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The Southeast Europe Disputes Resolution Handbook 2021

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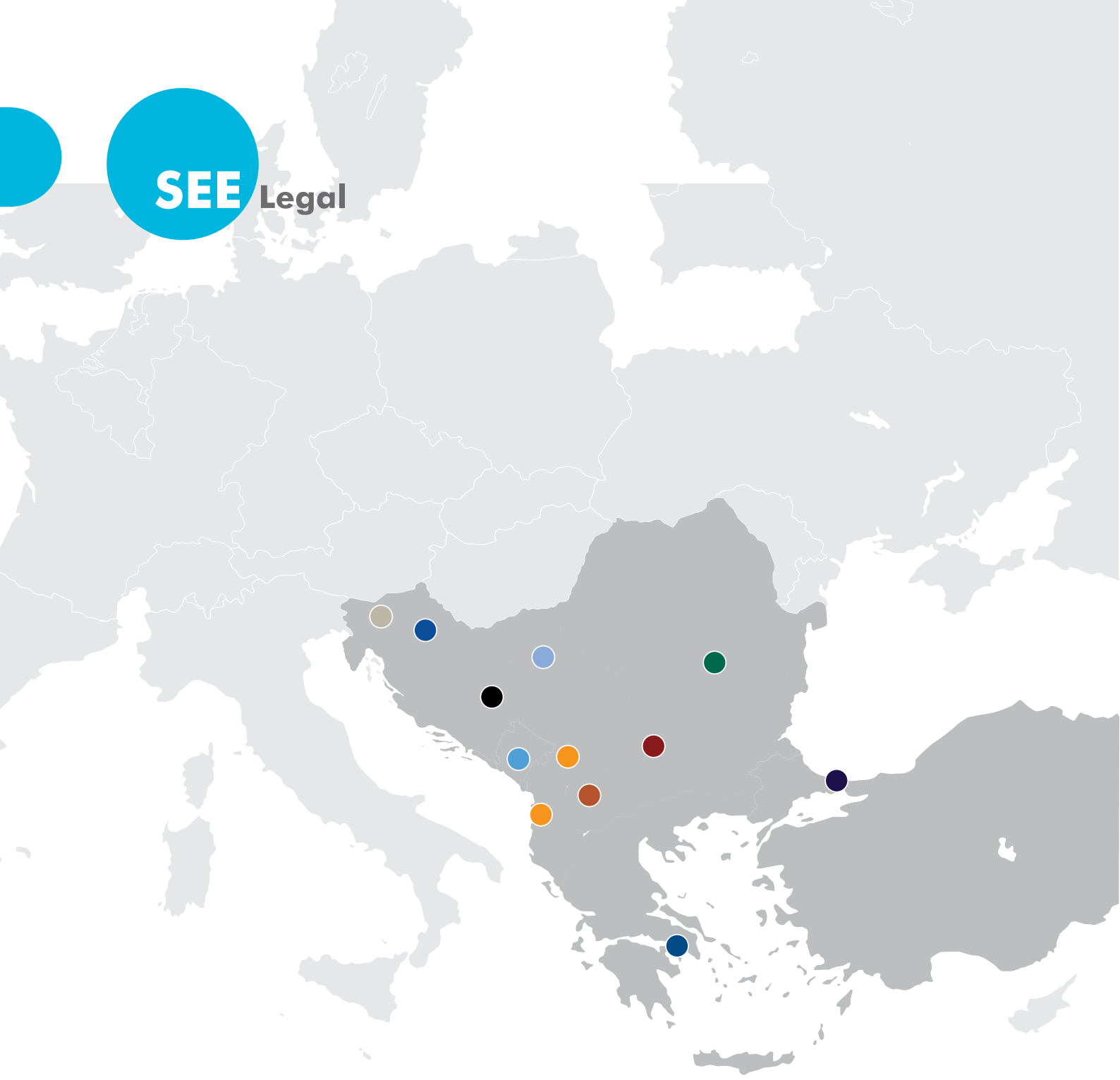

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DISPUTE
RESOLUTION

PREFACE

Dear Partners and Friends of SEE Legal,

South East Europe Legal Group ("SEE Legal"), a unique regional organisation consisting of 10 leading independent national law firms covering twelve jurisdictions of Southeast Europe, is delighted to present the 2021 Southeast Europe Disputes Resolution Handbook.

Established in 2003 and being a legal market leader for over 18 years, SEE Legal employs more than 400 lawyers and has an impressive client base of multinational corporations, financial institutions and governmental bodies. The member firms of SEE Legal have proven ability to handle high-profile cases in national and international litigation and arbitration proceedings, and have been continuously ranked as top tier law firms in the main reputable legal directories (Legal 500, Chambers & Partners, IFLR 1000, etc.).

This Handbook aims to provide in-house attorneys and legal professionals with a helpful tool to comprehend the legal framework regulating different legal options for resolving disputes in the 11 jurisdictions of Southeast Europe. It includes an overview of the respective national court systems, explaining the various available court proceedings, as well as the national arbitration institutions and procedures applicable therein. The Handbook also provides relevant information on mediation as well as a mechanism of a voluntary resolution of commercial disputes. Furthermore, it discusses the rules on enforcement of foreign judgments and foreign arbitral awards. For the jurisdictions of the European Union member states, the respective EU law provisions are referred to concerning matters, such as evidence, competence, recognition and enforcement of judgments.

Should you have any specific questions regarding dispute resolution matters in Southeast Europe, please do not hesitate to contact us. We would be pleased to hear from you.

Sincerely,

Branko Maric
Head of the SEE Legal Dispute Resolution Practice Group

Borislav Boyanov
Co-Chair of SEE Legal Group

Disclaimer

This publication is intended to provide a general guide to the dispute resolution regulations in Southeast Europe. Each section of the Handbook has been prepared by the relevant SEE Legal member firm covering the particular jurisdiction. This Handbook does not include a chapter for Kosovo. This publication is not meant to be a treatise on any particular jurisdiction's legislation and is not exhaustive, but is meant to assist the reader in identifying the main principles governing a dispute resolution process in the various jurisdictions of the Southeast Europe and to provide helpful guidance. Legal advice should always be sought before taking any action based on the information provided herein. The information contained herein is based on the respective legislation as of 31 August 2021. No part of this Handbook may be reproduced in any form without our prior written consent.

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TURKEY

1. General overview

In Turkey, the main dispute resolution methods used to resolve commercial disputes are negotiation, mediation, litigation and arbitration. While no statistics are available for negotiation, it is usual for commercial disputes to be resolved through negotiations between the parties, with or without the participation of attorneys, in order to avoid lengthy and costly procedures.

Litigation is the most prevalent dispute resolution method in Turkey. According to the Ministry of Justice's statistics, the first instance commercial courts rendered 101,063 decisions in 2019. Based on these statistics, we may safely say that the first instance commercial courts have a very heavy workload in Turkey.

On the other hand, while the number of disputes resolved through arbitration is not comparable to those resolved through litigation, arbitration is increasingly preferred in a number of sectors, particularly energy and construction. In addition, arbitration is preferred in the resolution of complex and high-value disputes, e.g. in the resolution of disputes arising from infrastructure projects and M&A transactions.

In addition, the use of mediation in the resolution of commercial disputes has increased after the introduction of compulsory mediation as a prerequisite prior to filing certain commercial lawsuits.

The COVID-19 pandemic has affected dispute resolution both negatively and positively. The judiciary's response to the pandemic was slow and the courts were required to postpone their hearings due to the pandemic. The Council of Judges and Prosecutors advised the courts to postpone hearings, within the scope of the measures taken as a result of the COVID-19 pandemic between 13 March 2021 and 15 June 2021, as well as between 29 April 2021 and 17 May 2021.

On the other hand, the pandemic has driven rapid action for introduction of the long-awaited virtual hearings in Turkey. Virtual hearings are regulated through the amendment to the Civil Procedure Law (the "**CPL**") in July 2020. Under the CPL, upon request of one of the parties, civil courts can allow the requesting party, or his or her lawyer, to attend the hearing virtually. Moreover, upon request of one of the parties or on their own motion, civil courts can decide to hear witnesses, court-appointed experts and party-appointed experts virtually. The Ministry of Justice then introduced the "E-Hearing" system and published a guideline on the use of this system to ensure proper implementation of the CPL. For now, the system allows only attorneys to attend their hearings virtually, but the system is expected to allow witnesses, court-appointed experts and party-appointed experts to attend their hearings virtually, as well. The Ministry of Justice announced that, as of 18 January 2021, the "E-Hearing" system has been used by 535 courts in Turkey.

As for arbitration, the Istanbul Arbitration Centre ("**ISTAC**"), one of the leading arbitration institutions in Turkey, introduced, in April 2020, the ISTAC Online Hearing Rules and Procedures. In addition, while there are no statistics, a large number of hearings within the scope of arbitration proceedings, with Turkey being the chosen seat, have been conducted virtually in 2020 and 2021. While the Cassation Court has not yet dealt with the question of whether holding a virtual hearing violates the parties' right to a fair trial, most scholars and practitioners argue that it would not do so if the appropriate measures have been taken.

2. Litigation

2.1 Governing Legislation

The CPL is the primary piece of legislation governing litigation in Turkey. In addition, the Execution and Bankruptcy Law (the "**EBL**") deals with the execution of judgments among other things. However, the legislation governing litigation in Turkey is not limited to the CPL and EBL. For instance, the Turkish Commercial Code (the "**TCC**") defines "commercial lawsuits" and contains procedural rules specific to commercial lawsuits.

Both the CPL and EBL are amended from time to time to provide a more effective dispute resolution mechanism for the parties in the resolution of their disputes. Recent amendments to the EBL abolished "postponement of bankruptcy" proceedings and made "concordat" the main restructuring mechanism under Turkish law.

2.2 Court System and Jurisdiction of Courts

(a) Court System

In Turkey, there are (i) the civil and criminal justice systems and (ii) the administrative justice system. The first instance courts within the civil and criminal justice systems are ordinary civil courts, commercial courts, employment courts, execution courts, civil peace courts, cadastre courts, consumer courts, family courts, intellectual and industrial property rights courts, and criminal courts. As a general rule, decisions of these first instance courts are subject to appeal before the Regional Civil Courts of Appeals, and decisions of the Regional Civil Courts of

Appeals are subject to appeal before the Cassation Court, the final court of appeal in criminal and civil matters.

The first instance courts within the administrative justice system are administrative courts and tax courts. The courts of appeals within this system are the Regional Administrative Courts of Appeals and the Council of State, the final court of appeals in administrative matters.

The Court of Jurisdictional Disputes hears jurisdictional disputes between the courts within the civil and criminal justice system and those within the administrative justice system.

Finally, the Constitutional Court, among other things, decides on individual applications concerning claims that a person's fundamental rights and freedoms under the Turkish constitution have been breached through public force (including its use by judicial authorities), provided that such rights and freedoms are protected by the European Convention of Human Rights and the protocols ratified by Turkey.

Under the TCC, civil law disputes concerning both parties' commercial enterprises are commercial lawsuits. In addition, the TCC lists the types of disputes that are categorically commercial lawsuits, regardless of the parties' merchant status. The TCC states that commercial lawsuits must be heard by commercial courts, unless otherwise provided by law. As a general rule, decisions of commercial courts are subject to appeal before the Regional Courts of Appeals and decisions of the Regional Courts of Appeals are subject to appeal before the Cassation Court.

(b) Jurisdiction of Courts

Under Turkish law, competence and jurisdiction rules designate the courts that claimants are required to apply to when bringing a claim. Competence determines which court can hear a particular type of dispute. Under the TCC, "commercial lawsuits" must be heard by commercial courts, unless otherwise provided by law. The courts are required to assess on their own motion whether they have competence to hear the particular type of dispute before them.

On the other hand, jurisdiction determines which geographic territory has jurisdiction to hear a dispute between the parties. The CPL and TCC provide the main rules governing jurisdiction of the courts. In addition, under the CPL, merchants and public entities can agree to the jurisdiction of the courts within a particular geographical territory in Turkey by way of a jurisdiction agreement, unless the law gives compulsory jurisdiction to a particular court. Setting aside the cases in which the law gives exclusive jurisdiction to a particular court, unlike competence, courts do not assess their own motion as to whether they have jurisdiction. The parties are required to object to the court's jurisdiction in their response petition. If they fail to do so, they cannot object to the court's jurisdiction afterwards.

These rules governing competence and jurisdiction continue to apply in cases in which a dispute contains a foreign element.

The choice-of-court clauses giving exclusive jurisdiction to foreign courts are enforceable if: (i) the dispute contains a foreign element; (ii) the dispute does not fall within the exclusive jurisdiction of Turkish courts; (iii) the dispute arises out of a relationship within the scope of obligations law; and (iv) the choice-of-court clause entered into between the parties is precise and clear.

2.3 Procedure

The main steps before first instance courts in a commercial dispute are: (i) exchange of pleadings (it may be one or two rounds, depending on the value of the claim or type of dispute); (ii) preliminary hearing, in which the court decides on procedural issues (e.g. on a defendant's objection to the court's jurisdiction or competence); (iii) evidentiary hearings; (iv) oral proceedings, in which the parties submit their final oral submissions; and (v) judgment.

Courts are not entitled to dismiss a claim prior to the completion of exchange of pleadings. However, after the exchange of pleadings has been completed, the courts can dismiss the lawsuit on procedural grounds without reviewing the merits of the dispute.

The likely timeframe for a first instance commercial court to decide on a commercial dispute depends upon, among other things, the procedure applicable to the dispute (either simple procedure or ordinary procedure), the type of dispute (e.g. compensation claim, annulment of a general assembly of shareholders' resolution) and complexity of the dispute (e.g. the number of involved parties). On 1 January 2019, the Ministry of Justice started the "target timeframe" practice, under which a "target timeframe" is set for each lawsuit upon the filing of the lawsuit. For instance, currently, the "target timeframe" for a lawsuit before a first instance commercial court in Istanbul, in which a contractual claim is brought, is 450 days. Accordingly, the likely timeframe for a first instance commercial court to decide a commercial dispute is one and a half years. However, depending on several factors that include the court's workload this timeframe may be substantially longer.

In Turkey, hearings are held publicly. However, under the CPL, upon the concerned person's request, or on their own motion, the courts are entitled to decide to hold hearings, partly or entirely, *in camera* if the public moral, public safety or the concerned person's predominant interests absolutely require doing so. However, it is seldom, if at all, that commercial courts will decide to hold hearings, partly or entirely, *in camera*.

As for documents submitted to the court, the parties to the lawsuit and intervening persons are entitled to review the lawsuit file under the court clerk's supervision. Third

parties can access the lawsuit file only if they prove their legitimate interest in the lawsuit and the judge grants them access to the file.

In addition, lawyers are authorized to examine all lawsuit files, but they cannot obtain copies. Moreover, if the court orders a document in the file to be treated as confidential, a review of this document requires the judge's explicit authorization.

2.4 Evidence

Under the CPL, there are two types of evidence: (i) conclusive evidence and (ii) discretionary evidence. Conclusive evidence is defined as written documents that bear the debtor's signature, which the debtor does not deny or cannot deny (as the signature is on an official document), oaths and final judgments. Discretionary evidence is defined as witness statements, expert witness statements and site visit findings. The standard of proof in commercial disputes depends on the type and amount of the claim.

Parties must evidence legal transactions creating the right to a claim by a written document bearing the debtor's signature if the value of the claim exceeds TRY 4,880[1] (approximately EUR 500). This threshold is updated on a yearly basis.

A party is required to submit any evidence in such party's possession if he/she relies on, or his/her counterparty relies on such evidence. As a general rule, if a party fails to submit evidence while it is proven to be in such party's possession, the court may consider the counterparty's claims in relation to the content of this evidence as being true. The court may require third parties to submit the documents in their possession, as well. Third parties must either comply with the court's order or provide reasons for not submitting the evidence if they do not comply with the court's order. If the court does not consider the third parties' reasons to be satisfactory, it may hear them as witnesses. Under Turkish law, there are exceptions to the disclosure requirement. These exceptions apply to family members of the parties who can refuse to act as a witness based on this relationship, and those who are required not to disclose as a result of their professional relationship with the parties (e.g. attorneys).

In practice, factual witnesses appear before the court to provide their statements, while both court-appointed and party-appointed expert witnesses submit their opinions in writing. However, the court can summon expert witnesses to the court to examine them at the hearing.

Cross-examination of both factual and expert witnesses is available under the CPL.

2.5 Costs

(a) Court Fees and Expenses

To bring a claim before Turkish courts, claimants must pay (i) a fixed application fee (TRY 59.30[2] (approximately EUR 6)) and (ii) court fees. The court fees may be fixed or proportional, depending on the type of claim (i.e. depending on whether the claim has a certain monetary value). The fixed court fee is TRY 59.30[3] (approximately EUR 6). The proportional court fee is equal to 6.831 per cent of the claim amount. Claimants must deposit only an amount equal to one-quarter of the proportional court fee at the time of filing the lawsuit. In addition, claimants will incur litigation costs, such as service costs and expert witness fees. The litigation costs will depend on the number of parties involved and the type of evidence to be obtained but this, generally, does not exceed TRY 5,000 (approximately EUR 500).

If the claim is subject to a proportional court fee and the claimant prevails in the lawsuit, the defendant will be required to compensate the claimant for the amount equal to one-quarter of the proportional court fee that the claimant will have already deposited and, in addition, the defendant will be liable for the remaining three-quarters of the proportional court fee, as well as the litigation costs. If the lawsuit is dismissed, the proportional court fee that the claimant paid when filing the lawsuit will be refunded to the claimant.

Finally, there are also statutory attorney fees that are determined by the court at the end of the trial. The statutory attorney fees are regulated by the Attorneys Law and payable directly to the prevailing party's attorney. The statutory attorney fees are calculated in proportion to the amount of the claim. These fees have no relevance to the legal fees paid by a client to its attorney and it is not a mechanism to recover or replace the latter.

(b) Legal Fees

The Union of Turkish Bar Associations determines the minimum fee rates tariff for the services provided by attorneys. It updates this tariff on a yearly basis. Attorneys cannot provide their services for amounts that are below these minimum fee rates.

In Turkey, a number of different legal fee arrangements, such as hourly rates, fixed fees, capped fees and monthly fixed fees are customarily used. In addition, under the Attorneys Law, a client and his or her attorney can agree that a percentage of the claim amount, or of the amount to be decided in the client's favour, will be paid as a legal fee. However, this percentage cannot exceed 25 per cent of the claim amount.

[1] *This is subject to annual update.*
[2] *This is subject to annual update.*
[3] *This is subject to annual update.*

(c) Third Party Funding and Insurance

While it is permitted, third party funding is not regulated under Turkish law and it is not common in Turkey.

(d) Insurance

Insurance is available for parties to cover their litigation costs in certain disputes. However, the General Conditions of the Ministry of Treasure and Finance in relation to this type of insurance state that commercial law disputes are not within the scope of such insurance.

(e) Legal Aid

Under the CPL, legal aid is available for individuals and a limited group of associations and foundations. Conditions of legal aid for individuals include their lack of ability to pay the litigation or execution costs, wholly or in part, without experiencing significant difficulty in providing a basic livelihood for themselves and their families. Foreign individuals may also receive legal aid if there is reciprocity in relation to legal aid between Turkey and the relevant country. However, legal aid is not available for legal entities other than a limited group of associations and foundations. Considering its conditions and that it is not available for most legal entities, receiving legal aid is not common for the parties of a commercial dispute.

(f) Security Requirement for Foreign Claimants

Under the International Private Law and Procedure Law (the "**IPPL**"), if foreign individuals or entities file a lawsuit, intervene in a lawsuit, or initiate an execution proceeding before the Turkish courts or execution offices, they must deposit a security amount in order to cover court expenses and damages that the counterparty may suffer. However, if there is reciprocity between Turkey and the relevant country, the relevant foreign party is exempted from depositing such security. Such reciprocity may be contractual (based on a bilateral or multilateral agreement), legal or *de facto*. *De facto* reciprocity exists if Turkish individuals or entities do not have to deposit a security by reason of their foreign nationality when they file a lawsuit, intervene in a lawsuit or initiate an execution proceeding in the relevant country.

(g) Security for Costs

Leaving aside the security requirement for foreign claimants, defendants are entitled to apply to the court to order claimants to provide security for litigation costs if:

(i) a Turkish citizen, having no habitual residence in Turkey, files a lawsuit, intervenes in a lawsuit on the claimant's side or initiates an execution proceeding; or

(ii) the claimant has been declared bankrupt, "concordat," reconciliation proceedings concerning the claimant have been initiated in the past, or it is evidenced that the claimant is incapable of paying her or his debts.

2.6 Appeal

For a decision that is subject to appeal, the general time limit to appeal a decision of a commercial court and a Regional Court of Appeals is two weeks after service of the court's reasoned decision on the parties, but there are also exceptional time limits for certain cases. In addition, if the dispute relates to a monetary claim, a commercial court's decision can be appealed before the Regional Court of Appeals only if the amount of the claim exceeds TRY 5,880[4] (approximately EUR 600). Similarly, there is a monetary limit for an appeal before the Cassation Court, which is TRY 78,630[5] (approximately EUR 8,000). The appealing party can appeal the first instance court's decision on both factual and legal grounds, including the first instance court's failure to correctly apply the procedural or substantive rules. On the other hand, the appealing party can appeal a decision of a Regional Court of Appeals only on legal rather than factual grounds.

As stated above, the likely timeframes for the Regional Courts of Appeals and the Cassation Court to decide on appeal requests depend, among other things, on the workload of the relevant chambers within these courts and the complexity of the disputes. According to the Ministry of Justice's 2019 statistics, the 11th Chamber of the Cassation Court reviewing appeals in relation to commercial disputes completed the review of an appeal request within 411 days, on average. Adding this to the period of up to three years for the Regional Court of Appeals to decide on the appeal request, the two-stage appeal process may take approximately four years.

2.7 Execution of Judgements

Execution of a judgment can be requested from the execution offices. As a general rule, judgment creditors are entitled to initiate execution proceedings against judgment debtors within ten years from the judgement's date, through any execution office in Turkey. Upon an execution request, the execution office serves an execution order on the judgment debtor. Within seven days after the service of the execution order on the judgment debtor, the debtor must:

(i) do what the execution order orders her or him to do; or

(ii) file a request with the court for stay of execution proceedings.

To initiate an execution proceeding for execution of a judgment, the party requesting execution must pay a fixed application fee (TRY 59.30[6] (approximately EUR 6)) and the costs for the service of the execution order on the judgment debtor.

Execution of judgments can be requested before they become final by completion of the appeal reviews,

[4] *This is subject to annual update.*

[5] *This is subject to annual update.*

[6] *This is subject to annual update.*

excluding some judgments as specifically determined by law (e.g. judgments in relation to enforcement of foreign judgments and foreign arbitral awards can be executed only after they become final). If execution of a judgment is requested before it becomes final, an appeal of the judgment before the Regional Court of Appeals or the Cassation Court does not automatically stay the judgment's execution. To stay the judgment's execution, the judgment debtor must deposit a security with the execution office covering the claim amount and request the Regional Court of Appeals or the Cassation Court to stay execution of the judgment. If the Regional Court of Appeals dismisses the judgment debtor's appeal request or the Cassation Court approves the judgment, the security submitted by the judgment debtor will be forfeited for payment of the judgment creditor's claim.

2.8 Interim Measures

The main types of interim measures available under Turkish law are (i) interim injunction and (ii) preliminary attachment.

The party seeking an interim injunction (e.g. to prevent disposal of immovable property) is required to provide *prima facie* evidence that executing a future judgment will be considerably difficult or impossible in the event of a possible change in the status quo or there is concern that serious harm or damage will occur in the case of a delay.

In order to obtain a preliminary attachment, the creditor must provide *prima facie* evidence that (i) there is a due amount that the debtor failed to pay; (ii) the creditor's receivables have not been secured by a pledge; and (iii) in the absence of a preliminary attachment, the creditor will have significant difficulty in collecting its receivables at the conclusion of the legal proceedings.

It is possible for courts to grant an ex parte interim measure decision if it is convinced that service of the interim measure request on the party against whom the interim measure is sought is not compatible with the purpose of the interim measure.

The party seeking an interim measure must pay (i) a fixed application fee (TRY 59.30[7] (approximately EUR 6)), (ii) a fixed court fee of TRY 97.70[8] (approximately EUR 10) and (iii) the litigation costs, which are approximately TRY 500 (approximately EUR 50). In addition, if the court grants an interim measure, as a general rule, it requests the party seeking such interim measure to deposit a security in order to compensate for the damages that the party, against whom such interim measure is sought, and third parties may suffer due to the interim measure. This security may be in cash or in the form of a bank letter of guarantee. The amount of the security is at the court's discretion. In practice, the amount of the security changes between 15 per cent and 40 per cent of the claim amount or the value of the asset at which an interim injunction is directed.

2.9 Simplified Procedure for Debt Recovery

Under Turkish law, there is no simplified procedure for debt recovery through the courts. However, under the EBL, creditors are entitled to initiate execution proceedings against their debtors for debt recovery through the execution offices. They are not required to first obtain a judgment in order to initiate such proceedings.

Upon the creditor's execution request, the execution office serves a payment order on the debtor. Upon service of the payment order:

(i) if the debtor does not object to the payment order within seven days following service of the payment order, it must pay the amount in the payment order or it must declare its assets to the execution office within these seven days; or

(ii) the debtor can object to the debt in the payment order within these seven days.

An objection to the debt automatically suspends the execution proceeding. In order to resume the execution proceeding, the creditor must challenge the debtor's objection, by either (i) applying to the execution court to remove the objection or (ii) filing a lawsuit with the competent civil court for cancellation of the objection.

If (i) the debtor does not object to the payment order within seven days following service of the payment order and it does not pay the debt within these seven days or (ii) the debtor's objection is removed or cancelled through the above procedures, then the creditor may request attachment, seizure and sale of the debtor's assets.

In addition, if the receivable is based on a negotiable instrument, the EBL provides a more advantageous procedure for collection of the debt through execution proceedings.

3. Alternative Dispute Resolution Methods

In Turkey, mediation and arbitration are more prevalent among alternative dispute resolution methods. In addition, arbitration has proven to be an effective dispute resolution method for the resolution of commercial disputes; in particular, for the resolution of complex commercial disputes. This has made arbitration more prevalent than litigation in certain matters, such as energy and infrastructure projects, as well as M&A transactions.

[7] *This is subject to annual update.*
[8] *This is subject to annual update.*

3.1 Mediation

The Mediation Law of 7 June 2012 governs mediation in Turkey. In addition, the TCC, as well as other laws, define which disputes are subject to compulsory mediation under Turkish law.

In December 2018, the TCC was amended to introduce mediation as a prerequisite in order to file a debt or compensation claim in a commercial lawsuit. Failure to comply with this requirement results in dismissal of the lawsuit on procedural grounds. The mediator must conclude the mediation proceedings within six weeks after her or his appointment. This six-week period can be extended by the mediator for another two weeks, if needed.

According to the Ministry of Justice's announcement, parties reached an agreement in 141,130 out of 263,542 mediation proceedings initiated after 1 December 2019 for resolution of their commercial disputes. Based on this 54 per cent success rate, we may safely argue that in the last two years, mediation has proven to be an effective dispute resolution method.

3.2 Arbitration

3.2.1 Governing Legislation

In Turkey, international arbitration is governed by the International Arbitration Law (the "**IAL**"). As a general rule, the IAL applies if the dispute contains a foreign element and the seat of arbitration is in Turkey. The definition of "foreign element" under the IAL is broad and, based on this broad definition, most commercial arbitration proceedings fall within the IAL's scope. The IAL is based on the UNCITRAL Model Law on International Commercial Arbitration (the **"UNCITRAL Model Law**"). However, the IAL has not been amended to implement the 2006 amendments to the UNCITRAL Model Law.

Domestic arbitration is governed by the CPL. The CPL applies if the dispute does not contain a foreign element (as defined under the IAL) and the seat of arbitration is in Turkey. The CPL is based on the UNCITRAL Model Law as amended in 2006. In other words, the legislation governing domestic and international arbitration is in accordance with the UNCITRAL Model Law.

Both the IAL and CPL were amended on 28 February 2018. Prior to these amendments, set-aside lawsuits, challenging the awards rendered in Turkey, were required to be filed before the first instance commercial courts and they were subject to appeal before the Regional Courts of Appeals and Cassation Court. Currently, set-aside lawsuits are required to be filed directly before the Regional Courts of Appeals and they are subject to appeal only before the Cassation Court. These amendments have already shortened the timeframe in which to obtain a decision from the court of final instance in a set-aside lawsuit. At the present time, in light of the recent developments concerning arbitration as one of the alternative dispute resolution mechanisms, both the IAL and CPL are expected to be amended in order to modernize the legislation governing arbitration. These amendments are expected to shorten the timeframe in which to obtain a decision from the court of final instance in a lawsuit for the enforcement of a foreign arbitral award.

3.2.2 Arbitration Agreement and Arbitrability

Turkey is party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "**New York Convention**") and is required to recognize arbitration agreements under Article II of the New York Convention. The IAL defines "arbitration agreement" as an agreement by the parties to submit to arbitration all or certain disputes that have arisen, or which may arise, between them in respect of a defined legal relationship, whether or not contractual. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Under the IAL, the validity of an arbitration agreement is governed by the law which the parties choose as the law applicable to the arbitration agreement, or by Turkish law if the parties have not chosen any law to be applicable to the arbitration agreement.

For an arbitration agreement to be valid under Turkish law, (i) the parties' intention to arbitrate must be clear and unambiguous; (ii) the arbitration agreement must define the legal relationship between the parties; (iii) the parties must have the capacity to sign an arbitration agreement under the law applicable to their capacity; and (iv) the arbitration agreement must be in writing. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement. The Cassation Court considers the parties' intention to arbitrate to be unclear and unambiguous if, under the arbitration agreement, the parties can submit their disputes to both arbitration and the courts at their discretion.

For the parties to be able to submit their disputes to arbitration under an arbitration agreement, the subject matter of the dispute must be capable of resolution through arbitration. Under Turkish law, a matter that is incapable to be resolved through arbitration is considered to be grounds to set aside an arbitral award or the grounds to refuse recognition or enforcement of a foreign arbitral award.

Both the IAL and CPL provide that disputes relating to rights *in rem* over real property in Turkey, and disputes arising from matters that are not at the parties' discretion, are incapable of being resolved through arbitration. For instance, criminal and family law matters are not arbitrable. In addition, according to the Cassation Court's precedent, a dispute is inarbitrable if it relates to Turkish public policy. As Turkish public policy is not defined, this leads to

unpredictability about what is and what is not arbitrable. For instance, according to the Cassation Court's precedent, lawsuits for the determination of rents are not arbitrable on the grounds that they relate to Turkish public policy, even though they do not relate to rights *in rem* over real property.

4. Enfocement of Foreign Judgements and Arbitral Awards

4.1 Governing Legislation

(a) Enforcement of Foreign Judgements

In Turkey, the IPPL governs recognition and enforcement of foreign judgments. In addition, the CPL is relevant for the procedure to be followed in recognition and enforcement lawsuits.

(b) Enforcement of Arbitral Award

Turkey signed and ratified the New York Convention, but Turkey declared that it would apply the New York Convention only in recognition and enforcement of awards rendered in the territory of another contracting state and with respect to differences arising from legal relationships that are considered as "commercial" under Turkish law. If an award is rendered in the territory of another contracting state in a dispute arising out of a "commercial" relationship, the New York Convention applies to its recognition and enforcement in Turkey. In such a case, the provisions of the IPPL apply to the aspects not dealt with in the New York Convention.

On the other hand, if the award is not rendered in the territory of another contracting state, the IPPL governs enforcement of such foreign arbitral award in Turkey. However, there is no significant difference between the provisions of the New York Convention and the IPPL with respect to the grounds upon which the courts may refuse recognition and enforcement of a foreign arbitral award.

4.2 Procedure

For the recognition and enforcement of a foreign judgment in Turkey, the relevant party must file a recognition or enforcement lawsuit by submitting the following documents: (i) a lawsuit petition; (ii) a copy of the foreign judgment duly legalized by the authorities of the relevant country, with a notarized copy of its Turkish translation; and (iii) the document evidencing that this decision is final, and duly certified by the authorities of the relevant country with a notarized copy of its Turkish translation. If the relevant state is party to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, also known as the "Apostille Convention," the apostilled copy of the foreign judgment can be submitted.

For the execution of a foreign judgment through the execution offices in Turkey, the competent Turkish court must render an enforcement decision and this enforcement decision must become final. This means that if the judgment debtor appeals the enforcement decision, the decision will become final only after the appeal review by the Regional Court of Appeals and the Cassation Court if the first instance court's decision is appealed.

As for the recognition and enforcement of foreign arbitral awards in Turkey, the party requesting recognition or enforcement must file a lawsuit with the competent first instance commercial court. The enforcement decision is subject to appeal before the Regional Court of Appeals and the Cassation Court if the debtor appeals the court's decision. The relevant party must file the recognition or enforcement lawsuit with (i) a lawsuit petition; (ii) a copy of the arbitration contract or clause (not the contract), with a notarized copy of its Turkish translation; and (iii) the foreign arbitral award, with a notarized copy of its Turkish translation.

Turkish courts will enforce a foreign judgment, without reviewing the merits of the dispute in accordance with the principle prohibiting the *révision au fond*, if the foreign judgment is final under the laws of the relevant foreign state, the matter concerns a civil law dispute and the following conditions are met:

(i) There must be reciprocity between Turkey and the relevant foreign state. Reciprocity exists if there is a bilateral or multilateral international agreement under which these states undertake to enforce judgments of another state's courts (contractual reciprocity), the conditions for enforcement of foreign judgments in both states are similar (legal reciprocity) or, in practice, the relevant foreign state enforces Turkish judgments (*de facto* reciprocity).

(ii) The subject matter of the foreign judgment must not fall within the exclusive jurisdiction of Turkish courts (e.g., disputes regarding title over immovable properties are under the exclusive jurisdiction of Turkish courts) and, if the party against whom the foreign judgment is invoked raises this defence, there must not be excess of jurisdiction.

(iii) The court judgment must not be clearly contrary to Turkish public policy.

(iv) The right of defence of the party against whom the foreign judgment is invoked must have been respected when the court judgment was rendered.

As for enforcement of foreign arbitral awards under the New York Convention, the party opposing recognition and enforcement has the burden to raise and prove the grounds for non-enforcement under Article V.1 of the New York Convention, while the grounds under Article V.2 may be observed by the courts *ex officio*. In practice, the most invoked grounds are violation of the parties' right to be heard and public policy.

Recent decisions demonstrate that Turkish courts follow the principle prohibiting *révision au fond* and limit their judicial review to the grounds upon which recognition and enforcement of a foreign arbitral award may be refused. The problem with respect to recognition and enforcement of foreign judgments and arbitral awards arises from the courts' interpretation of these grounds, particularly the public policy grounds. However, in recent years, the Cassation Court's decisions tend to interpret the public policy grounds stricter than they did in the past.

While Turkish courts' approach towards enforcement has, over the years, changed in favour of enforcement, obtaining a non-appealable enforcement decision may be a lengthy process. Obtaining a final enforcement decision may take from two to four years. This is the reason why this three-tier system is expected to be amended, thereby and, hopefully, shortening the likely timeframe in which to obtain a final enforcement decision.

The legislation governing enforcement of foreign judgments and arbitral awards does not respond to the question as to whether a party can request an interim measure from the court prior to filing, or during, an enforcement lawsuit. This raises the doubt about whether the party seeking enforcement can make such a request. While the chambers of the Cassation Court have not yet adopted a uniform approach, most chambers are inclined to accept that interim measures can be obtained prior to, or during, enforcement proceedings.

4.3 Costs

To initiate a lawsuit for enforcement of a foreign judgment or arbitral award, the party requesting enforcement must pay (i) a fixed application fee (TRY 59.30[9] (approximately EUR 6)) and (ii) court fees. The court fees may be fixed or proportional. The chambers of the Cassation Court have not yet adopted a uniform approach as to whether enforcement lawsuits are subject to a fixed or proportional court fee. However, a recent decision of the Cassation Court has shed light on this issue for the enforcement of foreign arbitral awards and concluded that enforcement of foreign arbitral awards is subject to a fixed court fee. While this decision reduced the uncertainty with respect to enforcement of foreign arbitral awards, this uncertainty remains for the enforcement of foreign judgments.

Secondly, there will be litigation costs, such as service costs and expert witness fees. In addition, statutory attorney fees may also arise. Finally, the party requesting enforcement may be required to deposit a security if this party is foreign and is not exempt from the requirement to deposit such security. Please see section 2.5 above for the details of the court fees and expenses (including statutory attorney fees), legal fees and security requirement for foreign claimants.

[9] *This is subject to annual update.*

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