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SIGNIFICANT AMENDMENTS UNDER THE 7TH PACKAGE OF THE JUDICIAL REFORM

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Ever since the Judicial Reform Strategy Document has been introduced on 30 May 2019, six sets of legal amendments, covering a wide range of legal fields from the Turkish Penal Code to the Enforcement and Insolvency Law, entered into force.

In this context, the 7th Judicial Reform Package was drafted and submitted to the Justice Commission on 9 March 2023. The proposed package, which is expected to enter into force soon, aims to achieve important objectives such as providing greater protection for debtors during attachment proceedings, facilitating the process of evidence discovery and expanding the scope of mandatory mediation.

I. Compulsory Enforcement Proceedings

a. Attachment in Residential Properties

With the amendment to Article 79(A) of the Enforcement and Insolvency Law **("EIL")**, the attachment proceedings in the debtor's residential properties will be subject to a court decision. In other words:

- When the bailiff determines that the location of the attachment proceedings is a dwelling, he/she must apply to the Enforcement Court to obtain approval for the attachment accordingly.
- There is no need to obtain the Enforcement Court's approval in cases where the debtor consents to the attachment.
- There is no need to obtain the Enforcement Court's approval in provisional attachment proceedings or eviction / delivery procedures that necessitate entry into the dwelling.

Under Turkish Law certain goods are considered unseizable such as the necessary and personal belongings of the debtor and the householder (Article 82 of EIL). The scope of unseizable goods has been expanded with the amendment. From now on, any personal belongings (irrespective of the quantity of the same) of the debtor and the householder which serve to the joint use of these persons cannot be attached (Article 82/1(3)).

Furthermore, the new regulation provides extra protection for those personal belongings by prohibiting their attachment even if the debt arises from them.

b. Excessive Attachment (Überpfändung)

The legislator tries to strengthen the debtor's position against the creditor in movable and immovable attachments by reinforcing the prohibition on excessive attachment more explicitly with the amendment to Article 85 of the EIL.

Even though the current regulation also limits attachment with "the amount sufficient to cover the receivable amount", its wording has failed to prevent excessive attachment in practice.

Whether the new wording will serve the intended purpose is going to be determined by how the bailiffs use their existing discretionary powers as the process remains as it was:

- For the attachment of movable property, the bailiff will prepare an attachment record and appraise the properties (Article 102 EIL).
- If the appraisal does not reflect the truth or the value of the seized property exceeds the debt, the debtor can file a complaint against the bailiff's actions to the Enforcement Court.
- The Enforcement Court examines the complaint petition without being bound by the attachment record. The exceeding amount will be returned to the debtor if the court is convinced that the attachment is excessive.

Although the new regulation does not change the current practice, it may cause the bailiffs to use their discretionary power in favour of the debtor during appraisal. So, instead of risking excessive attachment, this amendment may cause bailiffs to postpone the attachment procedure until they find appropriate valued goods. In this scenario, complaints will no longer be made by the debtor but by the creditor whose attachment request was rejected.

c. The Liquidation of Seized Assets Under Custody

The current Article 88 EIL stipulates that, assets no longer required to be held under custody, such as those released from attachment, can be retrieved by their owner. If not retrieved by the owner, these assets are put up for auction and the proceeds from the sale are paid to beneficiaries after deducting the expenses incurred for custody and sale.

Article 88/a EIL has been introduced with the 7th Judicial Reform Package to address the insufficiencies of this previous regulation. This amendment establishes that if the owner, who is given priority to retrieve his/her assets after the expenses are paid, fails to retrieve the assets, the following steps will be taken:

- Firstly, the lien beneficiaries will be invited to exercise their rights arising from the lien on the asset;
- If such rights are not exercised, the asset will be put up for auction;
- If the sale is not possible, the ownership of the asset will be offered first to the custodian and then to Makine ve Kimya Endüstrisi A.Ş. (a

state-owned enterprise in defence industry), in exchange for the relevant expenses and fees;

- If the above steps remain unsuccessful, the ownership of the asset will be given free of charge to the Türkiye Kızılay Derneği (Turkish Red Crescent), as a last resort.[1]

II. Monetary Threshold in Commercial Disputes

The current regulation of the Turkish Commercial Code ("**TCC**") provides that commercial disputes with a value or amount below TRY 500.000,00 are subject to a simplified procedure (Article 4). Disputes exceeding this threshold, however, are heard by a committee of judges and are subject to written procedure.

This threshold has been increased to TRY 1.000.000 from TRY 500.000 with the amendment. In addition, this new threshold will also be updated annually in accordance with the revaluation rate under the Civil Procedure Law **("CPL")**.

In light of this amendment, the monetary threshold under the Law on Establishment, Duties and Jurisdiction of the First Instance Courts and Regional Courts of Appeal (No. 5235) has also been revised from 500,000,00 TRY to 1,000,000,00 TRY for cases to be heard by a committee in commercial courts of first instance.

III. Mediation

a. The Scope of Mandatory Mediation

The action for invalidation of objection, negative declaration and restitution cases provided under the Turkish Commercial Code ("**TCC**") and Labour Courts Act have also been subject to mandatory mediation with the recent amendment.

During the period leading up to this amendment, there have been debates among scholars and courts regarding whether action for invalidation of objection, negative declaration, and restitution cases should be subject to mandatory mediation. The Court of Cassation had ruled that, unless explicitly stated under the laws, mandatory mediation provisions could not be interpreted broadly, and that mandatory mediation was not required if the case was not related to the collection of a receivable.[2] With the amendment, the legislature aims to resolve this uncertainty and clarify this debate. As a result, whether or not these cases are subject to mandatory mediation is no longer a matter of debate.

In order to eliminate the results that may arise to the detriment of the debtor due to the negative declaratory actions being subject to the mandatory mediation, Article 18(A)(17) has been added to the Law on Mediation in Civil Disputes ("**Mediation Law**").

Article 72 of the EIL provides an advantage to debtors. Accordingly, if the debtor files a negative declaratory case before the creditor commences execution proceedings, the debtor can pay deposit and request to suspend the execution

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[1] The draft regulation will be implemented in accordance with the procedure and principles to be published by the Ministry of Justice within 6 months from the date it enters into force

[2] Court Of Cassation 11th Civil Chambers, 2020/4396 E., 2021/3198 K., 01.04.2021

proceedings. However, before the inclusion of Article 18(A)(17) to the Mediation Law, debtors were not able to exercise their right to suspend execution proceedings. This was because the only party allowed to initiate execution proceedings was the creditor, while the debtor had to wait for the conclusion of the mediation process before filing a negative declaratory action. From now on, the debtor can file a negative declaratory action during the mediation process, and this action will be treated as if it was filed prior to execution proceedings (Article 18(A)(17)).

With the amendment to Article 18(B) of the EIL the scope of mandatory mediation has been expanded to include the following disputes:

- Disputes arising from rental agreements,
- Disputes arising from the distribution of movable and immovables and the dissolution of joint ownership,
- Disputes arising from the right of condominium,
- Disputes between neighbours.

b. The Scope of Disputes Eligible for Mediation

Under Turkish Law, not every dispute can be settled through mediation. Article 1 of the Mediation Law provides that mediation can be applied to only in private law disputes arising from the parties' disposable transactions. For instance, domestic violence disputes cannot be settled through mediation (Mediation Law Art. 1/2).

With the amendment to Article 17(B) of the Mediation Law, scope of disputes that can be subject to mediation has been expanded. The amendment has also clarified another controversial issue by explicitly providing that disputes related to the transfer of immovable properties or the acquisition of restricted real rights are eligible for mediation.

c. Enforceability of Settlement Agreements in Commercial Disputes

As per Mediation Law; court issued annotations to the settlement agreements do not turn the settlement agreement into a verdict, but rather a verdict-like document. Once the agreement has been accepted as a verdict-like document, it becomes enforceable without further approval from the court.

The current version of Article 18(4) Mediation Law requires the signatures of the parties, the mediator and the parties' counsels altogether for a settlement agreement to become enforceable without the court's approval.

With the amendment to the Mediation Law; the parties' signature is no longer required for the settlement agreement to become enforceable without the court's approval. Instead, a settlement agreement signed by the mediator and the parties' counsels can now be enforced without court approval.

This amendment applies only to commercial disputes. The existing procedure where the signatures of the parties, the mediator and the parties' counsels are required, is preserved in non-commercial disputes.

d. Enforceability of International Settlement Agreements

The United Nations Convention on International Settlement Agreements Resulting from Mediation ("**Singapore Convention**") was adopted by the United Nations General Assembly on 20 December 2018 and entered into force on 11 April 2022 in Turkey. Article 17(A) of the Mediation Law has been amended to ensure conformity with the Singapore Convention.

Even though, a settlement agreement can be enforced in Turkey under the Mediation Law; it cannot be enforced in different countries without the relevant foreign court's approval. By the same token, a settlement agreement concluded in a foreign country, cannot be enforced in Turkey, even when it is considered a verdict-like document according to that foreign country's courts. The amendment to Mediation Law Article 17(A) aims to facilitate the enforceability of settlement agreements by complying with the Singapore Convention:

- The court to be applied is the commercial court of first instance, and these courts' jurisdiction has been regulated under this provision.
- Accordingly, the commercial courts of first instance will examine the provisions of the Singapore Convention and the conditions stipulated under Article 18 Mediation Law together when issuing an enforceability annotation.

While Mediation Law regulates the procedural rules of enforceability annotation, Articles 4 and 5 of the Singapore Convention regulates positive and negative conditions regarding substantive rules. Accordingly:

- The party who applies for an enforceability annotation has to prove that the settlement agreement was concluded as a result of the mediation;
- The counterparty will try to prove the invalidity of the settlement agreement by claiming the invalidity of the mediation agreement, the incapacity of one of the parties or the lack of impartiality of the mediator, in order to prevent the enforcement.

The courts have discretionary power to dismiss the applicant's enforceability application as it evaluates the eligibility for mediation and public order *ex officio*, regardless of the defences the counterparty brings forward.

IV. Discovery of Evidence

Until now, discovery of evidence, which is usually used to prevent the loss of evidence during the period between prior to the filing of a lawsuit and its commencement, could only be requested from courts. As per Article 400 et seq. CPL, the Civil Courts of Peace are responsible for pre-action requests, and the court trying the case is responsible for post-action requests.

However, the CPL reserves the duties and powers of notaries for discovery. In the current regulation notaries are allowed to go beyond the limited framework specified under Article 61 of the 1512 No. Notary Public Law in determining and documenting the state, form, and value of something or somewhere.

The rights granted to notaries under Article 61 of the Notary Law have been expanded even further with this recent amendment. So much so that it has become almost impossible to distinguish notaries from courts in terms of discovery of evidence. Under this new regulation, notaries, upon request, can:

- Conduct inspections within or outside the notary office,
- Take witness statements,
- Request expert examination.

This change references Article 400 et seq. CPL. The reasoning of the amendment states that the notary will apply the provisions of CPL (Article 400 et seq.) by analogy while performing the aforementioned procedures.

The most striking point regarding Article 400 et seq. CPL is the necessity of the applicant having a legal interest in the discovery of evidence. Whether such an interest exists is exclusively within the judge's jurisdiction. With this amendment, parties will be able to request discovery of evidence, which they may not have been able to obtain through the court previously, without demonstrating their legal interest.

V. Criminal Law Regulations

a. Turkey's War on Drugs

Turkey has a rather strict drug policy compared to EU countries. The regulations related to using, selling and distributing drugs are set forth in the Turkish Penal Code and The Control of Narcotic Substances Act. In order to support the war on drugs, the relevant regulations have undergone the following amendments:

- The confiscation process of drugs has been re-arranged;
- The scope of substances that are prohibited to produce and trade has been expanded and the penalties have been increased;
- Regulations have been introduced regarding the monitoring and rehabilitation of individuals who use narcotics and stimulant substances.

b. Amendments to the Turkish Criminal Procedure Code

The Criminal Procedure Code have been amended in light of the Constitutional Court’s previous decisions regarding the right of defence:

- According to the Article 193 Criminal Procedure Code, courts cannot sentence the condemnation of the perpetrator when he/she does not attend the hearing. The types of decisions in which the presence of the perpetrator at the trial is mandatory have been expanded with the judicial reform package.
- Currently, the parties have the right to file an objection against the judge or court decisions within seven days. These objections are examined through a simplified procedure. When the court decides the deferment of the announcement of the verdict, the damaged party has

the right to object to this decision. With the amendment, the procedural review process of objections filed against decisions to defer the announcement of the verdict is aimed to be conducted in a more detailed manner in light of the Constitutional Court's decisions.

- One of the extraordinary remedies regulated under the CPL is that, the Chief Public Prosecutor can request an appeal to the detriment of the perpetrator against the final decision of the Regional Court. With the amendment "the existence of a substantial error that will affect the decision" has been made a requirement of this extraordinary remedy.

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