternatives to court adjudication. All other methods of ADR (such as negotiation, conciliation, mini-trial, referee, expert determination, etc.) are rare. Mediation looks to take centre stage in the coming year following the enactment of the Law on Labour Courts provisions mentioned above.

The Attorneys' Code Article 35/a provides conciliation as an ADR procedure that can only be performed by attorneys admitted to the Bar. However, it is not frequent in law practice in Turkey. Although there are plans to make further regulations on conciliation, the content and timing of the plans are unknown for now.

These other forms of ADR are used more often when contained in a larger scheme of dispute resolution method as an early step. Modern FIDIC forms of construction contracts, for instance, provide for a dispute adjudication board (DAB) process, which can later be challenged before arbitrators (or, rarely, courts). Contractors and employers active in Turkey are gaining more familiarity with the fast-track procedures of DABs.

The DAB process may be popularly perceived as 'rough justice', but that qualification does not do justice to the legitimacy of DAB findings. Unofficial statistics that world-renowned construction experts cite at international conferences indicate that, when challenged before arbitrators, DAB findings are confirmed overwhelmingly more often than not.

VII OUTLOOK AND CONCLUSIONS

Many significant changes were made in Turkish law in the past year. The procedural amendments for dispute resolution have begun to show their effect already, with the workload of the courts being distributed more equally and helping them to function faster. With the amendments on composition of creditors, commercial life in some sectors can reasonably be expected to regain vitality. It can be expected that parties will be required to seek mediation

before filing suit in other types of disputes, just like they must now do in employment and commercial disputes. The cumulative effect of the past year's changes in Turkish law, whether procedural or substantive, will likely be to reduce the number of disputes litigated in court, to ease the path of investors, and to provide economic stability.

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