ÖZGÜNLAW
PROTECTING YOUR INTERESTS

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

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Recent News

WHAT DOES THE NEW REGULATION ON PAYMENT SERVICES AND ELECTRONIC MONEY PROVIDE?

The Regulation on Payment Services and Issuing Electronic Money and Payment Service Providers, and the Communiqué on the Management and Supervision of the IT Systems of Payment and Electronic Money Institutions and the Data Sharing Services of Payment Service Providers in Payment Services Area entered into effect after having been promulgated on the Official Journal dated December 1, 2021 and bearing the issue number 31676.

Consisting of six sections and looked forward to being published by the industrial stakeholders, the New Regulation aims to set out the applicable principles and procedures in authorization and activities of the payment and electronic money institutions, as well as provision of payment services and issuance of electronic money.

Drawn up upon the amendments to the Law on the respective applicable regulations, the New Regulation covers the provisions on sustaining payment services and electronic money issuing activities effectively and uninterruptedly, and supporting development of the payments area, and reinforcement of the corporate structures of the respective institutions, and the institutions, which are already licensed, are expected to harmonize with the provisions, as set out under the New Regulation, during one-year period granted thereunder as the transitional process.

The highlights of the New Regulation are as follows:

The New Regulation has introduced the requirement to obtain permission from the legal representative of any minors with respect to the mobile operators in order for any pre-paid or post-paid line users to procure the payment services. The post-paid or pre-paid lines will be required to be provided to the customers closed to any pre-paid transactions, and they will be able to be opened to mobile transactions only upon the approval to be obtained from the subscribers.

The most critical provision introduced for the institutions intermediating for bill payments is that in the event that any institution operating under the scope of intermediation services for bill payments outsources from any other Payment Service Providers which has executed an agreement with the bill issuing institutions to make collections for and on behalf of them, no requirement will be sought for them to have entered into an agreement directly with the bill issuing institutions.

Stabile cryptocurrency is defined for the first time under the New Regulation and referred to as the intangible assets which are issued exactly for the fiduciary money and distributed via digital networks upon being created virtually.

The New Regulation has, on the other hand, limited the transactions on use of anonymous pre-paid instruments, and such transactions are itemized thereunder.

It has also set out the requirement on co-working of the payment service providers and introduced the business registration and code system for the business which are critical for the industries which are not covered under the Former Regulation.

The new procedures on obtainment of operating license have been introduced, highlighting some changes on the process as compared to the application process of the already-licensed ones.

It has also been set out that in order for the institutions to carry out the payment services through the agency of a representative, they are required to have obtained all information and documentation, as necessary to that end, from the representative, and to have convinced that the representative does not pose any risk in terms of provision of the payment services without any problem, in compliance with the applicable regulations.
Another groundbreaking provision introduced thereunder is that the institutions will be allowed to cooperate with the legal persons situated abroad in line with their purposes and activities, and that they will be allowed to provide the payment services to their domestic customers through the agency of the legal persons situated abroad.

It has been clearly prescribed under the New Regulation that the institutions may become a shareholder only to the institutions which issue electronic money, or provide payment services, or which are exempted from the commercial business ban to the extent that it does not create any impediment for them to perform and fulfill their obligations, as prescribed under the applicable regulations.

There are also some changes on outsourcing; namely, the electronic money institutions may not outsource electronic money issuing activities in any manner whatsoever. Some additional provisions have been introduced on equity, and the minimum equity amounts have been increased.

Furthermore, the institutions are now required to hold a deposit amount at and before the Central Bank of the Republic of Turkey, and to provide an additional deposit amount depending on the number of representatives.

Another industrial-critical provision is that the payment funds are now allowed to be yielded with overnight interest at the bank where the hedge account is held.

As explained in detail above, the New Regulation has introduced many clear and extensive provisions for existing payment institutions and newcomers.

It is clearly understood that especially the new provisions on avoidance of any discriminative practices across the industry on provision of payment account and infrastructure services among the payment service providers will have an effect on ensuring that the market will have fair and equitable competition conditions.

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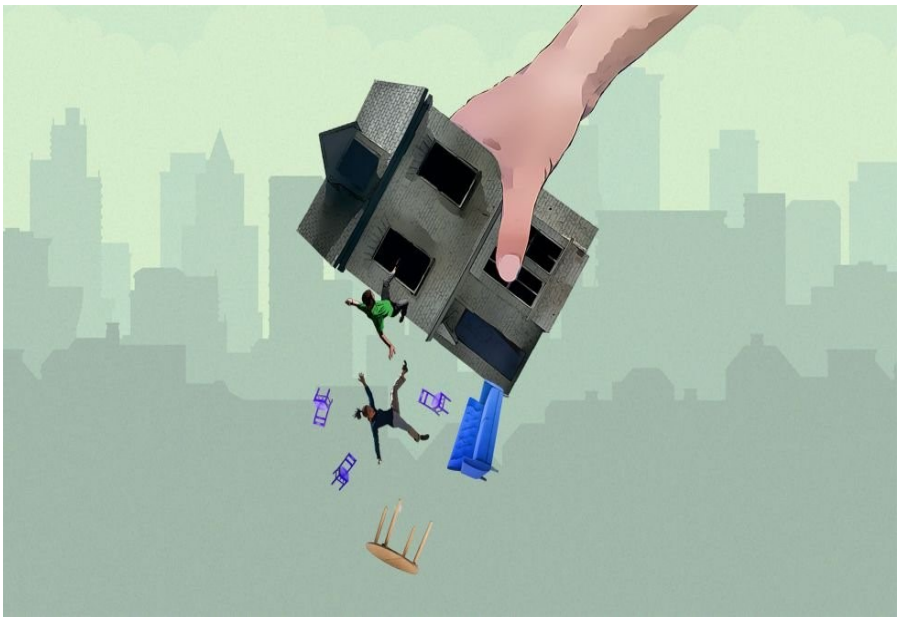
EVICTION DUE TO NECESSITY UNDER RESIDENTIAL RENTAL AGREEMENTS



A. INTRODUCTION

Rental agreement is one of the most commonly-executed types of agreement in daily lives. Such type of agreement can be executed rapidly due to its nature, which makes it one of the most commonly-encountered disputes in settlement of disputes. In our country, there has been an increase in the number of actions for eviction especially in the aftermath of Covid-19 pandemic.

Most property owners are seeking ways to evict the tenants from the property, and to rent the property again at a higher amount or under a much more advantageous rental agreement considering the prevailing economic conditions or changing conditions.

However; the lawmakers have set out strict terms and conditions to file an action for eviction in order to protect the tenants' rights. The 1st subparagraph of the article 350 of the Turkish Code of Obligations grants the landlord a right to terminate the rental agreement due to any necessity to arise.

Accordingly; "In the event that the landlord, or the spouse, descendant or ascendant, or any other legal dependents thereof is required to use the property due to any residential or business need, they may terminate the rental agreement by filing an action in one month starting as of the date of expiry of the period of time as prescribed under the agreements for definite duration or the date to be determined by observing the termination period as per the general provisions under rental agreements, and the time periods as prescribed for serving a termination notification for such purpose under the agreements for indefinite duration …".

Filing an action for eviction due to necessity is based on filing a request for eviction of the immovable property due to the fact that the landlord or the owner thereof needs the property.

1. Terms & Conditions on Actions for Eviction due to Residential Necessity

i. Existence of Residential Need, and Right of Action

As can be understood from the article provided hereinabove, it has been prescribed that the landlord, or the spouse, descendant or ascendant, or any other legal dependents thereof may file an action for eviction due to need.

No action may be filed for any persons other than the foregoing. While such right was once granted only to the landlord, and the spouse and child(ren) thereof, the descendant or ascendant, and the dependents thereof have not also been included by the lawmaker under the new regulation.

As it is against the Turkish family system and traditions to exclude the father, mother and sibling(s) thereof from such right, the term "dependents" have been incorporated into the new law.

Another critical point here is that there is not any requirement for the person to file an action for eviction as the owner of the property. The right of action lies with the landlord.

Because the lawmaker is referring to the 'landlord', without any specific provision that the claim of necessity may be raised by the owner, only.

The landlord is not required to be the owner; however, in case of any joint ownership, all shareholders may file such an action only after meeting the quorum on shares and shareholders under the joint ownership. In any such case, either all shareholders should have such a need, or grant their consent unanimously on utilization of the property due to the necessity of a single shareholder. In case of any tenancy in common, all shareholders should file the action or grant their consent to that end.

ii. Necessity Should Be Unavoidable and Sincere

Although it is not set out clearly under the said provisions, another agreed matter here is that the necessity should be unavoidable and sincere.

In practice, it is required to prove that the claim of necessity is true, sincere and unavoidable in order for the decision for eviction to be ordered by the court in consequence of the litigation process.

It is undoubtedly not easy to determine under which conditions the necessity is true and sincere. Therefore, it is seen that sometimes it is based on the presumptions of fact.

However; various criteria such as the lifestyle, social and economic conditions of the landlord should be considered in concrete cases while determining whether the necessity is true and sincere, or not.

As per the settled case-laws of the Supreme Court of Appeals; if the plaintiff claims to need it due to the fact that s/he is under the threat of being evicted, s/he should prove it.

The 6th Civil Chamber of the Supreme Court of Appeals ordered, under the decision bearing the Basis number 211/3280, and the Decision number 2011/7033, and dated 27.06.2011 that:

"… Although the needy plaintiff's being under the threat of being evicted from its business is a valid reason as it is true in terms of its need for the property, the plaintiff should prove the existence of the threat of eviction. The plaintiff relied its necessity on its eviction notice, provided for the business run by the same, and its witnesses, requesting the court to order a decision based on the eviction notice and the expert's report after renouncing from its request of ensuring that its witnesses are heard during the litigation process. As the eviction notice is a document issued unilaterally by the tenant, it may be issued either beyond the knowledge of the landlord at any time or in joint collaboration with the landlord. Therefore, the existence of the eviction notice only does not prove the existence of the eviction threat. Due to the fact that the existence of the eviction threat is not supported with any other evidence by the plaintiff, it should be ordered to dismiss the action, and…"

Although it was first requested to increase the rental amount without mentioning of any necessity at the end of the rental period, it was then raised a claim of necessity therefor, which was not found unavoidable and sincere by the Supreme Court of Appeals. (The landlord did not provide the property, which was evicted a short time ago, to its daughter, and then filed an action claiming that its daughter needed the property, which shows that such claim is not sincere. The Decision, bearing the Basis number 2001/8167, and the Decision number 2001/8314, and dated 23.10.2001, of the 6th Civil Chamber of the Supreme Court of Appeals)

The 3rd Civil Chamber of the Supreme Court of Appeals ordered under its decision, bearing the Basis number 2018/7751, and the Decision number 2019/493, and dated 23.01.2019, that:

"In this present case, there is a dispute arising between the parties with respect to existence of a rental agreement which was executed on 30.11.2014. The action is based on arising of a residential need of the plaintiff's son, and the agreement showing that the needy persons is a tenant is available under the file. It is primary evidence for the needy person to be a tenant under the scope of the actions for eviction due to residential necessity. It is also understood that the claim of such necessity is confirmed by the witnesses to the plaintiff. In such a case, it should be acknowledged that the said necessity is sincere, true and unavoidable. The court should order a decision for acceptance of the claim of eviction due to necessity."

The landlord should need such immovable property. With respect to residential rental agreements; being a tenant is deemed alone a valid and satisfactory reason for need by the Supreme Court of Appeals.

The 3rd Civil Chamber of the Supreme Court of Appeals ordered a prejudication precedent, bearing the Basis number 2019/2702, and the Decision number 2019/4829, and dated 22.05.2019, that:

"As per the article 350/1 of the Turkish Code of Obligations; the residential need should be proven to be true, sincere and unavoidable in order to order a decision for eviction under the actions for eviction filed based on such a residential need. Any temporary need may not be claimed as a valid reason for eviction, or any need which has not arisen yet or which takes long to arise may not be deemed as a valid reason for eviction. Existence of the need on the date of filing is not sufficient alone, and it should be still at issue during the litigation period.".

Besides the foregoing, there are also some time-related conditions under the actions for eviction due to any necessity.

Any action, filed without observing such conditions, is dismissed.

Observance of such time-related conditions will be inquired automatically – i.e. even if it is not claimed by the parties – by the judge.

The 3rd Civil Chamber of the Supreme Court of Appeals ordered a prejudication precedent, bearing the Basis number 2017/4069, and the Decision number 2017/11195, and dated 06.07.2017, that:

"As per the article 350/1 of the Turkish Code of Obligations numbered 6098; the action for eviction due to necessity should be filed at the end of the period, as set out under the agreements for a definite duration, and within a period of one month as of the date to be determined by observing the periods of time, as prescribed for serving the termination notification under the article 328 of the said Law, with respect to the agreements for an indefinite duration. As per the article 353 of the Turkish Code of Obligations; in the event that the landlord has notified the tenant, in writing, of that it will file a legal action earlier or within the period of time, as prescribed to file a legal action, at the latest, such legal action may be filed up until the end of the extended one year of rent following such notification. The period of time granted to file a legal action is about the public order, and it needs to be considered automatically even if it is not claimed by the defendant."

The lawmaker does not want the landlord to go into trouble due to necessity. For example; if a landlord, living in Artvin, files a request for eviction since her/his child has been admitted to a university based in Istanbul, then such request is deemed valid and legal [1].

However, the residential necessity should continue up until the end of the litigation process.

The Supreme Court of Appeals ordered a decision that a sincere and unavoidable reason for eviction may not be at issue as it has been understood that it has been tried to sell the property even during the litigation process [2].

The decision, bearing the Basis number 2017/8674, and the Decision number 2018/1180, and dated 15.02.2018, of the 3rd Civil Chamber of the Supreme Court of Appeals reads as follows:

"…The plaintiff filed a request for eviction due to purchase and necessity under its petition, with no specific explanation on its claim of necessity under the letter of warning and the petition.

While the court should have made the plaintiff explain its claim of necessity, and focused on the matter of necessity through collection of any and all kinds of related evidence, it ordered a decision, in writing, based on missing research and investigation, which is against the applicable procedures and law, and therefore, the decision should be reversed…"

iii. Period of Filing a Legal Action

The period of filing a legal action is set out clearly under the article 350 of the Turkish Code of Obligations. Accordingly; a legal action needs to be filed within a period of one month as of the end of the period under the agreements for a definite duration.

However, it should be emphasized here that the period of time, as prescribed by the lawmaker here, refers to the period of prescription, and expiry of such period ceases the landlord's right to terminate the agreement.

The date of expiry of the rental agreement is calculated based on the date of issuance of the rental agreement. If no agreement in writing has been executed or no date of issuance has been specified under the agreement, the date of commencement may be proven based on the dates of application and execution of the subscription agreements for installation of electricity, water, natural gas, telephone, and Internet services at the immovable property [3]. However; the article 353 of the Turkish Code of Obligations sets out an exception to the foregoing.

Accordingly; *"If the landlord has notified the tenant, in writing, of that it shall file a legal action within the period of time, as prescribed for such purpose, at the latest, the period of filing a legal action shall be extended for a further year of rent."*

Such warning, reserving the right to file a legal action, should be served to the tenant before expiry of the period of prescription, at the latest.

2. Ban on Re-Letting, and Former Tenant's Right to Indemnity

As per the article 355 of the Turkish Code of Obligations; the landlord may not let the property to any other person other than the evicted tenant for three years without any just cause upon eviction of the tenant due to necessity.

Otherwise, the landlord shall pay the tenant, evicted by the same due to necessity, an indemnification amounting to not less than the one-year rental which has been paid in the last year of rent. Upon elapse of such three-year period of time, the landlord may let the property without any restriction.
In order to refer to the ban on re-letting, the landlord should have let the property to any third person other than the former tenant upon eviction of the property due to necessity. It is not clearly set out that whether it may be referred to such article or not if the landlord does not use the property for her/his own needs or her/his kinsmen and dependents without any just cause even if the property has been evicted by the same.

We are of the opinion that it would not be appropriate to subject the landlord to indemnification if s/he does not take an advantage for herself/himself or allows the property to be used free considering that the purpose of such article is to prevent the property from being let at a higher amount upon eviction of the tenant. [4]

The decision, bearing the Basis number 2001/13394, and the Decision number 2002/4387, and dated 08.04.2002, of the 4th Civil Chamber of the Supreme Court of Appeals reads as follows:

"… The plaintiff left the house without filing of any debt enforcement proceedings upon finalization of the decision, as ordered in consequence of the legal action for eviction filed by the defendant. Accordingly, it is understood here that the immovable property was evicted due to the defendant's need. However; the defendant sold the property to the third person in a collusive way without waiting for elapse of the period of time, as prescribed under the law, and then bought it back and let it again. It is therefore clear that the defendant acted in breach of the articles 15 and 16 of the Law numbered 6570."

The tenant's leaving the house on her/his own will upon any such request is not different than the eviction of the house through debt enforcement proceedings for the tenant to have the right to claim for indemnification.

The wording under the said provision reading as "When the landlord ensures eviction of the property due to any necessity" is supporting the foregoing. The way of eviction of the property by the landlord is not important here. However; in cases where eviction did not occur through a litigation process, the tenant needs to prove that s/he had to leave the property upon the landlord's request to that end. It is sufficient to have a letter of warning which has been issued to the tenant by the landlord, and states that a legal action for eviction shall be brought against the same unless the property is evicted. [5]

B. CONCLUSION

This legal means, which is resorted commonly nowadays by the Landlords under today's conditions, is subject to some restrictions both under the applicable laws and the case laws of the Supreme Court due to the reasons we tried to explain in detail hereinabove. Such that, individuality of the term of "need/necessity" has even been narrowed down by the courts and lawmakers, prescribing that it should be interpreted and considered specifically to each case – i.e. each landlord and tenant.

Accordingly, it has been quite appropriate for the lawmaker to include the descendant or ascendant, or any other legal dependents of the landlord regardless of the type of such need/necessity, considering the Turkish Family patterns.

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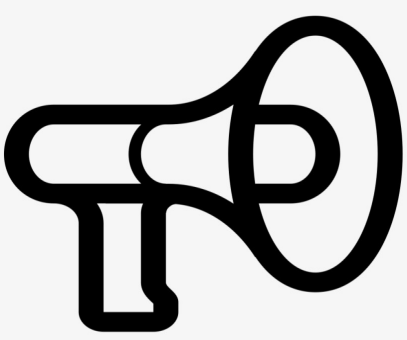

SUPPORTING CONVERSION OF GOLD AND FOREIGN CURRENCY ACCOUNTS INTO TURKISH LIRA ACCOUNTS

Recently, an excessive increase in exchange rates has been observed in Turkey. For this reason, the Central Bank of the Republic of Turkey announced that the locally-based legal entities can benefit from their support if they convert their foreign currency and gold deposit and participation fund accounts into Turkish liras term deposit and participation accounts.

These supports were accepted upon being promulgated on the Official Journal dated 11.01.2022.

First of all, the definition of "Legal entities with legal settlements in Turkey, with the exception of banks and other financial institutions designated by the Central Bank of the Republic of Turkey" was made for any locally-based legal entity.

The supports mentioned above are as follows;

Foreign currency deposits and participation fund account balances of legal entities in Dollars, Euros and Pounds, available on 31.12.2021, are converted into Turkish Liras at the exchange rate upon request of the account holder.

As for the gold assets, the gold account of legal entities that is available on 31.12.2021 or the gold account balances for processed and scrap gold that will be opened after that date are converted into to Turkish Liras at the conversion price, if so requested by the account holder.

A Turkish Liras deposit or participation account for the locally-based legal entities is opened by the bank for a period of 6 months or 1 year.

Source: https://www.resmigazete.gov.tr/eskiler/2022/01/20220111-14.htm

IF THE EMPLOYEE'S EMPLOYMENT CONTRACT IS TERMINATED DUE TO A CRIME COMMITTED OUTSIDE THE WORKPLACE, THE EMPLOYEE IS ENTITLED TO SEVERANCE PAY

Absenteeism resulting from a conviction due to a crime committed outside the workplace is a compelling reason for the employee, and in case of termination of employment contract by the employer, the employee is entitled to severance pay.

The following statements were included under the decision of the 9th Civil Chamber of the Supreme Court of Appeals:

"The worker is not entitled to severance pay only if the employment contract is terminated by the employer for the reasons specified under Article 25/II of the Labor Law.

According to sub-paragraph f of the second paragraph of Article 25 of the Labor Law, "the employee's committing a crime at the workplace that is punishable by imprisonment for more than seven days and whose penalty is not postponed" is a justifiable reason for termination that does not require severance pay for the employer.

The justified reasons for termination are regulated under the third and fourth paragraphs of Article 25 of the Law. These are the cases where the absenteeism exceeds the notification period, as prescribed under the Article 17, in the event that the worker is detained or arrested, and the case when a compelling reason prevents the worker from working at the workplace for more than one week.

If the employer terminates the employment contract based on the reasons, as set out under Articles 25 / I, 25 / III and 25 / IV of the Labor Law Nr. 4857, it must pay severance pay even if there is a justifiable reason.''

The Supreme Court has decided that the worker is entitled to severance pay for the reasons explained hereinabove.

For detailed information: The Decision, bearing the Basis Number 2020/5440, and the Decision Number 2021/7876, of the 9th Civil Chamber of the Supreme Court of Appeals

ABOUT THE OBLIGATION OF COMPANIES, NOT ESTABLISHED IN TURKEY, TO REPORT A PERSONAL DATA BREACH TO THE TURKISH AUTHORITY

We know that there have been serious personal data breaches recently. Unfortunately, very serious personal data breaches continue to occur in Turkey.

Finally, it was reported to the Personal Data Protection Board (the Competent Authority on Personal Data in Turkey, "the Board") that a food and grocery products supplier company, operating across, Turkey was the data controller, and that the personal data of more than 22 million people were captured illegally.

The magnitude of the recent breaches is pushing the personal data authority to be much more careful about this issue. All these recent data breaches are forcing the competent authority to be much uncompromising to impose penalties on personal data breaches.

Therefore, data controllers should now be very careful about data breaches, and they should carry out the "notification of the violation process to the Board", which will be carried out after the data breach, very carefully and quickly to eliminate such data breaches with the least damage.

Another important consideration point for the companies established in the EU is that in case of a data breach, it will not be sufficient for them to file their applications with the EU personal data authority, only.

Because it is stated by the Turkish Data Protection Authority that even a minor data breach, experienced by a company established abroad, should be reported to them in some cases as per the Turkish Law on Protection of Personal Data, and all related applicable regulations.

A.) DOES THE CONCEPT OF A DATA BREACH HAVE THE SAME MEANING UNDER GDPR AND TURKISH REGULATIONS?

The concept of "personal data breach" is defined by the European General Data Protection Regulation ("GDPR") as follows: "transmitted, stored or otherwise processed personal data in ways the accidental or unlawful destruction, loss, alteration, unauthorized disclosure or access, that led to a security breach".

According to the Section 12 of the Law on Protection of Personal Data, the applicable law across Turkey, data breach is defined as "the acquisition of personal data processed by others by illegal means".

In other words; as per the applicable Turkish regulations, any personal data must be seized by others in breach of the law for a data breach to occur.

Therefore, not every data breach needs to be reported to the Board under the GDPR.

B.) IN WHAT CASES SHOULD A FOREIGN COMPANY NOTIFY THE TURKISH PERSONAL DATA AUTHORITY?

The 5th Paragraph of the 12th Section of the Law nr. 6698 on Protection of Personal Data, which is the applicable law on protection of personal data in Turkey, sets out that in case of obtainment of the processed personal data through illegal means, the data controller is required to notify the concerned person(s) and the Personal Data Protection Board thereof as soon as possible.

Furthermore; the Personal Data Protection Board, which is the competent authority in Turkey, issued the Decision dated 24.01.2019 and numbered 2019/10 in order to ensure that the process, to be followed in Turkey in case of any breach of data, is in compliance with the General Data Protection Regulation (GDPR).

It has also been indicated, under the said Decision, by the Board that in case of breach of data at the internationally-based data controller, the data controller is required to report the case to the Board in accordance with the same principles if outcomes of such breach would affect the real persons who are the "data owners" and resident in Turkey, and the concerned persons make use of the respective products and services in Turkey.

C.) AFTER HOW MUCH TIME DOES THE BOARD NEED TO BE NOTIFIED AFTER THE DATA BREACH OCCURS?

It has been indicated, under the Decision, by the Board that the data controller is required to report the case to the Board in maximum 72 hours after being aware of the data breach. In case of any failure to report the case in 72 hours after being aware of the data breach, the valid reasons for such late reporting should also be included in the notification to be served after 72 hours.

It has also been indicated, under the Decision, that the affected concerned persons (data owners) should be contacted directly and informed of such data breach as soon as possible, and if it is not possible, the data breach should be announced through a publication to be posted on the website.

The board does not provide a separate time for foreign companies or Turkish companies about the notification period. Foreign companies must also be notified within this 72-hour period.

But it will take a serious time for a company that does not have a board in Turkey to learn that it must report this violation to the authority in Turkey and conduct the notification process.

Therefore, foreign companies should definitely indicate these issues as the reason for the delay in their notifications after 72 hours.

D.) HOW IS A DATA BREACH NOTIFICATION SERVED AND WHAT SHOULD BE SPECIFIED UNDER THE NOTIFICATION?

Such notification for data breach may be served by sending the "breach notification form" to the Board electronically by e-mail or physically by mail, or making use of the data breach notification platform available on the official website of the Board.

As per the Data Breach Notification Form, as requested to be filled-in by the Board; the below-listed details should be disclosed to the Board, and if it is not possible to report all these details completely, the Board may be gradually notified thereof subsequently.

1. Trade name/Full name of the data controller

2. Address of the data controller

3. Details of the person who issues the said notification for and on behalf of the data controller (contract/power of attorney if any person other than the data controller serves the notification)

4. Date and time of commencement of the breach

5. Date and time of commencement of the breach

6. Date and time of ending of the breach

7. Date and time of detection of the breach

8. If the breach has been reported to the data controller by the data processor, details of such notification and data processor (A copy of the notification form such as letter- e-mail message, etc.)

9. Detailed information on the source of breach, and how it has occurred

10.Detailed information on the effects of breach

11. Detailed information on how breach has been detected, and supporting documents, if any

12.All categories of the affected personal data (Data such as ID, medical data, ethnic origin, etc. should be listed separately)

13.Number of affected persons, and of records thereof

14.Groups of affected persons, and effects thereof

(Affected persons should be classified as employees, subscribers, customers, etc., and possible effects of breach on such persons should be indicated)

15.If the notification is reported to the Board after 72 hours, the reason for such late notification

16.Detailed information on that whether the affected persons have been notified, or not, and if not, the reason(s) therefor, and when such notification will be reported to the same

17.Date of notification served/to be served to the concerned persons

18.Detailed information on the method of notification served/to be served to the concerned persons

19.Means of communication to enable the concerned persons to get information about the data breach (web site, etc.)

20.Whether any other national organizations or institutions have been/will be informed, or not (law enforcement officers, supervisory institutions, etc.)

21.Whether any other international data protection authorities or concerned institutions have been/will be informed about the breach, or not?

22.Probability of exposure of the concerned persons to material adverse effects due to breach (It is required to assess the extent of the potential effects on the concerned persons in determination of the level of the data breach.

Nature of the breach, reason therefor, type of breached data, measures taken to decrease the effects of the breach, and categories of the affected concerned persons should be considered while assessing the said potential effects.

Consequently; such effects should be classified as very high, high, moderate, low, or not known.)

23.Effects of breach on your organization (Such effects should be classified as very high, high, moderate, low, or not known.)

24.What kinds of trainings have the employees received regarding the breach in the last one year?
(Proving documents should be submitted)

25.What kinds of technical and administrative measures have you taken to prevent such kind of breaches before occurrence of the respective breach (Proving documents should be submitted)

26.Technical and administrative measures you have taken or plan to take after occurrence of the respective breach, and information on the estimated time of completion of such measures

(Please indicate the measures you have taken to solve the problem and eliminate the adverse effects.

For example; accidental disposal of date, ensuring security of passwords, data security training planning, etc. Proving documents should also be submitted.)

FINALLY…

If any company established outside the EU or Turkey has suffered a personal data breach, if persons resident in Turkey are also affected by this breach in some way, it will not be enough for the company to report this breach to the personal data authority in the country where it is established, and it will also need to report it to the Turkish personal data authority.

If possible, this notification should be served within 72 hours with most of the details as of the time of occurrence of the breach, and if the notification is served after 72 hours, the reasons for this delay should be explained in detail.

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REAL ESTATE ACQUISITION BY FOREIGN COMPANIES AND FOREIGN CAPITAL COMPANIES

In this article, the real estate acquisition processes of foreign companies and companies with foreign capital in Turkey, the rules they must comply with and the sanctions that can be applied to them will be discussed.

B-FOREIGN COMPANIES

It is necessary to examine foreign legal entities by dividing them into partnerships, associations and foundations while determining the qualification of foreignness.

Although partnerships are legal entities established to share profits, associations and foundations do not have a profit sharing purpose.

In Turkish law, whether a partnership qualifies as a foreigner is determined according to the provisions of the Turkish Commercial Code. While partnerships established according to Turkish laws and headquartered in Turkey are considered Turkish partnerships; Partnerships with headquarters abroad are considered foreign.

1. REAL ESTATE ACQUISITION BY FOREIGN COMPANIES

The right of foreign real and legal persons to acquire real estate is regulated in the Land Registry Law. As a general rule, it is not possible for foreign legal persons to acquire real estate in Turkey, but there are exceptions to this general rule.

To put it more accurately, only foreign partnerships are allowed to acquire real estate in Turkey.

Foreign associations and foundations cannot acquire real estate. Foreign companies will also be able to acquire real estate under certain conditions.

Companies established in accordance with the laws of foreign countries will be able to acquire real estate or gain limited real rights within the framework of certain special laws in Turkey.

2. SPECIAL CASES IN WHICH FOREIGN COMPANIES CAN ACQUIRE REAL ESTATE

Foreign companies will be able to acquire real estate if they fall within the scope of the following laws;

- Tourism Promotion Law No. 2634:

The Ministry of Culture and Tourism may decide to allocate real estates in culture and tourism protection and development zones and tourism centers to foreign tourism enterprises.

- Law No. 4737 on Industrial Zones:

Foreign companies may be granted easement or usage permits in regions designated as “Industrial Zones” by the Ministry of Science and Industry.

- Turkish Petroleum Law No. 6491:

According to this law, companies will be able to own "Oil Rights", rent the necessary land from the Ministry of Finance, and request easement or right of use. In addition, if the relevant lands are in private ownership, they will be able to request the expropriation of these lands.

3. OTHER RESTRICTIONS THAT FOREIGN COMPANIES MAY FACE IN THE ACQUISITION OF REAL ESTATE

-The size of the real estate acquired by a company cannot exceed thirty hectares. At the same time, it cannot exceed 10% of the private property in the district in which it is located.

-If the company has purchased a land, it has to carry out a project on this land. This project must be submitted to the approval of the Ministry within two years.

-Companies must obtain permission from the relevant commands for the immovables to be purchased in military forbidden zones and military security zones, and from the provincial governorship for immovables to be purchased in special security zones.

-If foreign legal entities acquire real estate in violation of these conditions or fail to fulfill their obligations, they will be required to liquidate the real estate within one year.

Otherwise, the relevant real estate will be liquidated by the Ministry of Finance and the amount obtained will be paid to the right owner.

B- ACQUISITION OF REAL ESTATE BY FOREIGN CAPITAL COMPANIES

The expression of a company with foreign capital is often confused with the expression of a foreign company.

First of all, it should be noted that companies with foreign capital are established in Turkey in accordance with the provisions of the Turkish Commercial Code and are registered in the Turkish Trade Registry.

In other words, these companies are companies subject to the laws of the Republic of Turkey.

Only all or part of their capital belongs to foreign real or legal persons.

The fact that the shareholders are foreign persons does not put the company in the status of a foreign legal entity; because the nationality of the company and the nationality of its shareholders are different matters.

1. CONDITIONS

As a general rule, companies with foreign capital established in Turkey can purchase real estate and acquire limited real rights in order to achieve their operational purposes.

With the Foreign Direct Investment Law No. 4875, foreign investors were treated equally with domestic investors; permits and approvals such as investment permits, company establishment permits have been revoked; companies with legal personality established or participated in our country by foreign investors are allowed to acquire immovable property or limited real rights in regions open to acquisition by citizens of the Republic of Turkey.

Companies with foreign capital that will operate should apply to the governorship of the place where the real estate is located, together with the documents showing the company's authority to acquire real estate, for their real estate acquisition and other requests for the land registry.

The permission of the governor's office or the chief of staff is required for foreign-owned companies to purchase real estate from places within the military forbidden zone, military security zone and private security zone. The immovables acquired in contravention of this must be liquidated within the period given by the Ministry of Finance. Otherwise, it will be liquidated by the administration and the price will be paid to the right owner.

2. EXCEPTIONS TO THE CONDITIONS

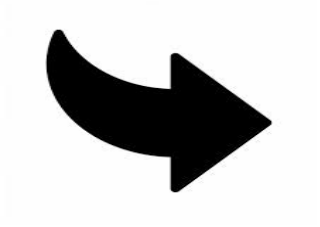
Although Foreign Capital Companies established in Turkey can acquire real estate under the above conditions, there are some exceptions.

- Establishment of immovable pledge, property acquisition through real estate pledge, real estate acquisition or limited real right acquisition arising from company mergers or divisions, Real estate ownership and limited real right acquisitions in special investment zones such as organized industrial zones, industrial zones, technology development zones and free zones,

These conditions do not apply to immovables acquired due to transactions deemed as loans within the framework of the Banking Law or for the purpose of collecting their receivables.

- Similarly, the above-mentioned restrictions will not be applied in companies in which people who lose their Turkish citizenship by obtaining a leave of absence are shareholders.

Therefore, companies in which expatriates who have acquired the citizenship of the countries they immigrated will be exempt from restrictions as if they were a Turkish company, even though they are technically considered as foreign capital companies.



3-COMPANIES WITH FOREIGN CAPITAL SUBJECT TO RELEVANT RESTRICTIONS

Although the name of this article seems to cover all foreign capital companies, in fact, many foreign capital companies will be able to freely acquire real estate without being subject to the conditions in this article.

Companies in which foreign persons/legal entities or international organizations hold 50% or more of a share or appoint / dismiss the majority of persons with the right of management will be subject to the restrictions under this article.

4- HOW THE RELEVANT PROCEDURE WORKS

It is necessary to determine whether the real estate that companies that want to acquire real estate in Turkey is in a military forbidden zone, military security zone or private security zone. For this reason, it will be necessary to apply to the Governorship Provincial Planning and Coordination Directorate in person, by mail or by e-mail.

After examining the application, the governorship will send the title deed registration information of the real estate and a sample of the coordinated diameter to the General Staff (or the authorized command) to the Provincial Police Department / Provincial Gendarmerie Directorate.

In case of a positive response from these institutions, a governor's permit may be issued to the company that applied for it. The governor's permit will be notified to the company and the company will have to register within 6 months after the notification. If there is no return within 15 days, it will be acted as if a positive response has been received.

If the General Staff / Police Department / Gendarmerie Directorate responds within 15 days that the relevant real estate is in a military forbidden zone, military security zone or private security zone, the approval of the authorized command / commission in terms of national security will be required. Otherwise, the foreign capital company will not be able to acquire real estate.

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"MATTER OF BEING A PART OF AN INVESTMENT"

Recognition of Financial Instruments as Investments in International Arbitration Based on Investment Treaties

There are many reasons underlying the increasing attractiveness of investment arbitration which protects foreign investors and their investments by investment treaties. This increasing attractiveness also makes an observable appearance in the globalized banking and financial sector.

Since investment arbitration is perceived by investors as a direct, impartial remedy against any unfair behavior or attribution of the state and typically allows investors to apply a state's international liability for violating its international obligations stipulated in the Investment Treaties, banks and financial institutions can demonstrate that the behavior of these authorities should be attributed to the state in accordance with the International Arbitration.

However, an investor and an investment must comply with the definitions set out in an investment treaty to be protected by the investment treaty. At this point, the question arises; whether the financing instruments are within the scope of the investment concept protected in bilateral investment treaties or not?

The term "Investment" refers generally under the Bilateral Investment Treaties to share certificates; bills; investment incomes; monetary receivables; any other financial rights which might be yielded from investment; movable and immovable properties; real rights such as mortgage, attachment, and pledge; industrial and intellectual property rights such as copyright, patent, license, industrial designs, technical processes; monetary receivables, and similar kinds of other monetary rights including but not limited to trademarks and know-how.

The term "Investment" is also generally interpreted in a quite broad extent to cover "any and all kinds of properties".

Due to such principle of broad interpretation; the said definition might be narrowed and/or excluded from some certain activities under some BITs (e.g.: Portfolio investments have been excluded from the scope of investment under the Denmark-Poland Agreement).

On the other hand; the term "Investment" is set out in a quite broad extent to cover the loans extended to initiatives under some agreements. It should also be underlined here that the term "Investment"" is interpreted in a quite broad extent in cases where it is not limited under the respective agreement.

Some BITs expressly acknowledge bank deposits as investments. On the other hand, there are other more restrictive BITs which expressly exclude them. Therefore, we can say that the scope of the investment concept will be determined within the framework of the bilateral investment treaties.

For example, it is stated in the Uruguay – United States BIT that 'Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as a bank account that does not have a commercial purpose and is related neither to an investment in the territory in which the bank account is located nor to an attempt to make such an investment, are less likely to have such characteristics.'

Another example to the treaties which that interprets investment broadly is the Energy Charter Treaty, which set outs that Article 1; "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects".

In terms of situated practice in international arbitration cases, we see that the assessment of the "investment" is based on some basic standards.

The ICSID tribunals generally apply the Salini test to determine whether an alleged investment constitutes an "investment" under Article 25(1) of the ICSID Convention or not. In a remarkable amount of case, non-ICSID tribunals also prefer to apply the Salini test, or a modified version in order to determine whether an investment constitutes an "investment" under the investment treaty in question.

The definition most frequently referred to relies on what has come to be known as the "Salini test", according to which the notion of investment implies the presence of the following elements:

i. a contribution of money or other assets of economic value,

Ii. a certain duration,

iii. an element of risk, and

iv. a contribution to the host State's development.

"The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called "Salini test". Such test identifies the following elements as indicative of an "investment" for purposes of the ICSID Convention:

(i) a contribution,
(ii) a certain duration over which the project is implemented,
(iii) a sharing of operational risks, and
(iv) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case." [1]

Such approach has been used for example in the recent Decision on Jurisdiction in the Jan de Nul case, where the tribunal stated;

The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called "Salini test". Such test identifies the following elements as indicative of an "investment" for purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case. [2]

The Tribunal, in Fedax case, applied the same elements to the case where the company Fedax applied with the ICSID arbitration, claiming that the bills assigned by way of endorsement were not paid by Venezuela, as can be seen under the Fedax v. Venezuela award. The tribunal, in Fedax v Venezuela [3] expressed the view that

'Loans qualify as an investment within ICSID's jurisdiction […] Since promissory notes are evidence of a loan and a rather typical financial and credit instrument there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this.' In the same line, the loan in question in the CSOB v Slovakia was held to involve 'a significant contribution by CSOB to the economic development of the Slovak Republic […] this is evident from the fact that CSOB's undertakings include the spending or outlays of resources in the Slovak Republic in response to the need for the development of the Republic's banking infrastructure.'

Although it was claimed by Venezuela that the bills did not constitute an investment, the arbitral tribunal ordered that the bills are also a means of borrowing, and therefore, an investment, judging from the expressions of "any and all kinds of titles to money", as set out under the Bilateral Agreement on Investments between the Kingdom of the Netherlands and the Republic of Venezuela

It is also argued and ordered under the said award that the funds, not physically transferred to the territory of the beneficiary but put at its disposal elsewhere, shall also qualify as the investment, beyond direct investments.

(…) 41. Like a number of other bilateral investment treaties and multilateral arrangements,57 the Agreement contains several references to investments made "in the territory" of the Contracting Parties.58 In this context, the Republic of Venezuela has argued that Fedax N.V. does not qualify as an investor because it has not made any investment "in the territory" of Venezuela. While it is true that in some kinds of investments listed under Article l(a) of the Agreement, such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature.

It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities. The same is true of many important offshore financial operations relating to exports and other kinds of business. And of course, promissory notes are frequently employed in such arrangements. The important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs. It is not disputed in this case that the Republic of Venezuela, by means of the promissory notes, received an amount of credit that was put to work during a period of time for its financial needs. (ICSID: FEDAX N.V. V. VENEZUELA (JURISDICTION) (…)

"Lending" is also addressed and considered under the scope of investment in several awards.

Another example, where the elements of the "investment" were evaluated under the light of the investment agreement was the case between CSOB v. Slovakia, where the arbitral tribunal deems the loan as an investment. The said dispute arose between CSOB Bank, established as per the Czech Law, and the Republic of Slovakia from the alleged breach of the "Financial Consolidation Agreement of CSOB Bank" executed by and between the Ministry of Economy of the Czech Republic, the Ministry of Economy of the Republic of Slovakia, and CSOB Bank.

As per the said Agreement; the Czech Republic shall grant a nonperforming loan to the Slovakian Collection Company to be incorporated in the Republic of Slovakia upon separation of the Czech Republic and the Republic of Slovakia. CSOD subsequently applied with the ICSID against the Republic of Slovakia for compensation, claiming that it sustained some damages due to breach of the Agreement during the process of repayment of such loans.

Under the said case; the Arbitrators ordered that limiting interpretations should not be performed as a rule while interpreting the definition of the term "Investment", and that the term "Investment" should be interpreted in a broad extent.

It has also been stated under the CSOB award that the criteria, as stipulated to be adopted while considering the debt instruments under the scope of investment, do not have a mandatory or imperative nature, and that although all of such criteria have not realized in a concrete dispute, the investment might be at issue, and also that each of the criteria used to define the term "Investment" is a "feature", like the Fedax award.

Under the said award, the transactions, which constitute an important part of the investment, have also been considered under the scope of investment as they are deemed as investment along with the other parts. The arbitral tribunal held under the case between CSOB v. Slovakia that investment is a complex operation with a whole of interrelated transactions.

Therefore; while the transaction, as escalated to the tribunal, may not be deemed as an investment when considered alone, it has been deemed as an investment considering that it is an important part of an investment as a whole.

…"72 The Tribunal agrees with the interpretation adopted in the Fedax case. An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment.

Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment."

"89. The Tribunal concludes, moreover, that the requirements spelled out in Article 1(1) of the BIT for a qualifying investment are also met in the instant case.

This must have been the view of the parties when they accepted a reference to the BIT in Article 7 of the Consolidation Agreement. The contrary conclusion would deprive this reference to the BIT of any meaning (cf. para. 67).

Furthermore, CSOB's activity in the Slovak Republic and its undertaking to ensure a sound banking infrastructure in that country compel the conclusion that CSOB qualifies as the holder of an "asset invested or obtained" in the territory of the Slovak Republic within the meaning of Article 1 (1) of the BIT, including "movable and immovable property and any other encumbrances, including any mortgages, liens, guarantees, and similar rights" (Art. 1(1)(a)) and "monetary receivables or claims to any performance related to an investment" (Art. 1(1)(c))."

Finally, applying the definition of an investment proffered by the Slovak Republic (para. 78, supra), it would seem that the resources provided through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The Tribunal notes, however, t8hat these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a CASES 283 formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.

91. The Tribunal concludes, accordingly, that CSOB's claim and the related loan facility made available to the Slovak Collection Company are closely connected to the development of CSOB's banking activity in the Slovak Republic and that they qualify as investments within the meaning of the Convention and the BIT. (…)"

(Decision on Jurisdiction, 24 May 1999, parag.89. [4]

Accordingly; considering that it is generally not stuck to the pre-contemplated definitions while considering the term "Investment" under the investment treaties, it should be underlined here that the recently-ordered awards take the "matter of being a part of an investment" into account.

In Deutsche Bank v. Sri Lanka, the tribunal found that a hedging agreement (under which the Sri Lankan national petroleum corporation contractually failed to make a required payment to the claimant) fell within the investment definition in the Germany–Sri Lanka BIT, which covered 'claims to money which have been used to create an economic value or claims to any performance having an economic value and associated with an investment'.

The Tribunal limited its analysis to only three elements contribution; risk; and duration and found that each of these elements had been satisfied.

Tribunal also reached that Deutsche Bank made a substantial contribution in connection with the Hedging Agreement invested Money and substantial resources. [5]

On the other hand; in another case, Joy Mining v Egypt, the Tribunal concluded that a bank guarantee relating to a supply contract concluded between the investor and an Egyptian State enterprise could not be considered as an investment under Article 25(1) of the ICSID Convention because the overall analysis of the operation revealed that the terms thereof were entirely normal commercial terms, including those governing the bank guarantees. [6]

The arbitral tribunal decided that the relevant guarantee is simply a contingent liability and cannot be regarded as an "investment" to be protected under the BIT.

Furthermore, the tribunal pointed out that even if the counter performance and the return of the letters of guarantee hold a financial value, a dispute on a bank guarantee in essence will never develop into an investment dispute. [7]

However, the application and interpretation of the term of the "investment" in international arbitration also changes and develops from day today.

A recent decision of the tribunal in Portigon AG v. Kingdom of Spain (ICSID Case No. ARB/17/15) has started a new chapter for direct claims by project finance lenders against states where the projects they finance are adversely affected.

The decision was rendered on August 20, 2020, and the tribunal held that project finance provided by Portigon, a German financial services company, qualified as an investment protected under the Energy Charter Treaty (ECT) and the ICSID Convention.

It appears that the tribunal, by majority, found that no distinction had to be drawn between equity and debt, and that both fulfil the requirements for an investment under the Energy Charter Treaty (ECT) and Article 25 of the ICSID Convention.

The ECT explicitly includes "bonds and other debt of a company or business enterprise" and "claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment" in its definition of "investment" (Article 1(6)). [8]

This award points out that although it is not a direct and physical investment provided by the bank, the finance as provided is deemed as a foreign investment where the finance has been provided to the investor.

Besides, the decision is important because of the interpretation of the Energy Charter Treaty Clause.

For example, in EDF v. Argentina case, the ICSID tribunal allowed an investor to incorporate an umbrella clause into the applicable investment treaty via the most-favored-nation (MFN) clause in the treaty.

Therefore, it is possible to say that the parties of the investment treaties including the MFN clause, may also request the Energy Charter Treaty (ECT) to be applied to the case in the light of the award given in Portigon AG v. Kingdom of Spain (ICSID Case No. ARB/17/15).

Moreover; it is quite commonly-observed under the decisions ordered recently that the Portfolio investments, meaning that investors invest in share certificates, bills and any other securities to yield capital gain, interest and dividend incomes by assuming various risks such as politic risks, currency risks and information risks, etc. and/or financing and project sponsorships, provided to launch and develop a certain project, are considered under the scope of investment.

In conclusion, since investment arbitration provides a direct an impartial remedy against any unfair behavior or attribution of the state and typically allows investors to apply a state's international liability for violating its international obligations stipulated in the Investment Treaties, banks and financial institutions can demonstrate that the behavior of these authorities should be attributed to the state in accordance with the International Arbitration.
A protected investment could provide confidence to the actors of the financial sector in international area to invest foreign investments and investment treaties provide crucial substantive protections for banks and financial institutions on several counts.

While considering the term "Investment" under the investment treaties, it should be underlined here that the recently-ordered awards take the "matter of being a part of an investment" into account.

This provides the banks and financial institutions with a potential direct way to apply the liability of the host states when they fail to protect the foreign investments in accordance with their treaty obligations.

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HOW IS NFT TECHNOLOGY POSITIONED UNDER TURKISH LAW?

⇒ What Does NFT Mean?

NFTs are bought virtually in high quantities thanks to the blockchain technology that is becoming more popular each passing day, which makes them highly popular and on huge demand. It brings along such questions as what the legal extent of this brand new technological concept is, and whether it can be positioned under the Turkish law, or not.

NFTs are getting bigger demand each passing day, and creators of NFTs can easily reach the buyers and sell their works at extraordinary high prices, which makes such works positioned at an extremely critical point under the intellectual property law and personal data protection law.

⇒ What does NFT (Non-Fungible Token) stand for?

NFT stands for "Non-Fungible Token" which is a digital technology. Non-fungible token is a data unit stored on a digital book called as block chain, which confirms that any digital asset is unique, and therefore, may not be interchanged. Having a quite different method of operation than the commonly-used coins and tokens, NFT is a unique and unchangeable asset with its authenticity and intellectual property essential. NFT stands for a recoverable digital asset having a digital value. Such non-fungible tokens may consist of not only many kinds of artworks such as music or paintings, but also a photograph or a video or even a tweet or a behavior which has become a viral hit.

Each NFT has a unique and original identifier and meta data.

While cryptocurrencies and NFTs can preserve its nature without losing their qualifications and still continue to exist as a cryptocurrency for both parties of a transaction, NFTs cannot be replaced with any other NFT or match up with any other NFT as they are unique, which well explains why NFTs are considered as an "artwork". Besides, NFTs benefit from the blockchain technology. Details of NFTs are recorded under a digital book, known as the block chain, helping to authenticate any digital work.

⇒ How is NFT positioned under Turkish Law?

We are far away from saying that NFTs are regulated under the Turkish Law. However; some provisions banning to use cryptocurrency assets directly or indirectly in any payments to be made in Turkey were incorporated under the Regulation on Banning Use of Cryptocurrencies in Payments, as promulgated by the Central Bank of the Republic of Turkey on April 16, 2021. Therefore, trading of NFTs by means of cryptocurrencies will lead to arising of many legal issues with respect to their position and existence in legal transactions.

⇒ NFT Technology and Personal Data Protection Law

Aside from whether NFT Technology is an artwork, or not; artistic activities are excluded from the applicable Personal Data Protection Law nr.6698 as per the article 28 thereunder.

However; NFTs have a blockchain base having a permanent and invariable nature, which makes it impossible to delete or change any personal data, kept on such base, and leading to arising of some problems with respect to protection of personal data.

Persons should be provided with information properly and grant their explicit consent for processing of personal data, but it will not be possible to dispose or delete any such data due to the blockchain base and nature of NFTs upon expiry of the period of use of such data.

In cases where NFTs, which keep personal data of persons who have not been provided with information or who have not granted their explicit consent as per the Law nr. 6698, or which cannot dispose of any personal data the period of use of which has expired, are not deleted, it needs to be clarified how the process will be run in terms of the Personal Data Protection Law, and who will be the data controller due to the decentralized nature of blockchain.

⇒ **Intellectual Property**

Protection of copyrights is essentially included under the Law on Intellectual and Artistic Works ("FSEK") numbered 5846.

As per the provisions set out under the FSEK; "any and all kinds of intellectual and artistic works" "which have the characteristics of the owners thereof", "and which can be deemed as scientific, musical, fine arts or cinema works" are deemed as works.

Accordingly; the works created as NFT are for sure considered as works under both the Turkish law and the international regulations, and they are expected to have a legal protection.

However; it is disputed how the NFTs, which do not have a legal position under the Turkish Law yet, can benefit from such legal protection.

⇒ **NFT Sales and Associated Intellectual Property Rights**

The rights of the owners of works are set out in detail under the FSEK.

Accordingly; owners of works have the moral rights to reproduce, process, distribute, represent, and to publicize via sign – voice – image transmission means.

As per the article 52 of the Law on Intellectual and Artistic Works numbered 5846; it is required to transfer such intangible rights to reproduce or process any artistic work separately in writing.

Sales of any NFT will not purport that any and all intellectual property rights of the work, which has been turned into an NFT, have been automatically transferred to the buyer, and the possession of NFT will be transferred only in sales of NFTs, and the intellectual property rights of the work shall be kept being held by the owner thereof.

Intellectual property rights may be transferred entirely or partially upon incorporating such provisions under the smart contracts constituting the basis of the sales of NFTs.

Although sales of NFTs are realized through smart contracts, it is still a critical question whether such contracts are able to comply with such terms and conditions of transfer, as set out under the Law on Intellectual and Artistic Works numbered 5846.

⇒ **Infringement of Rights on NFTs, and Settlement of Disputes**

It may be resorted to some ways to settle any disputes to arise from exercise of the rights on NFTs. Accordingly; an action for prevention of infringement, action for prohibition of infringement, action for pecuniary or non-pecuniary damages, action for determination of ownership or infringement, or action for return of unjust gains may be filed in case of any potential dispute.

However; as the blockchain system on which the NFTs are kept is not within the borders of any state and/or under the control and/or supervision of any state, some issues might arise even in such key issues as the applicable law or the competent jurisdiction, etc.

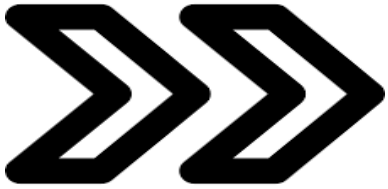
Besides, NFTs have not been regulated under any law yet, which might also lead to arising of many problems in interpretation of the rules of law to apply thereto.

⇒ **Taxation of NFTs**

Copyright earnings is defined as the earnings gained from intellectual and artistic works. In other words, copyright earnings refer to the earnings gained from exploitation of the copyrights in several ways such as use or sales thereof.

However; it is set out by the lawmaker that any and all earnings, gained from self -employment activities, shall be taxed customarily, subject to some exceptions.

Nevertheless; taxation of NFTs due to trading of cryptocurrencies, not allowed under the Law, is not possible currently. However; it is envisaged that various statutory regulations will be enacted in the near future with respect to this ever-growing informal economy.



IT MAY BE RESORTED TO SOME WAYS TO SETTLE ANY DISPUTES TO ARISE FROM EXERCISE OF THE RIGHTS ON NFTS. ACCORDINGLY; AN ACTION FOR PREVENTION OF INFRINGEMENT, ACTION FOR PROHIBITION OF INFRINGEMENT, ACTION FOR PECUNIARY OR NON-PECUNIARY DAMAGES, ACTION FOR DETERMINATION OF OWNERSHIP OR INFRINGEMENT, OR ACTION FOR RETURN OF UNJUST GAINS MAY BE FILED IN CASE OF ANY POTENTIAL DISPUTE.

ACCESS BLOCK AUTHORIZATION OF TURKISH FOOTBALL FEDERATION (“TFF”)

Upon enaction of the Law Nr. 7346 Amending Certain Laws published on the Official Journal on December 25, 2021, a new additional article was incorporated under the Law Nr. 5894 on Establishment and Duties of the Turkish Football Federation.

With this article, the Board of Directors of the Turkish Football Federation ("TFF") is now authorized to block access in case it is determined that the broadcasts related to football matches are used illegally on the internet.

As per the said regulation; if it is determined that the broadcasts related to football matches within the borders of Turkey are made available on the internet illegally, the Board of Directors of TFF may decide to block the access regarding the broadcast and section in which the violation occurred.

In addition, in cases where access to the infringing content cannot be technically prevented or the violation cannot be prevented by blocking access to the relevant content, the Board of Directors of TFF is authorized to impose an access block for the entire website.

With this authorization granted to the Turkish Football Federation Board, it is authorized to block access to the content of the website or the entire website without a court decision, based on protection of broadcasting rights.

In this case, it is of great importance that the people who will take charge in the administrative unit should be selected from experienced experts in their fields, and have a good grasp of TFF decisions, judicial decisions and regulations.

The article incorporated under the Law Nr. 5894 is as follows:

“Protection of broadcasting rights

SUPPLEMENTAL ARTICLE 1 –

(1) In case it is determined that the broadcasts related to football matches within the borders of the Republic of Turkey are made available on the internet illegally, the Board of Directors shall decide to block access regarding the broadcast and section where the violation occurred.

However, in cases where it is not technically possible to block access to the infringing content or the violation cannot be prevented by blocking access to the relevant content, a decision may be made to block access to the entire website.

This decision is sent to the Access Providers Association in accordance with Article 6/A of the Law on the Regulation of Broadcasts Made on the Internet and Fight Against Crimes Committed Through These Broadcasts, dated 04/05/2007 and numbered 5651.

Against this decision, an appeal can be made to the Criminal Judgeship of Peace within one week. An administrative unit is established within the TFF to carry out the works and procedures related to blocking of any such access.

The Board of Directors may delegate its authority under this article to persons who will be commissioned in the administrative unit.

(2) If it is determined that the broadcasts related to football matches outside the borders of the Republic of Turkey are made available on the internet illegally, the provision of the first paragraph shall be applied upon the request of the broadcasting right holder.

However, in order for the request to be made, it is obligatory to notify the TFF of the contract regarding the broadcasting right, and to prove the right ownership.

(3) The procedures and principles regarding the implementation of this article are determined by the instruction to be issued by the Board of Directors.”

For detailed information:
https://www.resmigazete.gov.tr/eskiler/2021/12/20211225-1.htm

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