ÖZGÜNLAW
PROTECTING YOUR INTERESTS

LAW BULLETIN

No. 2 January, 2019

We are glad to share January issue of our Law Bulletin which includes recent legal developments and news globally and in Turkey.

All the content herein is for information purposes only and please contact us for further information.

Editors:
Semra Gürçal
Ayşecan Mantarcı

Recent News

DETERMINATION OF THE JURISDICTION IN DISPUTES ARISING FROM CONTRACTS INVOLVING "FOREIGNNESS ELEMENT" AND THE CLARITY AND PRECISION OF THE "JURISDICTION CLAUSES"

Jurisdiction, which means the authority given to a court to hear a case within a particular geographic area, is one of the appearances of the right of sovereignty of the state.

As a result of the sovereignty right, State courts have jurisdiction over matters inside that state and in a transaction with no foreign element involved it will not necessary to determine the courts which are to have jurisdiction in the event of a dispute.

However the question of *" which state's courts should exercise the case*" comes up in case the dispute involves *" a foreignness element"*.

Within this scope, for the contracts which are complicated by a foreignness element, it is very essential for the parties to determine the courts which are to have the jurisdiction in the event of a dispute.
In this article, by exemplifying with the applicable legislation and Supreme Court decisions,we shall provide you with an explanation regarding how the Turkish Law Sytstem regulates the rules for the *"jurisdiction clauses"* in the contracts which include *"a foreignness element"*.

In case the civil matter includes a "foreignness element", which means that at least one party is not Turkish, The Code of International Private Law and Civil Procedure numbered 5718, which provides certain procedural provisions in order to determine the jurisdiction of the court, shall be applicable.

Within this scope, the Article 40 of the Law no 5718 regulates that *"The international jurisdiction of the Turkish courts shall be determined by the domestic jurisdiction rule"* .

The ***"domestic jurisdiction rules"*** referred to in the article 40, are regulated under the provisions of Code of Civil Procedure dated October 1, 2011 and numbered 6100.

In accordance with Article 17 of the Law no 6100, the parties*(limited to merchants or public legal entities* may*)* may authorize one or more courts to hear a dispute arising out of the contract by writing ***" a jurisdiction clause"*** into the main contract or with a separate contract which is attributed to main contract. Article 18 of Civil Procesural Law also states that the chosen local court in the jurisdiction clause must be clearly stated.

In addition to these provisions, in case of a foreignness element Turkish law allows and respects the choice of the parties to determine foreign courts as the courts with jurisdiction.

According to Article 47 of the International Private Law and Civil Procedure Law numbered 5718 ,

Article 47- (1) Except in cases where the jurisdiction of a court is determined according to exclusive jurisdiction of specific court principles, the parties may agree on jurisdiction of a court of foreignness state in a dispute that contains a foreignness element and arises from obligatory relations. The agreement is invalid unless it is proved by written evidence. The competent Turkish court shall have jurisdiction only if the foreignness court decides that it has no jurisdiction or if a plea as to jurisdiction is not presented in Turkish courts.

As it is seen in the article 47 of International Private Law No. 5718 , except the cases where the jurisdiction of a court is determined according to exclusive jurisdiction of specific court principles, the parties may agree on jurisdiction of a court of foreignness state in a dispute that contains a foreignness element and arises from obligatory relations.

However, in continuation of article 47, the Law regulates that ; The agreement is invalid unless it is proved by written evidence.

Further to this article , according to Article 18 of Law no 6100 in order to provide the validity, it is mandatory that "jurisdiction clause" must "clearly" and "precisely determine" the parties to determine the courts which are to have the jurisdiction in the event of a dispute.
Within this scope, the jurisdiction of the court of a foreign state which is authorized by a jurisdiction agreement, should be directly and clearly specified in terms of the article 47 of International Private Law.

As explained below; it is not enough for the validity of jurisdiction clause just to determine the state where the case shall be heard. The name of the court to hear the dispute has to be clear and definite as well.

The clause of clarity of the court of foreign state which is authorized by a jurisdiction agreement depending on the regulation in the article 17 and 18 of Code of Civil Procedure, should be sought in terms of the article 47 of International Private Law. For the acceptance of that the chosen court is determined, the competent court should be mentioned by its name.

In one of the latest awards given by Istanbul 16th Regional Court, it is ruled that a jurisdiction clause that provided that disputes between Turkish and foreign counterparties are to be heard before the 'English Courts' was invalid and in order for a jurisdiction clause to be valid and enforceable, the name of the particular English court must be expressly set out. »

According to the decision of the Regional Court, Articles 17 and 18 require 'precision', in that the name of the foreign court must be expressly stipulated. The court also stated that it is not right that the court accepted the jurisdiction clause which is that in case the parties do not agree the dispute shall be referred to the courts of England and which does not bear the principle of "clarity" without taking into account these points, and rendered a decision in writing.

The latest practices of 11th Civil Chamber of Supreme Court are in the same direction. According to the common practice of the Supreme Court, the dispute must be submitted to the Turkish courts, rather than to the chosen courts unless otherwise the name of the court is clearly determined and specified in the jurisdiction clauses

In addition to this, even though the jurisdiction clause is valid, sometimes is is not possible to make an objection regarding jurisdiction because of the general principle of good faith

Even though there is a valid jurisdiction agreement, if the case has been filed in the court where the defendant is domiciled, the defendant will not be able to object to the jurisdiction of the court in accordance with the rules of good faith. In such a case, it is accepted contrary to the good faith rules that the plaintiff has an objection to jurisdiction although the plaintiff will be able to express himself better in his own country.

In this regard, in its decision dated 25.11.2015 and numbered E.2015/5517, K.2015/12591, 11th Civil Chamber of Supreme Court decided in a case that ;

"the proceedings had been initiated before an Istanbul Court, that Istanbul is where the defendant resided and that the defendant would be expected to defend its rights "better" before a court in its place of residence as opposed to a court in a foreignness country."

In this decision, 11th Civil Chamber of Supreme Court applied "principle of good faith" which is codified in Turkish Civil Code Article 2 and means that "Everyone must follow the principles of good faith when exercising their rights and fulfilling their debts/obligations"

Within this scope, despite the clearly written and valid jurisdiction clauses agreed by the parties to bring proceedings in the chosen court , the case can be filed before the court which has the jurisdiction where the defendant is domiciled.

To sum up briefly , it is clear that Turkish Law recognises and practices both jurisdiction agreements or clauses which determine foreign courts as the competent court in case the contract where the dispute arises from contains a "foreignness element".

However, a clear and definite wording should be applied in order to prevent any ambiguity or discrepancy while writing the jurisdiction clauses.At this point, it will be enough just to make a determination on of which state courts shall be entitled to hear the case and the name of the foreign court must be written clearly.

Unless there is valid jurisdiction clause on which the parties clearly and precisely agree and even though parties object to the jurisdiction of the courts within the relevant time after the lawsuit is filed before a Turkish local court, the court decides that the dispute must be submitted to the Turkish courts, rather than to the chosen courts.

Bibliography:

1. Supreme Court 11th Civil Chamber decision no. E.2015/5517, K.2015/12591, dated 25.11.2015

2.

Recent News in Investment Arbitration Claims Filed by Turkish Contractors under the Turkey-Libya Bilateral Investment Treaty

Due to the fact that Libya is one of the leading states with whom Turkish investors had worked before the civil war occurred in February 2011 , one of the countries with whom Turkish investors had problems concerning their investments is the state of Libya which was substantially damaged by the civil war .

In this respect, there are several investors who had same problems, terminated their investment activities and returned to Turkey due to the adverse events occurred in accordance with the political situation in Libya. At the following this problematic process, some of Turkish investors has initiated arbitration proceedings against the State of Libya within the scope of Bilateral Investment Treaty between Turkey and Libya being effective as of 22/04/2011.

The first awards in Turkish investor- Libya cases were given as of November 2018, in the cases of Cengiz İnşaat and Tekfen. Tekfen case which has just been concluded was different from the Cengiz İnşaat case since it was filed on the basis of a contractual claim, not based on the Turkey-Libyan BIT. However, it is still very important since the tribunal awarded in favour of the Turkish investor in consequence of arbitration process, taking 3 years.

The first award in investment arbitration claims filed by Turkish contractors under the Turkey-Libya bilateral investment treaty is Cengiz İnşaat Case, which has resulted in a sizable win for the company .

The case filed In 2016, on the basis of the claims for damages arising from the civil war because suspension of the projects due to the fact that the work camps were overrun and destroyed.

According to recent news, the tribunal held Libya liable for denying full protection and security under the BIT. Arbitrators awarded approximately $50 million (US) in compensation, as well as further relief regarding the release of certain performance bonds and financial guarantees.

The Tribunal also awarded that it had jurisdiction to consider breach of various provisions of the BIT, including the full protection and security provision, notwithstanding that the treaty contains a special clause that applies to wartime and civil conflict

In addition, when viewed from the aspect of that tribunal awarded that special “war clause” in BIT does not preclude claimants from mounting full protection and security claim, the award become more significant since it will also positively influence the other cases against Libyan State on the basis of Turkey-Lıbya BIT.

Source: https://www.iareporter.com/articles/an-update-on-7-turkish-investor-claims-against-libya/

International Circulation of Documents through E-Apostille as of 1 January 2019

Apostille is a form of authentication issued to documents in order to be used in other country according to the Hague Convention signed in Den Haag on 5 October 1961 by state parties. Apostille makes a document issued by a governmental institution of a country valid in other governmental institution of other country without any further authentication.

In Turkey, Office of Governor (in provinces), Office of District Governor (in districts), and for judicial documents, chief of high criminal courts, Judicial Commission or Presidency of Justice Commission where high criminal courts can issue apostille upon request by submitting the document physically.

As per the Law Amending the Enforcement and Bankruptcy Law and Other Laws, it is regulated that as of 1 January 2019, apostilled documents will be served on the relevant parties electronically through General Directorate of Postal Services (PTT) on condition that personal data are protected.

Within this framework, Ministry of Justice and Ministry of Interior which are authorized to issue an apostille will not have to establish separate systems, and they will be able to assess the applications electronically through a common platform to be created by PTT instead and convey them to the relevant institution for approval.

The institution will issue an e-Apostille by verification of electronic signature and share the completed documents and approval links with a citizen through the system. During this process, PTT assume a duty for mediating the international circulation of e-apostilled document, instead of authentication of a document sent by the relevant institutions.

By courtesy of this practice which will be enter into force on 1 January 2019, it is aimed to minimize bureaucratic transactions, and to carry out proceedings in a prompt and effective way.

The system where all request accepting and performing transactions are made, match the documents in international circulation with signature database, and can easily authenticate the originals.

Source: www.ptt.gov.tr

PREACUTIONARY ATTACHMENT DECISIONS AS "SAFEGUARDS" IN THE ENFORCEMENT OF FOREIGN JUDGEMENTS

In order for a foreign court decision or arbitration award to be executed in Turkey , the decision or the award has to be subject to an "enforcement case" before the Turkish courts and the enforcement case has to be heard in accordance with related Turkish Laws. The foreign decision/arbitration award shall be effective in Turkey only after the enforcement decision is rendered by the court.

Although the court can only examine the cases for enforcement of foreign judgements in terms of some specific criteria and in regard to public order, obtaining an enforcement decision from the court can take a long process because of the large number of files in the Turkish courts and the fact that the legal remedies in Turkish Law System are multi-staged.

As a result of this long process, the defendants might take some fraudulent actions on their assets to prevent themselves from the results of the enforcement case by disposing of their possessions. The party losing the case before the foreign authorities may act in order to dispose of his/her assets while the process of enforcement of the foreign decision is in progress. This poses a significant risk to a party who has already won the case before the competent court.

Depending on this situation, in order to ensure the collectability of the receivables which are subject to a foreign judgment that has not been enforced yet, it becomes very important for the plaintiff to obtain "temporary legal protections" against the defendant in case he or she dismisses the property while the enforcement case is in progress.

Within this scope, it is explained in this article whether Turkish Law allows the plaintiff who requests enforcement of a foreign judgment to obtain *"a precautionary attachment decision"* before the foreign judgement is enforced in Turkey.

In accordance with Turkish law, pursuant to the provisions of Turkish Civil Procedural Law No. 6100 and Bankruptcy and Enforcement Law no 2004 , a plaintiff is entitled to ask a temporary legal protection from the court before/during the case. According to these laws there are two ways of obtaining a *"temporary legal protections" which* are *"precautionary measure"* and *"precautionary attachment"*.

The "precautionary attachment decision", which has the effect of freezing the debtors' assets to ensure the satisfaction of the debt is an important means of securing the counterparty's acquisition by eliminating the possibility of transferring the assets of the counterparty until the case has been concluded.

According to the article 257/1 of the "Bankruptcy and Enforcement Law"; a precautionary attachment decision on debtor's assets can be granted with respect to unsecured receivables that are due and payable, or for receivables not yet due and payable; where the debtor has no specific place of residence or has commenced actions to conceal or dissipate assets with the aim of avoiding payment.

In this regard, the issue arises on point of whether the decision of a foreign court or a foreign arbitration award can be the basis for a precautionary attachment decision before being executed by an enforcement decision.

In its decision no. E. 2004/9775, K. 2004/13391, dated 30.12.2004, the Supreme Court responded to this question positively. According to the Supreme Court's decision, the plaintiff requesting enforcement of the decision of the foreign arbitrator given according to the rules of ICC arbitration, may request a precautionary attachment decision on debtor's properties(1). In this decision, the Supreme Court decided that;

"Due to the fact that the award, which was decided to be enforced, could not be enforced before its finalization and the subsidiary formal procedure of the precautionary attachment could not be completed, rescission of the precautionary attachment was decided on the grounds that the objection was justly raised to the precautionary attachment, and the judgment was appealed by the representative of the plaintiff. Depending on the decision in relation to the appeal of the foreign award, the plaintiff requested a precautionary attachment, and the rendered precautionary attachment was revoked upon the debtor's objections. Although the enforcement of award could not be »

executed before becoming final, there is no legal obstacle for requesting a precautionary attachment based on this award. Whether the subsidiary formal procedure of the precautionary attachment is completed or not is the next stage and cannot be the justification of the judgment. The court rejected the objection by taking into account this aspect."

Additionally, 11th Civil Chamber of Supreme Court decided in one of its decisions that(2); there was no legal obstacle to the request for a precautionary attachment decision, even though the foreign decision cannot be executed before the enforcement decision is rendered. According to this decision;

"The purpose of enforcement decision is to ensure the judgments which are rendered in relation to civil cases in foreign countries and become final according to the acts of state, to be executed in Turkey. Accordingly, in order to render a decision for precautionary attachment having the characteristics of a measure concerning a claim which is determined by a decision or an award of a foreign court, there is no need to seek a condition for enforcement of a foreign judgment. (…) On the other hand, as stated in the article 6 of International Arbitration Law No. 4886, since it is possible to render a decision for precautionary attachment before or during arbitration, a precautionary attachment can be ruled after rending a decision."

According to the common practice of the majority of the Civil Chambers of the Supreme Court, the temporary protection measures may be decided before or during the enforcement case.

As an another example to this common practice, 6th Civil Chamber of Supreme Court stated in its decision dated 14.04.2014 and numbered 2014/3906 E. 2014/4941 K. that;

The purpose of enforcement decision is to ensure the judgments which are rendered in relation to civil cases in foreign countries and become final according to the acts of state, to be

executed in Turkey. Accordingly, in order to render a decision for precautionary attachment having the characteristics of a measure concerning a claim which is determined by a decision or an award of a foreign court, there is no need to seek a condition for enforcement of a foreign judgment.

In addition, it should be added that in the Article 6 of International Arbitration Act no 4686 the precautionary attachment decision is clearly determined. According to this article;

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection or an interim attachment and for a court to grant such measure or attachment. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order an interim measure of protection or an interim attachment during arbitral proceedings. The arbitral tribunal may require any party to provide appropriate security in connection with such measure or attachment."

In accordance with the article, since a precautionary attachment can be decided before or during arbitral proceedings, depending on this, it can be clearly said that precautionary attachment can also be granted before rendering a decision in relation to the enforcement of a foreign award.

Within the scope of our explanations above, in practice, it is seen that the party who does not wish to pay in accordance with the court or arbitration decision tends to transfer the assets to third parties, take them to another country or turn them into money in order to prevent the creditor from acquiring the receivables.

In order to avoid similar surprises, it is important to obtain a precautionary attachment decision, which is also one of the temporary legal protection measures, on the debtor's property to guarantee that the creditor will receive the receivable when the foreign judgement becomes enforceable in Turkey.

Bibliography:

1. 19th Civil Chamber, E. 2004/9775, K. 2004/13391, T. 30.12.2004.

2. Supreme Court 11th Civil Chamber, 21.04.2015, 2004/4309 E., 2005/4022 K.

3. Supreme Court 11th Civil Chamber, 06.04.2014 T., 2009/1287 E., 2009/4176 K.; Supreme Court 19th Civil Chamber, 23.03.2015 T., 2015/1656 E., 2015/4049 K

4. Doç. Dr./Assoc. Prof. Zeynep Derya Tarman Enforcement Of Foreıgn Court Decısıons And Arbıtral Awards In Turkey And The Problems In Practıce http://dergipark.gov.tr/download/article-file/412015

5. Nuray Ekşi Yargıtay Kararları Işığında Icc Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi http://www.ankarabarosu.org.tr/siteler/ankarabarosu/tekmakale/2009-1/5.pdf

LEGAL CHARACTERISTICS OF PAYMENT ORDER AND THE FINALIZATION OF THE ENFORCEMENT PROCEEDING IN TURKEY

Enforcement Department and Enforcement Directorates

Under Turkish Enforcement Law, the governmental mechanism which enables the debt to be performed forcibly is the enforcement department.

The most important component of the aforementioned enforcement department within the Turkish Law system is an enforcement office. Enforcement Offices are primarily in charge of debt enforcement. A creditor who wants to initiate an enforcement proceeding applies to the enforcement office.

The Enforcement Office is the initial agency to which creditors apply both for enforcement proceedings and bankruptcy procedures. Enforcement Offices are authorized to take actions for collecting debts or enforcing court judgments.

In this respect, the enforcement office sends payment orders or enforcement orders to debtors following the initiation of enforcement proceedings by creditors. If the requirements of the orders are not met and the enforcement proceeding becomes final, the enforcement office is authorized to seize and sell the debtor's assets, upon the creditor's request, and to pay the creditor's claim with the acquired money.

Initiating Enforcement Proceeding:

Pursuant to Turkish Enforcement and Bankruptcy Law No. 2004, there are three types of enforcement proceedings;

i) Proceedings of General Lien,

ii) Proceedings of Bills of Exchange, and

iii) Proceedings of eviction of leased real estates by enforcement proceedings.

General Lien proceedings only apply to pecuniary and security claims. A General Lien is initiated by a request to be filed by the creditor to the enforcement office.

The creditor submits its enforcement proceeding request to the enforcement directorate in writing and the enforcement office (the bailiff) examines whether this enforcement proceeding request meets the conditions prescribed in the Law. If the enforcement office is satisfied that the conditions have been met, the bailiff shall issue a payment order or an enforcement order and then send it to the debtor. (Article 60 of Enforcement and Bankruptcy Law)

At this stage, the creditor may collect its claim against its debtor in two ways under Turkish Law:

The first enforcement proceeding is that the creditor may bring a lawsuit before the court and receive a final verdict (judgment) and the creditor will be able to collect its debt thereafter (Enforcement proceeding with judgment). Upon the enforcement proceeding request, if the request complies with the conditions prescribed by the Law, an enforcement order shall be sent to the debtor.

The second enforcement proceeding is that the creditor may apply to any enforcement office without any necessity for receiving any final verdict (judgment) through the court and the creditor may collect its debt through the enforcement office: Article 58 of Enforcement and Bankruptcy Law (Enforcement proceeding without judgment). In such enforcement proceedings, if the request is in consistent with the conditions prescribed by the Law, the bailiff shall issue a payment order and send it to the debtor.

Issuing and Serving a Payment Order:

As it is explained above, the enforcement office receiving the enforcement proceeding request shall issue a payment order and send it to the debtor.

The payment order creates expected provisions and consequences on condition that it is served on the debtor. Therefore, the enforcement office receiving the enforcement proceeding request shall issue a payment order and send it to the debtor within three days at the latest of the enforcement proceeding request: Article 61/I of Enforcement and Bankruptcy Law.

The payment order states that the debtor has to pay its debt or, in case of any objection, has to file an objection. If the debtor does not do either of these, the enforcement proceeding shall continue (the assets could be seized) against the debtor.

The payment order is served on the debtor by the enforcement office. If the enforcement proceeding is initiated against more than one debtor, each joint guarantor has to be served a separate payment order: Article 21 of »

Notification Law.

Upon being served service with the payment order, the debtor is forced to accept or deny the debt which is the subject of the enforcement proceeding. The debt can be denied by filing a petition to object to the payment order.

Objection to Payment Order and Finalization of Payment Order:

- If the debtor objects to the payment order:

If the debtor objects to the payment order within seven days as of the date of service of the payment order, the enforcement proceedings shall be ceased thereupon: Article 66 of Enforcement and Bankruptcy Law.

In order to proceed with the enforcement proceedings, the creditor has to apply to the court to request the annulment or cancellation of the debtor's objection. While the objection continues, the payment order can only become final once the court decides in favor of the creditor.

In addition, the debtor may always waive or withdraw its objection, and the payment order becomes final upon the waiver of objection.

- If the debtor does not object to the payment order within seven days:

The payment order becomes final if the debtor does not present any objection within 7 days following service of notice of the payment order: Article 78 of Enforcement and Bankruptcy Law.

Finalization of the payment order can occur explicitly or implicitly. Likewise, the payment order may become final if the debtor waives the objection within the objection period.

If the debtor does not object to the payment order within 7 days as of the date of service or the payment order becomes final by waiver of an objection, the enforcement office shall seize and sell the debtor's assets and then pay the creditor's claim with the acquired money, in accordance with its authority arising from the law and upon the creditor's request.

As is seen above, in order for the enforcement office to seize the debtor's assets, the payment order has to become final. Under Turkish Law, when a payment order becomes final, an aforesaid payment order would become an instrument having the qualifications of a judgment. Upon finalization of the payment order, the creditor may request the seizure of the debtor's assets.

Source: Enforcement and Bankruptcy Law No. 2004

Westwater Files International Arbitration Request Against Republic of Turkey

The U.S. energy materials development company Westwater Resources, Inc. (Westwater) has filed a request for arbitration against the Republic of Turkey with the claim of that Turkey violated the bileteral Investment Treaty between Turkey and USA

In a written statement made by the company, it was stated that the claims in arbitration are based on the damages arising out of cancellation of several exploration and operating licenses related to two uranium projects (Temrezli and Sefaatli) previously held by one of the local subsidiaries of the company, Adur Madencilik Limited Sirketi (Adur).

In 2007, Adur had obtained exclusive rights for the exploration and development of uranium at Temrezli and Sefaatli (located 200 km from Ankara) by the Turkish mining agency (MIGEM). After successfully completing the exploration stage, Adur was granted a number of operating licenses.

According to Westwater's statement "the Turkish government cancelled the seven licenses which are as four operating licenses, one pending operating license and two exploration licenses and held by Adur by asserting that the licenses were issued by mistake and that the Turkish govenment has a govenmental monopoly over all uranium mining activities in Turkey. .

The company released its claim on 13 December 2018, however, as of today the claim has not yet been registered by ICSID yet.

Source: https://www.westwaterresources.net/investors/news-releases/2018/12/13/westwater-files-international-arbitration-request-against-republic-of-turkey

Amendment Granting a Right for Exceptional Citizenship in Exchange For Real Estate Purchase Through Preliminary Sales Contract in Force Now!

Foreign citizens are free to purchase a house anywhere in Turkey on condition that it is not located in a military zone. Within the scoe of the article 20 of the regulation concerning the Law on Turkish Citizenship, it is even possible to obtain an exceptional Turkish citizenship through purchasing a real estate in Turkey.

In addition to this, the relevant legal regulation determines the purchase amount threshold concerning the value of real estate to be purchased. The purchase threshold in granting citizenship through purchasing a real estate has been decreased from 1 million USD to 250.000 USD or its equivalent in TRY.

Accordingly, foreign citizen can obtain citizenship through acquisition of real estate amounting to 250.000 USD in Turkey by affixing an annotation to title deed registers that this real estate will not be sold for three years.

According to the current amendment published on the Official Gazette on 6 December 2018 concerning the regulation on implementation of the Law on Turkish Citizenship, new regulations have been brought in order to facilitate the acquisition of citizenship.

As per this amendment, “preliminary sales contracts” which have not been clearly permitted before, will be deemed to be “real estate purchase” which will cause an exceptional citizenship right.

Within this scope; foreigners will be entitled to Turkish citizenship on condition that notarized preliminary sales contract is annotated to the title deed register in order not to transfer or cancelled for three years

concerning the real estate which has been purchased in cash in the amount of 250.000 USD at least or its foreign currency equivalent or Turkish Lira equivalent, or flat ownership or construction servitude has been established.

By this amendment, a notarized preliminary sales contract in advance on a real estate amounting to 250.000 USD or its equivalent in Turkish Liras will be sufficient in order to obtain a citizenship right upon an annotation before the title deed register for not transferring and cancelling for 3 years.

Supreme Court’s Decision in Favor of the Employee Dismissed Due to the Disclosure of Salary Increase Rates

A computer specialist, who complained the injustice of salaries at his workplace, allegedly shared the document including the salary increase rates of other employees from a computer that he cleaned and backed up, with his colleagues and superior. His employment contract was terminated unilaterally after this share because of the fact that he “disclosed the professional secret”.

In relation to the termination, the plaintiff who filed a lawsuit before the Employment Court asserted that he shared the document concerning the salary arrangements only with his chief of department and those doing the same job in order to show the unjust treatment owing to the different salary practice, and requested the annulment of unfair termination and the re-employment.

The defendant employer defensed that the plaintiff shared the salary information with a third party, the plaintiff, who obtained and shared the confidential information with regard to the salary increases with an unauthorized third party, was dismissed justly.

The Civil Chamber who rendered a precedent decision, evoked that the employer is obliged to treat equally and not to discriminate as per the article 5 of the Labor Law No. 4857 based on the principle of equality in the article 10 of constitution, and emphasized that an employer has to perform equal treatment to employees according to this obligation. It is also decreed in the same decision that the salaries of employees working at the same workplace should be known by the employees in order for the salary increase rates to be inspected within the scope of the obligation of equal treatment, and the principle of equal treatment comes before the principle of confidentiality.

By this decision, this controversial matter has been clarified. Accordingly, an employee, at the same seniority and work, should have the knowledge of salary and increase rate compared to other employees if criteria are not determined, and in this case the salaries and increase rates will not be confidential on condition that such information will not be used maliciously.

After the district court acknowledged the employer to be right, the plaintiff appealed the decision. As a result of the appeal review of the Supreme Court 9th Civil Chamber, it clarified a controversial matter in the employment law, and decreed that the share of employees’ salary increase rate with other colleagues would not constitute “confidential information and professional secret”, and an employee could disclose such information in order to provide the principle of equal treatment.

THE RESPONSIBILTY OF DOCTOR AND HEALTHCARE PERSONNEL AND LAWSUITS ARISING OUT OF MEDICAL ERRORS

The right to the highest attainable standard of physical and mental health, in short, “right to health” is a fundamental human right protected by international law. For the continuation of a healthy life a proper and lawful medical intervention is of great importance and an improper or incomplete implementation of the intervention results in great pain in the patient. Sometimes these results are irreparable and permanent and affect the whole life of the patient and in some cases the medical errors may cause even the patient's death.

As a result of this vital importance; a doctor or a healthcare personnel is obliged to act carefully while carrying out the patient’s treatment. Within this scope, doctor and healthcare personnel are fully responsible for “the slightest negligence” due to “the highest duty of care”.

In this article, the special conditions of responsibility of the doctor and healthcare personnel and characteristic elements of the lawsuits arising out of medical errors shall be explained.

In general, medical malpractice, can be defined as damage of the patient due to misdiagnosis, wrong treatment, or deficient care because of the lack of knowledge, inexperience or indifference of the doctors or other personnel of health care institutions, polyclinic, hospitals etc.

The term medical malpractice action or claim means a written claim or demand for payment that is filed for the failure on the part of a health care provider to furnish health care services.

Indemnifying the loss arising from the negligence of the hospital and its personnel is based on the attorney agreement. Within this scope, the proxy is obliged to fulfill all occupational conditions in order to hold its patient harmless, to detect the patient’s status medically in due of time and without any delay and to take all necessary measures in full, and to determine and implement the appropriate treatment without any delay as well.

Due to the fact that bodily injuries include an intense uncertainty at the beginning, the type of the lawsuit to be filed against a doctor and hospital will be “the lawsuit for uncertain debts” set forth in the article 107 of Code of Civil Procedure No. 6100.

In addition to the fact that medical errors does not have any certainty in terms of liability and negligence like other liability types, if it is not certain that the patient’s errors and sickness arise from the medical errors, and it is uncertain whether it is medical error or not, and whether the doctor and the hospital will be held responsible or not, the lawsuit should be filed as determination lawsuit and in case the existence of medical error is proven by the gathered evidences and expert reports, the lawsuit should be turned into a compensation lawsuit afterwards.

Possible Lawsuits

Pecuniary and Non-Pecuniary Compensation As a Result of Wrong Treatment

Wrong treatment constitutes a tortious act within the scope of the Code of Obligations at first and a contradiction to agreement. The Supreme Court’s practices accept the representation relation between patient and doctor at private hospitals, and the private law part of malpractice cases acts therefrom. Patient who is damaged due to the failure of doctor or hospital shall have a right to claim pecuniary and non-pecuniary compensation from both the doctor and the hospital, if any, where the doctor practices its profession.

Criminal Case As a Result of Wrong Treatment

Wrong treatment constitutes a crime committed against the integrity of body in case a doctor’s personal fault remains at the forefront. The nature of the crime may change depending on the patient’s damage.

In case a doctor’s fault causes a death, the crime of reckless homicide set forth in the article 85 of Turkish Penal Code. This crime is regulated as an act requiring a penalty of imprisonment from a term of two to six years. In case the act results in the death of more than one person, or the injury of more than one person together with death of one person, the aggravated crime shall occur and the upper limit of the crime shall be the imprisonment of fifteen years.

In case a death does not take place as a result of malpractice but it leads to a health problem for patient, the crime of reckless injury shall occur. (Art. 89 of Turkish Penal Code). The penalty of reckless injury is regulated as an imprisonment of a term of three months to one year, or a judicial fine. »

Parties of the Case

In case there is a direct relation between the doctor and the patient, and the hospital does not intervene, a lawsuit will only be filed against the doctor. In case the patient resorts to a private hospital and a doctor is appointed by the hospital management for the treatment and operation; a lawsuit may be filed against both the doctor and the hospital according to the joint liability provisions.

In the lawsuits to be filed against the doctor and the hospital, within the scope of joint liability, an insurance company which provides an Obligatory Liability Insurance of Medical Malpractice may also be sued.

In case an obligatory insurance is not taken, according to the article 14 of Insurance Law No. 5684, a lawsuit may be filed against the guarantee account.

As for the lawsuits for medical errors arising out of Public Hospitals, it will be filed before "administrative jurisdiction" against the Ministry of Health and the management of universities of medical faculties instead of the doctors being a public official and healthcare personnel.

However, in case of existence of public official's personal faults which may be drawn apart from the duty, on condition that personal faults are proven, a lawsuit may be filed before judicial justice due to the actions which are deemed to crime.

Within the framework of the Law on Private Hospitals and the relevant legislations, the Ministry of Health is obliged to exercise due care by granting a permission and license for opening a private hospital and controlling these hospitals regularly.

If the patients are harmed due to the deficiency in doctor and healthcare personnel, lack and inadequacy of treatment facilities and units, unsuitability of operating rooms and intensive care units, both the managers of private hospital and the Ministry of Health which fails to carry out necessary inspections will be responsible.

For these reasons, people and their relative who are damaged by the treatments of private health institutions, deficiencies in medical confiscating, or negligence of health services may file a lawsuit before judicial justice against companies to

which the private hospital is affiliated and doctors having a personal fault, and they may also file a compensation lawsuit against the government (Ministry of Health and universities) before administrative jurisdiction on the same matter.

Competent Courts

Competent Court of Compensation Lawsuit against Private Hospital

As a result of the representation relation deemed to have been established between a patient and a doctor, it is deemed that consumer courts are the competent courts in such cases. The lawsuit for compensation against the hospital and doctor due to the wrong treatment of a private hospital should be filed before the consumer courts.

Competent Court of Compensation Lawsuit against Public Hospital and University Hospitals

As to the compensation for damages as a result of the wrong treatment of public or university hospitals having the nature of governmental institution, the administrative justice has the jurisdiction.

Authorized Courts

As for the lawsuits to be filed against a private hospital or a doctor having a private clinic, the authorized court is a court of the domicile on the lawsuit date (Art. 6 of Code of Civil Procedure). In the lawsuit arising from tortious act, as per the article 16 of Code of Civil Procedure, the court where the tortious act has been committed or a loss has occurred or may occur, or the court of domicile of the injured party is authorized.

In case of a criminal liability of doctor, an application should be lodged through a complaint petition before Chief Public Prosecutor's Office where the hospital of tortious act committee by the doctor is located.

LIMITATION PERIODS IN THE LAWSUIT

The limitation period for compensation lawsuits to be filed against a doctor is 5 years. However, in case a doctor's act is deemed to be a crime as per criminal act, the extended limitation period will apply and according to subparagraph 1-e of article 66 of Turkish Criminal Code, the extended limitation for bodily injuries is 8 years

The limitation period for the lawsuits to be filed against private hospitals is 10 year

The limitation period for the lawsuits to be filed against a doctor, hospital and insurance company as per the provisions of joint liability is 10 years. The limitation period for the administrative lawsuits to be filed against Public Hospitals is 1 year as of time of discovery of loss,

The commencement of the time limitation starts from the discovery of the final report concerning the loss of physical strength.

As it is explained, the liability of doctor and healthcare personnel constitutes great importance in a legal meaning. It should be accepted that a doctor is responsible for his/her own fault concerning the profession, even if it is a slight fault. Doctors and healthcare personnel are obliged to assess all kinds of risks and possibilities in relation to the diagnosis and treatment, and to take accurate actions. Otherwise, legal actions might be taken for the incurred losses against all actors being part of the provided health services

Bibliography:

1. "SAĞLIK HAKKI" Ve SAĞLIK HİZMETLERİNİN SUNUMU Prof. Dr. Nazmi ZENGİN* http://dergipark.gov.tr/download/article-file/303589

ARBITRATION PROCEDURE FOR DISPUTES ARISING FROM PUBLIC PROCUREMENT CONTRACTS

In recent years, considerable developments have been taking place in development of Arbitration in Turkey, the most important of which is undoubtedly the establishment of the Istanbul Arbitration Center in 2015.

ISTAC, which is an independent and impartial institution providing dispute resolution services for both international and domestic parties, was established with the aim of being the "international centre for the resolution of commercial disputes between European, Asian and Middle Eastern countries".

For the sake of this ultimate aim both the commercial business sector and also the public authorities including law-makers have been making their great efforts to support the operations of ISTAC

As a very important improvement, Turkish Public Procurement Authority has amended its standard contracts to bring them in compliance with "the arbitration" in order to motive the public authorities to apply the ISTAC Arbitration, as an alternative to the Turkish courts.

Within this scope, one of the most important development have been taken so far is obviously to make the Arbitration An Applicable Way For Disputes Arising From "public procurement contracts"

"The amendment" which significantly regulated the Communique on Application of Consulting Service Procurement Tenders, Communique of Application of Service Procurement Tenders, Goods Purchase Tenders, Communique on Application of Construction Works Tenders, Communique on Framework Agreements Tenders was published in the Official Gazette dated 30th December 2017.

It has been regulated by the Amendment that ; For the "Communique on Application of Public Procurements" specified as above, the contracting authority has the right to choose arbitration as an alternative to Turkish Courts for the settlement of the disputes arising between the parties out of the contract being signed on the basis o the Public procurement.

Before leading in the details of the issue, we will briefly explain the "arbitration" and "court procedures," which are two main methods of dispute resolution in Turkish law.

Accordingly, jurisdiction in Turkish law as a rule belongs to the courts, However, as a result of the principle of " freedom of contract" the parties have also an option to choose "arbitration" as the alternative of the court procedures.

Within this scope, if there is a "foreign element" in the contract, the arbitration shall be applied in accordance with the rules of International Arbitration Act No. 4686, or if the parties are Turkish the Arbitration Rules of Turkish Civil Procedural law No. 6100 shall be applicable.

In addition to this, with the establishment of ISTAC in 2015, the "institutional arbitration mechanism" was established for the first time in Turkey.

However, in principle, without prejudice to prohibited situations Turkish law allows the parties to sign an "arbitration clause" for the private law relations , especially for commercial matters. The parties are usually not allowed to make an "arbitration agreement" on the matters which are related to public relations and / or public order.

Therefore the abovementioned "Amendment" providing the parties with the right to choose the arbitration in public procurement contracts is an important innovation for Turkish Law.

Within the scope of this amendment, during the execution stage of the public procurement contracts, as for the resolution of disputes which may arise between the parties, the authorities shall choose either Turkish Courts or arbitration. Therefore, the parties should insert one of these two alternatives into their agreements. In case an arbitration is preferred, and if a dispute consists of a foreignness element, Arbitration Rules of Istanbul Arbitration Center or International Arbitration Act No. 4686 shall be chosen and the dispute shall be resolved in this manner. As for disputes not having the foreignness element, Rules of Istanbul Arbitration Center shall be directly applied.

With this amendment , unlike the previous regulations which considers the arbitration as an exceptional way to applied only in exceptional circumstances, the arbitration becomes a usual dispute resolution mechanism, or disputes arising from Public Procurement Contracts regardless of whether the contractor party is a Turkish citizen or not.

Besides, in case the arbitration is preferred in the Public Procurement Contract and there is no foreignness element in (if the contractor is a Turkish citizen/company) ISTAC shall be entitled to conduct the arbitration.

However, in case the contractor is a foreign citizen/company; the parties have an alternative to choose ISTAC or an ad hoc arbitration under the provisions of International Arbitration Act No. 4686. In this case,, if the ad hoc arbitration is prefered , the arbitration shall be conducted by a three-membered arbitral tribunal in accordance with the provisions of International Arbitration Act No. 4686 will apply.

As is seen, by means of the amendment of 30 December 2017, in public procurement contracts signed with both Turkish and foreign bidders, they may choose an arbitration to be heard before Istanbul Arbitration Center which is a mechanism of institutional arbitration. In this way, disputes arising out of public procurement agreements will be easily resolved by experts in the quickest way, and domestic/foreign investors' needs for efficient resolution will be fulfilled promptly.

EXTRATERRITORIAL JURISDICTION FOR THE CRIMES WITH FOREIGNNESS ELEMENT IN TURKISH CRIMINAL LAW

After the murder of Saudi journalist Jamal Khashoggi in Istanbul many problem has arisen with both political and legal aspects.

Due to the allegations that the murder took place within the consulate building, discussions have been moved to another dimension in accordance with the The Vienna Convention on Consular Relations of 1963.

In fact, no matter what circumstances the crime is committed, the issue of where the offense should be prosecuted in criminal proceedings was often a controversial point.

This is because of the direct influence of the criminal proceedings on the rights and freedoms.

In Turkey, the rules for the Principles for Extraterritorial Jurisdiction of the criminal Law are regulated under the articles 8th - 19th of the Turkish Criminal law no 5237.

In this article, the rules for the Principles for Extraterritorial Jurisdiction of the Criminal Law shall be briefly summarized within the scope of these above-mentioned articles and on the basis of main three principle as; "Territoriality Principle" , "The Principle of Personality", "Principle Of Universality".

1- Territoriality Principle;

In accordance with "Territoriality Principle" which is one of the main principles, the state can claim jurisdiction to prosecute criminal offences committed within their borders irrespective of by whom and to whom they were committed against in criminal law

Therefore, jurisdiction for crimes committed in the territory of the Republic of Turkey belongs to the Turkish courts, even if the offender and/or the victim are foreign.

According to the Article 8th of Turkish Criminal Code; Turkish laws are applied for the offenses which are committed in Turkey. Where the act constituting an offense is partially or entirely committed in Turkey, or the result is obtained in Turkey, the offense is assumed to have been committed in Turkey.

According to the same article, if the offense is committed;

- in the Turkish territory, or airspace and Turkish territorial waters,

- in open seas and the space extending above these waters, and in/by the Turkish vessels and airplanes,

- in/by Turkish war ships and aircrafts,

- in the stationary platforms exclusively constructed in the territorial boundaries of Turkey or in industrial zones,

then this offense is assumed to have been committed in Turkey.

2- The Principle of Personality

This principle is regulated within the scope of three different case ;

In Case Perpetrator Is Turkish Citizen-Victim Is Foreign

If a foreigner, excluding the offences listed in Article 13, commits an offence in a foreign country causing injury to Turkey, which requires a punishment with a minimum limit of less than one year imprisonment, and if the offender is found in Turkey, then he is punished according to the Turkish laws. However, the trial is filed upon request of the Ministry of Justice.

However, for offences of "bribery" and "influence peddling" are not based on the request of the minister of Justice.

If The Perpetrator Is A Foreign-Victim Turkish

If the offence is committed with the intension of causing injury to a Turkish citizen or a legal entity incorporated according to the Turkish laws and subject to special law, and if the offender is found in Turkey, then the perpetrator is punished according to the Turkish Laws upon complained of the injured party provided that that he is not convicted in the said foreign country for the same offense.

If Both The Perpetrator And The Victim Are Foreign;

It is possible to make a trial in in case of existence of the following conditions;

Where the offence requires punishment with a minimum limit of less than three years imprisonment according to the Turkish Laws; »

Where there is no extradition agreement or the demand of extradition is rejected by the nation where the crime is committed or the person accused of a crime holds citizenship.

Principle Of Universality:

In the event that the following offenses set out in Article 13 of the Turkish Criminal Code are committed by a citizen or a foreigner in a foreign country, Turkish law shall apply. Thw offenses set out in Article 13 of the Turkish Criminal Code are as below;

- Genocide and crimes against humanity, crimes against the dignity of their bodies and the signs of the sovereignty of the state, crimes against the security of the state, crimes against the constitutional order and the functioning of this order, crimes against National Defence, crimes against national security and espionage, crimes against relations with foreign states.

-Torture, intentional pollution of the environment, production and trade of narcotic or stimulant drugs, facilitating the use of narcotic or stimulant drugs, counterfeiting in money, production and trade of tools that manufacture money and precious stamps, counterfeiting in Seal, trafficking, hijacking or detaining of sea, rail or air transport vehicles, or harming those vehicles.

On the other hand, sometimes a crime committed outside the Turkey by a foreigner may cause another crime in Turkey. In this case , there is only one action committed in a foreign company , however usage of the revenue arising out of the crime in Turkey constitutes another kind of crime according to Turkish criminal Law.

For example in case the revenue which was gained from a crime committed in a foreign country is used in Turkey for any disposition, the crime of "Laundering of assets acquired from an offence" be constituted a set forth in the article 282 of Turkish Criminal Code No. 5237.

According to Turkish Criminal Code article 282;

"Where a person conducts any act in relation to an asset which has been acquired as a result of an offence which carries a minimum penalty of one year imprisonment, in order to transfer such asset abroad or to give the impression that such asset has been legitimately acquired source of such , shall be subject to a penalty of imprisonment for a term of two to five years and a judicial fine of up to twenty thousand days. (…)

Where this offence is committed by a public officer or professional person in the course of his duty then the penalty to be imposed shall be increases one half"

As it is explained above, judging a foreigner before Turkish authorities due to his/her crime committed in a foreign country can only be possible in case circumstances and/or crimes which are prescribed limitedly in Turkish Criminal Code exist.

In addition to all this, before ending our article we would like to state once more that for the matter of Turkey's right to prosecute the case of Jamal Khashoggi is actually another matter that should be discussed in accordance with The Vienna Convention on Consular Relations of 1963 as we briefly mentioned above.

In this context, as a result of the interpretation of many articles of The Vienna Convention dated 1963 , many lawyers and legal experts agree that the murder of Saudi Journalist has exceeded the limits of diplomatic immunity.

According to the article 31 titled "Inviolability of the consular premises" of the Convention, the authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster.

On the other hand, it is stated in the article 41 titled "Personal inviolability of consular officers" that Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

When it is assessed within the scope of Khashoggi's murder, the article 55 titled "Respect for the laws and regulations of the receiving State" plays a significant role. According to the article, it is the duty of all persons enjoying such privileges and

immunities to respect the laws and regulations of the receiving State.

Under all these provisions, whether Turkey has jurisdiction over Khashoggi's murder is still a big matter of debate. However, in the current situation , the Turkish authorities still keep their decisive attitude in prosecuting criminal proceedings arising out of the this serious murder committed within the borders.

Source: The Vienna Convention on Consular Relations of 1963

Sülün Sok. No:8 34330 1.Levent Beşiktaş / TURKEY
Phone : +90 212 356 3210(pbx) / +90 212 325 2307(pbx)
Fax : +90 212 356 3213
E-mail : info@ozgunlaw.com
Webpage: www.ozgunlaw.com

Follow us!