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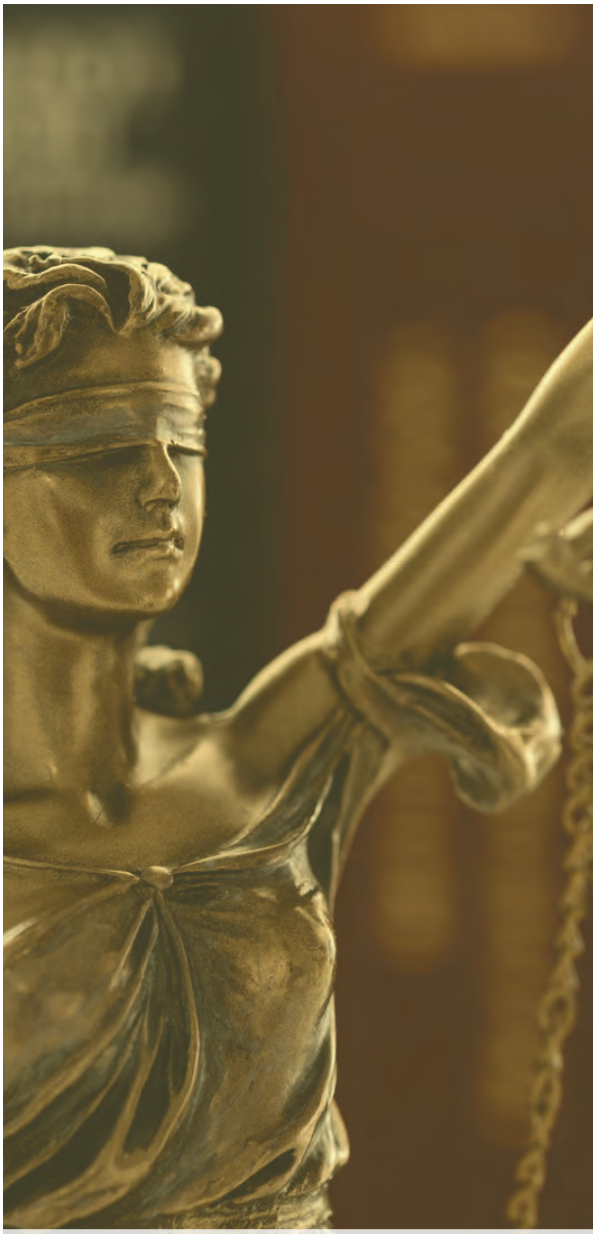

ANADOLU UNIVERSITY

Business Law

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Preface

Dear Students,

Business Law is a branch of law that covers all the areas of law dealing with how to form and run a business. It mainly establishes the basic rules that all businesses should follow. In general the term business can be defined as a commercial activity. Therefore this book covers some of the subjects a person may need while dealing with any kind of commercial activity. Starting with an introduction to business law, commercial enterprise law, law of contracts, company law, organization of the judiciary, fiscal law, labor and social security law, mediation and international commercial arbitration are included in this book. All the related topics are explained with their basic concepts and unnecessary detail is tried not to be given.

The concept of business law is wider than the topics examined in this book, but the aim of writing this book has been taken into consideration and the book is tried to be limited to a student's book. Therefore the aim of this book is to help the students to learn the main subjects related with business law.

I hope you will enjoy the subject of this book and benefit from the knowledge and experience that you will acquire from it. Our goal is to help you not only during your education but also in your professional life. Whenever you deal or form or run a commercial activity this book shall be the first step to guide you. I wish you all the success in your studies and future life.

Editor

Prof.Dr. Şebnem AKİPEK ÖCAL

Chapter 1 Introduction to Business Law

After completing this chapter, you will be able to:

Learning Outcomes

1. Develop the ability to understand the meaning and concept of business law
2. Develop the ability to think analytically on the sources of Turkish Law, and therefore the sources of business law
3. Develop an understanding of the concept of person and types of person

Chapter Outline

Business Law
The Development Of Business Law
The Need For Business Law
Sources Of Turkish Law
Concept Of Person
Capacity Of Persons

Key Terms

Business
Business Law
Turkish Law
Sources of Law
Person
Real Person
Legal Person
Capacity

INTRODUCTION

In this chapter, the concept of business law shall be discussed. Business law is a law that is formed by a combination of different branches of law; and it includes these branches not as a whole, but up to a point that is necessary for a merchant. In other words, though in many countries it is regarded as a separate branch of law, in Turkey business law still may not be regarded as a separate branch of law. Contrary to this view, it covers the subjects that a merchant, a real or legal person who deals with trade should know and use. The main aim of this law is to dictate how to form and run a business. It mainly establishes the rules that all businesses and merchants should follow.

This chapter is organized to provide: firstly, an overview of business law; secondly, a short discussion of the development of business law in the world, and thirdly, a discussion of the need for business law forms.

Since this book is about Turkish business law, some information on Turkish law shall also be given, including especially the sources of Turkish law. Then the concept of person forms an important part of this chapter. Since there is a need for a person to do business and to become a party to a commercial relation, this concept forms an important part of business law. As is known, there are two types of person, namely real person and legal persons; both shall be explained in this chapter. As the last topic the capacity of both real and legal persons will be evaluated.

BUSINESS LAW

Business law is a branch of law that covers all of the laws including how to form and run a business. In a way, this branch of law establishes the rules that all businesses should follow. In general, business law deals with all kinds of legal issues in business and commerce.

Another question to be answered is "What does 'business' mean?" According to the dictionary, business has two different meanings. One of them is "a person's regular occupation, profession or trade", the other one is "commercial activity". In a business dictionary, it is defined as an organization or an economic system where goods and services are exchanged for one another or for money.

your turn [1]

Look up the word business in the Cambridge Online Dictionary: https://dictionary.cambridge.org/dictionary/ english/business. Try to write example sentences to reflect its different meanings.

As can be understood, both the word business and the concept of business law have many different meanings. In this book, the concept of business law is understood as a branch of law dealing with all legal problems resulting from business activities; and the word business is mainly used to refer to a commercial activity or work done to earn money. Business law may, first of all, be relevant to starting, managing, and transferring a business. It is also relevant to issues such as selling and buying, and to contracts for that matter. Besides contracts, consumer protection is another subject which is very important in running a business. Labor law is also used a lot in all kinds of business activities, both in the sense of individual labor law and social security. Commercial enterprise is a very important topic in business; and the concept of merchant should be dealt with care. Especially the rights and duties of merchants form a core part of this branch of law. In running a business, it is also important to know about the fiscal system and taxation. At the same time, the court structure should be introduced. Where, how, what, and when to sue are crucial questions to be answered. Besides the courts, there are new alternative dispute resolution methods that are being developed both in the world and in Turkey. Among them, mediation is gaining great importance. Besides its voluntary application especially in some labor disputes, a compulsory mediation is introduced in Turkey. There are also discussions that a compulsory mediation may be brought to some commercial disputes up to a certain amount, but they are not conclusive yet. Another important alternative dispute resolution method is arbitration. National arbitration is yet developing in Turkey, but international arbitration is used as a very useful method of dispute resolution, especially among large companies.

Business law is mainly used among merchants: and a merchant may be a real person or a legal person. The legal person merchants are business associations or in other words the companies. A chapter in this book shall be devoted to companies and different types of companies in Turkish legal system, especially corporations and limited liability companies shall be explained in that chapter. Likewise intellectual and industrial property can be regarded as an important topic in business law.

Due to space limitations, we have restricted our discussion in this book to eight chapters, the first of which is an introduction to business law. The content of the respective chapters includes: law of commercial enterprise, law of contracts, law of companies, labor law, fiscal law, the court structure, and mediation and international arbitration.

THE DEVELOPMENT OF BUSINESS LAW

The origins of business law may be found in the law merchant or, in other words, *lex mercatoria*. The law merchant is a system of rules and customs and usages generally recognized and adopted by merchants as the law for the regulation of their commercial transactions and the resolution of their disputes. The law merchant was developed in the 11th century. Its main aim was to protect the foreign merchants not under the jurisdiction and protection of the local law. It also aimed to help the traders to negotiate contracts, partnerships, trademarks and various aspects of buying and selling by themselves. Especially sales contract. It spread hugely first around Europe and then around the whole world since traders kept going from place to place. Law merchant forms the basis of business law. In the medieval era, most of the commercial transactions and dealings were considered having a universal character. But after the medieval era, they lost their universal character; and the "nationalization" of law started. Following the birth of the national states in Europe, the process of codification started, so most of the rules of the law merchant were codified in different codes or laws, i.e., commercial code, code of obligations, etc. In England, on the other hand, the law merchant started to be blended in common law by the judges.

As a result, the modern concept of business law developed especially in England and the United States of America, respectively. Therefore, it can easily be stated that business law first completed its development in Anglo American law and then it spread to the Continental Law countries.

attention

There are two highly dominant legal systems in the World. One is the Continental Law system, having its origins in Roman law and the other one is the Anglo-Saxon Law system derived from the Common Law in England. The Continental Law system keeps the legislation as the foremost source of law, where as in Anglo-Saxon system the previous judgments are binding and form the main source of law. After the development of the United States, this country highly affected the law system and it was named as the Anglo-American law system. Turkey is a Continental Law country.

THE NEED FOR BUSINESS LAW

Business law, as a very broad topic, covers several different areas of law. Originally, as a single topic, the concept derived from Anglo American law where it relates to several different sets of rules applicable to commercial businesses. Business law touches everyday lives through every contractual relation. Contractual relations, as the cornerstone of all commercial transactions, have resulted in the development of specific bodies of law within the scope of business law regulating:

(1) sale of goods-i.e., implied terms and conditions, the effects of performance, and breach of such contracts and remedies available to the parties;

(2) the carriage of goods, including both national and international rules governing insurance, bills of lading, charter parties, and arbitrations;

(3) consumer credit agreements; and

(4) labor relations determining contractual rights and obligations between employers and employees and the regulation of trade unions.

From the viewpoint of the structure of the business entity, there are various forms of legal business entities ranging from the sole trader, who alone bears the risk and responsibility of running a business, taking the profits, but as such not forming any association in law and thus not regulated by special rules of law, to the registered company with limited liability and to a company whose shares are publicly traded or to multinational corporations. Therefore, the scope provided above for business law extends based on the type of the association model.

Within the basis of the above, business law is a separate area of law and is offered as a structured course in most of the law schools and thought as a separate course in many departments in the Anglo American universities, whereas in Turkey only some of the universities have courses on business law in the same context as above, and law schools do not have such titles in their undergraduate programs. However, all the sub titles/topics covered under Business Law are separate areas and scheduled courses in the Law Schools in Turkey.

In any case, from a civil lawyer's perspective, the scope of business law can be as extensive as covering contract law, commercial law, company law, competition law, labor law, fiscal law and even evolving with new areas of law developing in relation to consumer protection, computers and the Internet, all of which are already very broad areas of law on their own.

The framework of the scope of business law from the viewpoint of civil law may vary as to the association model and business type of the commercial business concerned. The editor of the present book believes that the titles in this book reflect the most common aspects of Turkish Business Law which can be extended to other areas of law. For example, none of the sectoral areas such as energy, telecommunications or drugs regulation is covered in this book as they are not within the purposes of the book. However, one should bear in mind that if one considers a regulated industry or services markets, then such areas would also be included in the Business Law coverage.

For example, when a Joint Stock Corporation is to be established, this will be subject to several areas of commercial law as well as contract law. Together with its operations and functioning, in addition to contract law and company law, all other areas of law of obligations and commercial law will be on the agenda of the company as well as the rules on labor law, tax law, competition law, consumer protection law and some sectoral rules where applicable. In that context, the scope of business law actually provides the businessmen and those who are involved in the business a broadly defined set of rules that the business will/may be subject to.

As can be understood from the above explanations, there is a huge need for business law, especially when a merchant is forming a commercial enterprise or when a business association is established. Additionally, when they enter into a legal transaction or when a dispute arises, again the principles of business law shall be helpful in the legal sense. Because of that reason, especially in the Business Administration Departments, not only in Turkey, but all over the World, business law is considered as a very important topic and taught as a compulsory course.

SOURCES OF TURKISH LAW

Introduction to Turkish Law

Turkish Republic was founded in 1923; but even before the foundation of the Republic, the Turkish Grand National Assembly was opened in 1920. Following the opening of the Grand National Assembly, the first constitution was enacted. The 1921 Constitution brought the principle of national sovereignty. As in the 1921 Constitution, the Turkish Grand National Assembly was deemed the "sole representative of the nation. Then, 1924 Constitution was enacted.

After the foundation of the new Republic, it was impossible to continue with the legal system that was applicable in the Ottoman Empire. Turkey is a Continental Law (civil law) country. Since the most important daily legal relations are the relations regarding the law of persons, family, property, succession and the law of obligations, first there was the need to fill the legal gap in these areas. One choice for Turkey was to seek for reception possibilities. Therefore, first of all, in the neediest areas of law, Turkey the Codes of Switzerland. So, in 1926 the Civil Code and the Code of Obligations had been enacted. Together with this effort of reception which continued in

the following years with the Commercial Code, Criminal Code, etc., Turkey was able to adopt modern and secular laws.

In the Turkish legal history two different constitutions followed the 1924 Constitution: the 1961 Constitution and the 1982 Constitution.

In general, it could easily be stated that Turkish law is no different from the main European laws. Therefore, there is no specific or different legal recognition of property rights. The comprehensive reform process accelerated in the late 1990s in Turkey directly affected relations with The Council of Europe. Besides that, comprehensive constitutional amendments and reforms packages were adopted. Actually, starting with the 1990s, there have been many amendments realized in many different laws of Turkey, including many of the provisions of the Constitution, Criminal Code, Commercial Code and many others. It could easily be stated that this period contains a legal reform in Turkey. The Turkish Civil Code and the Turkish Code of Obligation were also changed. The previous Turkish Civil Code was effective till 1 January 2002, and The Turkish Code of Obligations was effective till 1 July 2012. Then, the new ones entered into force.

Main Sources of Law

As mentioned above, Turkey is a Continental Law country. Therefore, the main sources of law are the written sources. Actually, article 1 of the Turkish Civil Code states that the law is applied with its letter and spirit to all legal disputes for which it contains a provision. In cases where no provision exists, the judge should decide according to the existing customary law; and in the absence of customary law principles, the judge should decide, where necessary, according to the rules he would himself lay down as if he were the legislator. The judge may also use the doctrine and the precedents (court decisions) as guidance.

When the above mentioned article is taken into account, a judge should first use the written sources of law and while using them he/she should understand the provisions not only with the letter but with the spirit as well. In private law matters, when the written laws are silent, in other words, when there are no provisions applicable, the judge must look for the existing customary law principles; and when they are silent as well, if the judge thinks that there is a necessity for a rule, he/she should lay down that rule then and decide accordingly. However, this provision as a whole is not applicable in public law, especially in criminal law. In criminal law, there is a very important principle: "there is neither crime nor punishment without a written law".

In summary, it can be stated that there are two groups of sources in Turkish Law. One involves the primary sources and the other involves the secondary sources. Primary sources include the written laws, the customary law and the judge as a law-maker. Secondary sources include the doctrine and the precedents, in other words, judicial decisions. They are not binding; the judge is free to use them according to his/her discretion. In our legal system, previous court decisions are not binding; but, most certainly, a judge in a lower court, may use especially the higher court decisions in similar cases. Therefore, the precedents are not binding in the Turkish legal system. However, the only exception to this rule is what is called the "unification of judgment."

Written Laws

Since codification is important in Turkey, as is the case with other Continental Law countries, the main source of law constitutes the written laws. The legislation power belongs to the Turkish Grand National Assembly. In general, legislation means both enacting new laws, abrogating the old ones and amending the existing laws when necessary.

your turn 2

Who is Hans Kelsen? Why is he important in the discussion of the written laws?

As it comes to the classification of the written laws, the famous legal philosopher Kelsen should be remembered since he was the first jurist who made a classification showing the hierarchy of the written laws as well. The most influential legal theory of the 20th century in the Continental Europe is considered to be Kelsen's "pure theory of law". According to this theory, the typical legal system is founded upon a system of norms. The written laws form a part of a hierarchical system of norms, with each layer gaining authority from

the previous. All the norms could be traced back through a chain of validity which is shown by a pyramid known as the Kelsen's pyramid. At the top of this pyramid is the "Grundnorm," namely the "Constitution" in our system. Then, the codes and statutes follow the constitution. International treaties, presidential decrees and by-laws are the other written sources in the Turkish legal system.

attention

Please note that a very important amendment in the Constitution is realized in Turkey after the referendum in 16 April 2017. According to these amendments, some of the written sources are changed with the elections made on 24 June 2018. Instead of the parliamentary system presdential system is introduced in Turkey. There is no longer the Council of Ministers; therefore, the concept of "statutory decrees" is changed and a new concept is brought as the "presidential decrees". Again there is no longer "regulations", since the regulations are issued by the council of ministers.

Constitution

In the hierarchy of written laws, the Constitution occupies the highest place. It is regarded as the most important binding source; and no other source of law can be contrary to the Constitution. The Constitution primarily defines the form and the ideology of the State, lays down the main rights and obligations of the individuals and the State. It also regulates the principal organs of the government and the three powers, namely the legislative, executive and judicial powers.

Article 11 of the Turkish Constitution shows clearly the supremacy of the Constitution. This provision dictates the following: "…laws shall not be in conflict with the Constitution. The provisions of the Constitution shall be fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals".

Codes and Statutes

A code is a law on general subjects, covering a whole branch of law, e.g., Civil Code, Commercial Code, Criminal Code, Code of Obligations; whereas a statute is a specific law on a certain subject, e.g., Statute on Consumer Protection, Statute on Land Registry. Instead of the term "statute," the term "law" having the same meaning may also be used in the same sense.

Codes and statutes are enacted by the Grand National Assembly and they are applied as a rule until they are abrogated or changed by another code or statute.

International Treaties

For an international treaty to become a source of law in Turkey, it should, first of all, become a party to this international treaty. In order to become a party, the international treaty should be concluded on behalf of the Turkish Republic by an authorized person. After Turkey becomes a party to the international treaty, this treaty should, as a rule, be approved by the Turkish Grand National Assembly by enacting a law. This process is named as ratification; and after ratification, the international treaty enjoys all the qualities of a code or statute.

There was a discussion regarding the place of the international treaties in the hierarchy of written laws. When there is a conflict between the provisions of an existing code or statute and the provisions of an international treaty, which one shall prevail is the main point of discussion. One such discussion in Turkey was concluded by an amendment in the Constitution in 2004. A new sentence is added to article 90 of the Constitution. According to this, in the case of a conflict between international treaties in the area of fundamental rights and freedoms duly put into effect and the domestic laws, due to differences in provisions on the same matters the provisions of international treaties shall prevail.

Presidential Decrees

Presidential decrees are issued by the President. In the new presidential system the executive power belongs to the President. There is also a vice President appointed by the President. But the prime minister and the council of ministers no longer exist in the new system. The president has an authority to issue presidential decrees. But the presidential decrees should not be in conflict wih the existing codes and statutes. Also it is not possible to issue presidential decrees on the subjects that should primarily be regulated with a

code or a statute. Fundamental rights and liberties and the political rights of the individuals cannot be regulated by presidential decrees.

By-Laws

President ministries and public corporate bodies may issue by-laws. Every valid by-law is dependent upon a code, a statute or presidential decree. By-laws contain more concrete and specific rules and they can not contain provisions contrary to the codes, statutes and presidential decrees.

attention

A public corporate body is a public institution having legal personality. Examples of public corporate bodies include universities, municipalities, and Turkish Radio and Television (TRT).

Customary Law

When there are no provisions applicable in the written laws, except for the criminal law, a judge should try to find out an applicable customary law principle. In that sense, no custom is applicable. For a custom to have legal validity and to be considered as a part of the customary law, certain requirements must be fulfilled.

Firstly, of all a custom must exist for a long period of time; it should have the characteristic of antiquity. Secondly, the custom should have the characteristic of continuity; it must be continuously observed. There should be no interruptions in the observance of the custom. Thirdly, the members of the society should believe consciously or unconsciously in the rightness of the custom. Fourthly, a custom may not be applied if it is in conflict with the written laws; therefore, customs must be in agreement with the written laws. Lastly, there is a need for a state sanction. Until a court applies a custom and gives it the sanction of state authority, it shall not be considered as a part of the customary law.

As mentioned elsewhere, it is not possible to use the customary law due to the important principle in criminal law: "there is neither crime nor punishment without law."

On the contrary, in commercial law, customary law plays a very important role; therefore, when studying business law, it is important to understand the importance of the customs among merchants as well. In order to be applied, a commercial custom or usage should be widely known.

Judge as a Law-Maker

The last primary source of law is the judge as a law-maker. When the written laws are silent, a judge trying to solve a case shall try to find a customary law rule; but if the customary law is also silent, this means that there is a legal gap. At this point, the judge has to decide whether this is a real legal gap or not. If it is a real legal gap, this means that there is a need for a regulation which is not provided by the law-maker. Therefore, the judge has to lay down a legal rule himself/herself and decide the case accordingly. If it is not a real legal gap, the judge has to dismiss the case.

The rule laid down by the Judge should also be general and abstract, but it shall not be binding in other cases. In other cases, this can be used as a part of the precedents.

THE CONCEPT OF PERSON

The word "person" is derived from the Latin word "persona". In Latin, "persona" means a being that is capable of sustaining rights and duties. In modern law, similar to the Latin Law, "person" means a being that is recognized by law as a subject of rights and obligations.

In general or daily usage, the word "person" refers to human beings, but in the legal sense it has a wider meaning which also includes companies, associations, foundations, syndicates, and even the state and public corporate bodies. Therefore a person is a being that is subject to rights and obligations that are imposed to it by law.

In other words a person can be considered as the object of legal rights. As a rule, in order to be regarded as a person, the law has to recognise this being as a person; otherwise, this being shall not be considered as a person.

In the modern legal systems including Turkish Law, there are two types of person: Real persons (natural persons) and legal person (juristic persons).

Real Persons

As stated above, real persons are actually human beings. They are also named as "natural persons" since they are accepted as a person naturally by law. Though all human beings are naturally recognised as a person by law in the modern legal systems, the case was not always the same in the legal history. For example, in the Roman law period, the slaves were not regarded as persons; therefore, they did not have any rights, and neither did they have any personality.

The personality of a real person begins with birth. According to article 28 of the Civil Code: "The personality right begins with the birth of the living child..." From this provision, it is understood that there are two requirements for the beginning of personality: 1. Alive birth 2. Whole birth. From the concept "whole birth," it should be understood that the child is completely separated from the mother's body; and from the concept "alive birth," it should be understood that after separating from the mother's body, the baby breaths at least once on its own. It is stated that the infant is regarded as a person at this moment of alive and whole birth.

The natural way for a person's personality to end is death. This point is also regulated in article 28 of the Civil Code: "Personality..... ends with death". A person is declared legally dead only if the corpse of that person is actually found and identified. When there is no corpse, this situation is not regarded as "normal" death. At this point, there are two important presumptions under which a person can still be declared dead despite the absence of a corpse.

attention

Presumption is a concept that is highly used not only in civil law, but also in the whole private and public law fields. A presumption is a legal inference as to the existence or truth of a fact not certainly known but drawn from the known or proved based on the existence of some other fact.
There are two types of presumptions, namely rebuttable presumption and irrebuttable presumption. Rebuttable presumption is a presumption which the contrary may be proved with any kind of proof. The most important examples of rebuttable presumption include presumption of innocence (in criminal law), presumption of ownership (in law of property) and presumption of good faith (in private law in general). Irrebuttable presumption is a presumption which the contrary may not be proved. For example, because of the principle of publicity, everybody knows the entries in the land registry. Therefore, nobody may allege that he/she has no idea about an entry in the land registry.

These presumptions which presume death are called the presumption of death and presumption of absence. The presumption of death is regulated in article 31 of the Civil Code. According to this provision, the death of a person is deemed proven, even if no one has seen the corpse, if that person has disappeared in circumstances in which his death may be considered certain. A plane crash is an example of death presumption. If a person was on the plane and a crash had occurred, even if the corpse could not be found, this person is presumed to have died. The result of death presumption is similar to that of a normal death. There is no need for a special court decision.

A declaration of absence can be filed in two different situations. In the first case, it is highly probable that a person is dead because he or she has disappeared in extremely life-threatening circumstances. In that case, the next of kin (the next

of kin may be any person deriving rights from his or her death) has to wait for one year and then apply to the court. This process applies when there is, for example, a severe earthquake and this person is known to be in that region, say at a hotel that has totally collapsed. Another example may involve a journalist in a war area who is reported lost while taking war photographs.

The second case is about a person who has been missing for a lengthy period of time without any sign of life. This is a situation in which a person has disappeared without any reason. In that case, five years should pass since the last sign of life before the application to the court.

In both cases, the court must, by suitable public means, call on any person who may provide information about the missing person to come forward within a specified period. This period may not be less than six months following the first public notice. If no news is received during the set period, the missing person is declared absent (presumed dead) and the rights derived from the fact of his or her death may be enforced as if death were proven. His or her succession may be distributed but the heirs have to give a guarantee ifor five and fifteen years in the first and the second case, respectively. If the absentee has been married, the marriage does not automatically dissolve with the court decision; the spouse has to ask for the dissolution of the marriage.

Legal Persons

In addition to real persons (individuals), there are also other entities some of which act like the individuals. Legal person refers to a non-human entity that is treated as a person for limited legal purposes--corporations, for example. Legal persons can sue and be sued, own property, and enter into legal transactions. Law attributes such entities a capacity and an authority to exist and act like individuals to the extent appropriate; and therefore, the provisions for individuals in civil law also apply to legal persons where appropriate.

There are certain requirements for legal entities. First, legal entities are established for a specific purpose. Legal capacity of a legal entity is framed as to this specific purpose concerned. In this regard, the purpose of a foundation (vakıf) is different from a company (şirket) and the purpose of a company is different from a public economic enterprise (kamu tüzel kişisi).

Secondly, legal entities are associated/organised/incorporated independently of the persons that form the legal entity concerned. This feature of a legal person relates to its organs that are to be established in accordance with the legal requirements regulated in the relevant laws. In this regard, the legal person exercises its rights and incurs legal obligations by its organs created by the individual. Nevertheless, the personality of a legal person is independent of and separate from the individuals who are acting within the organs of the legal entity. As the organs of a legal entity are to be created in accordance with the law, organs of an association (dernek) will be different from the organs of a cooperative (kooperatif) or the organs of a limited liability company (limited şirket).

Thirdly, the law recognizes the independence of legal persons and it defines the types of legal persons exhaustively. In other words, if an entity would like to have legal personality, this is to be stated in the law. For that reason, a partnership for inheritance and an ordinary partnership do not have legal personality as the law does not attribute a legal personality to such entities.

In principle, the establishment and the termination of legal entities are subject to the formalities stated in the law. As their establishment formalities, there are three different ways that the legal entities are subject to:

1. by way of a registration in the relevant registry (i.e companies)
2. by way of a permission from the relevant authority
3. no specific requirement for the establishment (free)

Legal persons are classified as **private law legal persons** and **public law legal persons.**

1. **Private Law Legal Persons** are established by a legal transaction subject to private law rules; and the types of private law legal persons are exhaustively listed in the law. Private law legal persons may be classified based on whether or not they **have an income generating purpose.** Accordingly, associations and foundations are legal persons with non-income generating purposes subject to private law rules and companies are income generating legal persons.

2. **Public Law Legal Persons** are the legal entities that are vested with public authority as some sort of a public duty is served by these entities. Public administrations and public institutions and public enterprises are public legal persons organized under public law. In that regard, the State (devlet), municipalities (belediye), village administrations (muhtarlık), universities, trade and industry chambers and bar associations bear public law legal personalities.

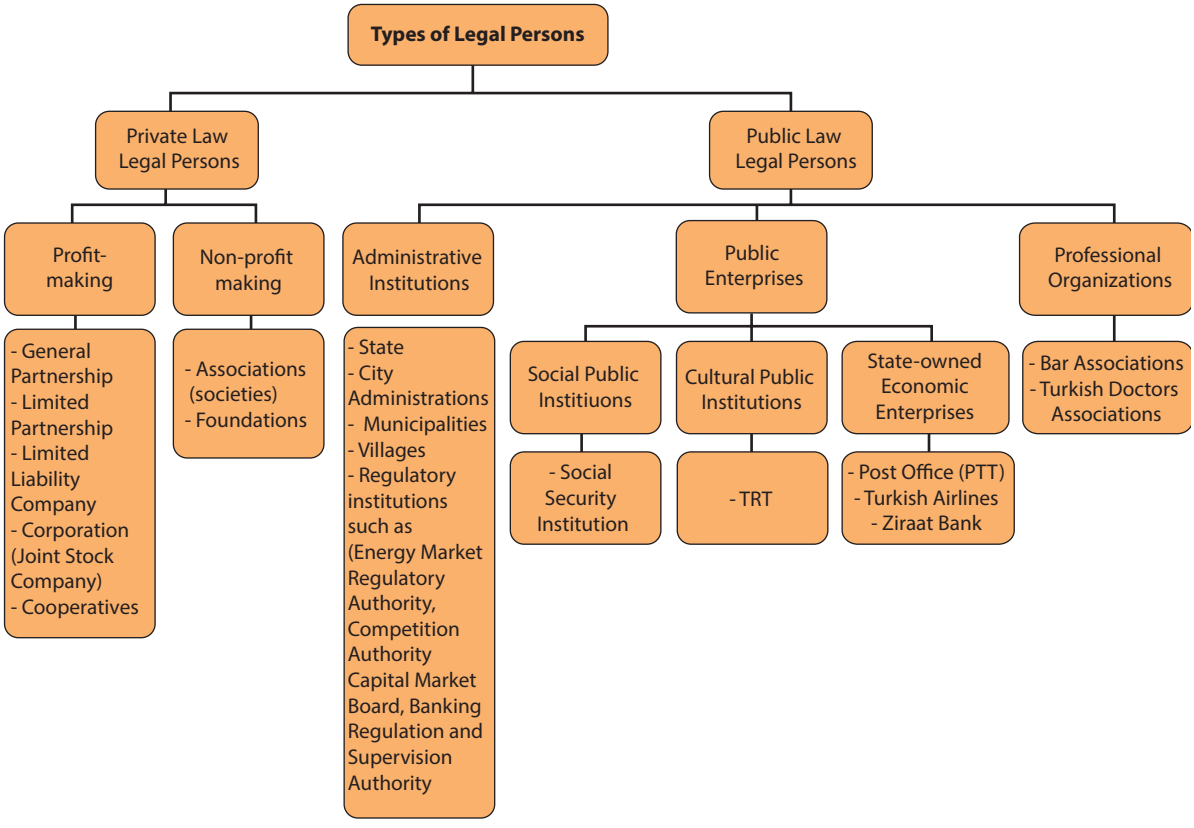

Figure 1.1

CAPACITY OF PERSONS

In Turkish Law, capacity of real persons and legal persons is regulated differently. The general provisions about the capacity of legal persons are explained very briefly above. What determines their capacity is their purpose. Mostly their capacity is drawn according to their purpose, but especially for business associations that are regulated in the Commercial Code, there are exceptions to this rule. Apart from that, the capacity of every legal person may have some differences according to the law that regulates it and according to its articles of association.

As to the capacity of the real persons, it is regulated in the Civil Code. The Civil Code makes a distinction between the capacity to have rights and duties and the capacity to act. Therefore, there are two main types of capacity.

Capacity to Have Rights and Duties

Every real person has capacity to have rights and duties. Capacity to have rights and duties is a passive capacity; and being a real person is enough to have this capacity. In legal history, there were people such as slaves or even women or children in some legal systems who were not the subject of legal rights or whose rights were limited. In the modern legal systems, the principle of equality is the governing principle of the capacity to have rights and duties.

Capacity to have rights and duties is also under the guarantee of the Turkish Constitution as well. According to article 12 of the Constitution, "every individual possesses inherent fundamental rights and freedoms which are inviolable and inalienable." Article 10 of the Constitution brings the principle of equality. Therefore, all real persons are considered equal according to this capacity.

In article 8 of the Civil Code, it is stated that within the limits of law, every person has the same and equal capacity to have rights and duties.

Normally, this capacity starts at the moment a child is born; but according to article 28 of the Civil Code, even an unborn child has capacity to have rights and duties provided that it survives birth. In other words, the baby shall have the capacity to have rights and duties starting from the moment it is first conceived as long as this baby breaths on its own just once after whole birth, which involves separation from the mother's body.

attention

According to the Civil Code, when a person dies leaving behind a child and a spouse, the legal heirs of that person shall be the child and the spouse. If this person does not have a child or grandchildren but has a mother and father together with a spouse, the legal heir of that person shall be the spouse and the parents. Therefore, if a man' s wife is pregnant when he dies, the birth shall be waited for to share the succession. When the baby is born alive and breaths at least once, this baby shall be the legal heir of the deceased father. If the baby is not alive, then the parents and the spouse shall be the legal heirs.

Capacity to Act

Unlike capacity to have rights and duties, capacity to act is considered as an active capacity. A person who has capacity to act has the capacity to acquire rights and incur obligations through his/her own actions. The capacity to act includes both the capacity to enter into legal transactions and the capacity to be liable from torts, i.e., tortuous liability. Since it is an active capacity, it does not enjoy the principle of equality. There are four groups of persons based on their capacity to act: persons of full capacity, limited capacity, limited incapacity, and full incapacity.

In order to have full capacity there are three requirements. Firstly a person should attain majority; secondly, this person should be capable of making fair judgements; and lastly, he/she should not be restricted. These three requirements of capacity can be explained as follows:

1. The concept of majority: According to the Turkish Civil Code, a person attains majority with the completion of age 8. In two exceptional situations, persons may acquire majority before completing 18 years of age. First of all, marriage confers majority. In Turkish law, the normal marriage age is the completion of 17 years of age with the consent of the parents; and the extraordinary marriage age is the completion of 16 years of age with the court decision. If a person gets married before the completion of 18 years of age in the above mentioned circumstances, this person would acquire majority. The second way is the court decision. A minor who has completed his/her 15 years of age may, upon his/her application and with the consent of his/her parents, be declared by the court to be of full age. However, to grant this decision there should be a valid ground for this application.

2. The capacity to make fair judgements (Discretion): Persons who have discretion are able to make fair judgements, so that they can act rationally. According to article 13 of the Civil Code, a person is capable of making fair judgements if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication or similar circumstances. As can be seen, Civil Code does not define the concept of discretion or the capacity to make fair judgements. On the contrary, the Turkish Civil Code gives some negative examples in which persons shall not have discretion as a rule; but this does not necessarily mean that under these circumstances persons shall never have discretion. For example, not all persons suffering from mental disorder can be be regarded as having no discretion. Therefore, this should be considered as a relative concept; and in every specific case. the judge should evaluate whether the related person has discretion or not.

3. Not to be interdicted: There are some grounds stated in the Turkish Civil Code in which a person may be interdicted. In CC articles 404-408, they are listed as mental disability, mental disorder, habitual drunkenness, habitual gambling. One year or more imprisonment. These are actually some of the examples among the ones that are named in the mentioned articles. Under these situations, a person is interdicted.

Full Capacity

If a person has all three of the above mentioned requirements, then this person is deemed to have full capacity, which means that this person may enter into any kind of transaction and may be liable for all his/her tortuous acts.

Limited Capacity

A person of limited capacity also has all of these three requirements, but his/her capacity is limited only for certain legal transactions. In other words, for the persons of limited capacity, capacity is the rule and incapacity is the exception that is only limited to specific transactions. These are married persons and the persons to whom a quasi guardian is appointed.

Curators and legal representatives are the types of quasi guardians. A curator represents the person of limited capacity only for the transactions to which he is appointed; and the person of limited liability should get the advice of the legal representative only for the transactions to which he is appointed, but performs these transactions by himself.

Though there are some discussions in the doctrine, mostly it is accepted that married persons are also of limited capacity for two reasons: the concept of family domicile (Civil Code art. 194) and the suretyship contracts (Code of Obligations art. 584). If a married person is the owner of the family domicile, which is the place where the family as a rule resides, this person may not transfer the ownership or create any other limited real right on this immovable without the written consent of the other spouse. If the family domicile is a rental place, the spouse who has concluded the rental contract may not withdraw the contract without the written consent of the other spouse. If the other spouse wishes so, he or she also may become a party to the rental contract only by his or her wish. A married person, with some exceptions such as merchants acting on behalf of their commercial enterprise, may not become a surety without the written consent of his or her spouse. Therefore, their liability is limited only for these transactions.

Limited Incapacity

Persons of limited incapacity are the persons having discretion, who are able to make fair judgements, but they either are not of full age or are interdicted. In other words, interdicted persons and minors who are able to make fair judgements are in this group. As a rule, persons of this group act through their statutory representatives. They are under parental authority or guardianship.

Persons of limited incapacity do not have the capacity to enter into legal transactions. Their parents or guardians act on behalf of them. However, there are some exceptions to this rule. First of all, they may enter into legal transactions with the consent of their statutory representative. For example, a parent may give some money to his/her child who is 17 years old and allow him/her to buy a computer. They may also enter into transactions by which they merely benefit from without incurring obligations. A donation (gift) contract is a good example of that. They can be a "donee" in a donation contract and accept the gift. They may also enjoy strictly personal rights by themselves. For example, they may get engaged by themselves without the approval of the statutory representative, but they shall not be liable for the financial aspects of the engagement.

When a person of limited incapacity enters into a legal transaction without obtaining the consent of his/her statutory representative, this transaction shall be considered as a voidable transaction. The other party has to inform the statutory representative and wait for a suitable period of time. During this period, the other party of the transaction shall be bound by this transaction but the person of limited incapacity shall not. If the statutory representative ratifies the transaction, it shall become binding for both parties; if not, the transaction shall be invalid.

Persons of limited incapacity have discretion; therefore, they have full tortuous liability, which, in other words, means that they are responsible for all their tortuous acts.

Full Incapacity

The last group in capacity to act involves the persons of full incapacity. They are the ones who do not have discretion, who are not able to make fair judgements. They should be either under parental authority or guardianship. Their statutory representative represents them in their legal transactions. These persons cannot create a legal effect by their actions. If they enter into a transaction, this transaction shall be completely null and void.

Since the persons of full incapacity do not have discretion, they are not liable for their tortuous acts. However, there are some exceptions to this principle. For example, because of "equity", they may have to compensate for the damages they have given. This is regulated in article 65 of the Code of Obligations. According to the article mentioned, "On grounds of equity, the court may also order a person who lacks capacity to consent to provide total or partial compensation for the loss or damage he/she has caused". When a very rich person who does not have discretion commits a tort and a very poor person suffers damage of this tort, then the rich person has to compensate for the damages of the poor person even if he/she is a person of full incapacity.

Summary

LO 1 Develop the ability to understand the meaning and concept of business law

Business law is a branch of law that covers all sub-branches of law including how to form and run a business. Business law establishes the rules that all businesses should follow. In a way, business law guides the merchants in all kinds of legal relations they may enter into. For this reason business law actually includes parts from different branches of law. In other words, it is a combination of different branches of law. Especially law of commercial enterprise is very important since it forms the basis of all kinds of businesses. Moreover, every business has to enter into legal transactions; therefore, law of contracts is an important part for the functioning of the business life. The business may be run by a real person merchant, but mostly and especially the large businesses are owned by business associations. For this reason company law forms a core part of business law. Business law cannot be thought without a basic knowledge of labor law. Among the sections of individual labor law, collective labor law and social security are important for any kind of a commercial enterprise. Fiscal law, especially taxation can sometimes be very problematic for any real or legal person who is running a business; and without at least a general knowledge in the mentioned field mistakes can be made. A person who deals with business should definitely know about the country's judicial system and dispute resolution process along with alternative dispute resolution matters. Most certainly, the concept of business law is not limited to the mentioned ones, but these provide the most urgent knowledge that should be covered. Business law also includes, among others, consumer protection as well as intellectual and industrial property.

LO 2 Develop the ability to think analytically on the sources of Turkish Law, and therefore the sources of business law

Article 1 of the Turkish Civil Code enables us to understand the sources of Turkish Law. According to this article, the sources of law can be classified as primary sources and secondary sources. Primary sources involve the written laws, customary law and the judge as a law-maker. Secondary sources involve the doctrine and the court decisions. Written laws are the Constitution, codes and statutes, international treaties, presidential decrees and by-laws. When the written laws, especially in private law, are silent, the judge should try to find an applicable customary law principle. If it also is silent and if the judge finds it that there is a real legal gap, he/she shall act as a law-maker and lay down a legal rule. The judge may be guided by the legal doctrine and previous court decisions, but these two sources are not binding. As a part of Turkish Law, these are also the sources of business of law, but it should especially be mentioned that customary law may also play an important role in the field of business law.

LO 3 Develop an understanding of the concept of person and types of person

A person is a being that is recognized by law as a subject of rights and obligations. There are two types of person, namely real persons and legal persons. Real persons are the human beings and every human being is considered as a person in the modern legal systems. The personality of a real person begins with birth. Whole and alive birth is necessary for that. Legal person refers to a non-human entity that is treated as a person for limited legal purposes. In order to be considered as a legal person, the law system has to recognise it as a person.

Test Yourself

1 Which of the following is **not** a private law legal person?

A. Foundations
B. Corporations
C. Capital Market Board
D. Limited Liability Company
E. Associations

2 Which of the following is **not** considered as an area covered by Business Law?

A. Constitutional Law
B. Commercial Law
C. Law of Contracts
D. Fiscal Law
E. Labor Law

3 When does the personality of a real person begin?

A. At the moment the baby is born whole and alive
B. At the moment the baby is conceived
C. At the moment the baby becomes one year old
D. At the moment the baby is reported not to have any physical or mental disorder
E. At the moment the baby becomes 18 years of age

4 What is the meaning of "commercial activity"?

A. Association
B. Commercial enterprise
C. Merchant
D. Business
E. Sales

5 Turkey is a/an ..... cauntry.

Which of the following completes the blanked part of the sentence above?

A. Anglo-Saxon Law
B. Anglo-American Law
C. African Law
D. Greek Law
E. Continental Law

6 A 16-year-old person who has discretion is a person of……..

Which of the following completes the blanked part of the sentence above?

A. Limited capacity
B. Full capacity
C. Limited incapacity
D. Full incapacity
E. Without capacity

7 According to Turkish Law, when is a person considered to have attained majority?

A. Upon completing 17 years of age
B. Upon completing 18 years of age
C. Upon completing 21 years of age
D. At the beginning 18 years of age
E. At the beginning 21 years of age

8 Which of the following sentences is correct?

A. Capacity to have rights and duties and capacity to act are similar concepts.
B. Principle of equality applies in order for the concept of capacity to have rights and duties.
C. In the legal history, there was never a time in which a distinction was made among the real persons based on their capacity to have rights and duties.
D. Capacity to have rights and duties is an active capacity.
E. Capacity to have rights and duties includes capacity to enter into legal transactions.

9 In order to understand the hierarchy among the written laws, ……'s pyramid may be used.

Which of the following completes the blanked part of the sentence above?

A. Locke
B. Montesquieu
C. Jhering
D. Savigny
E. Kelsen

10 Which of the following written laws occupies the highest place in the hierarchy of written laws?

A. Codes
B. Statutes
C. Constitution
D. Customs
E. International treaties

Answer Key for "Test Yourself"

1. C	If your answer is wrong, please review the section "Legal Persons".
2. A	If your answer is wrong, please review the section "Need to Business Law".
3. A	If your answer is wrong, please review the section "Real Persons".
4. D	If your answer is wrong, please review the section "Concept of Business Law".
5. E	If your answer is wrong, please review the section "Introduction to Turkish Law".
6. C	If your answer is wrong, please review the section "Limited Incapacity".
7. B	If your answer is wrong, please review the section "Capacity to Act".
8. B	If your answer is wrong, please review the section "Capacity to Have Rights and Duties".
9. E	If your answer is wrong, please review the section "Written Laws".
10. C	If your answer is wrong, please review the section "Constitution".

Suggested answers for "Your turn"

Look up the word business in the Cambridge Online Dictionary: https://dictionary.cambridge.org/dictionary/ english/business. Try to write example sentences to reflect its different meanings.

your turn 1

The Cambridge Dictionary gives three different definitions:

Business (Selling): the activity of buying and selling goods and services. E.g. The new firm plans to make a lot of business with foreign companies.

Business (Company): a particular company that buys and sells goods and services. E.g. Our neighbors are running their own family business.

Business (Work 1): work that you do to earn money. E.g. He travels a lot for business.

Business (Work 2): the amount of work done or the number of goods or services sold by a company or organization. E.g. Because of the high inflation rates, business is not good these days.

Who is Hans Kelsen? Why is he important in the discussion of the written laws?

your turn 2

Hans Kelsen is a famous Austrian-American jurist and a legal philosopher. He was born in 1881 and died in 1973. He formulated a kind of positivism, known as the "pure theory of law." He created a pyramid to classify the written laws and also to show the hierarchy between them. You can get more information on Kelsen from the internet sources below:

-https://www. britannica.com.biography

-www.newworldencyclopedia.org.entry

Chapter 2 Law on Commercial Enterprise

After completing this chapter, you will be able to;

Learning Outcomes

1. Define the characteristics of a commercial enterprise and its basic features within the system of Turkish Commercial Code and list the legal consequences of acting as a commercial enterprise.
   Define commercial business and its legal consequences
2. Distinguish the acts which constitute unfair competition (trade) and recognize the differences between unfair trading and competition law and list types of acts that may constitute unfair trading and list/describe the possible legal actions that can be taken against unfair trading

Chapter Outline

Introduction
Law of Commercial Enterprise Within the Systematic of Turkish Commercial Law
Unfair Competition (Unfair Trade Practices)

Key Terms

Commercial Enterprise
Merchant
Commercial Business
Unfair competition

INTRODUCTION

What is a commercial enterprise? What makes it so important for the business life? Who is a Merchant? What are the legal consequences of being a Merchant? What are the duties and liabilities of Merchants? What is unfair trade? What are the legal mechanisms and remedies against unfair trade? Are there special courts dealing with commercial matters?

These are just couple of questions which will be briefly touched upon in this Chapter on the Law of Commercial Enterprise as one of the major components of Turkish Commercial Law.

Economic growth has affected not only by the economic policies but also affected from a sound legal infrastructure which is particularly true for the design and enforcement of the rules regulating commercial business. The right combination of appropriate economic and legal environment are the major components that serve for the sound and sustainable economic growth aimed at national and international markets.

The scope of commercial business and commercial law is very broad. Those rules get even broader with some sector-specific regulations. For example, equally broad is the scope of the rules which apply to financial and capital markets as the locomotive of commercial business. Commercial Law is the key area of law with divergent set of rules all of which regulate one aspect of commercial business life and it is accompanied with many other specific rules.

The pattern of trade (whether it is at national level or international level) or the structure of the markets (commercial business in a regulated industry or commercial business as a foreign company or as a state undertaking) affect the rules to be applied to the commercial business concerned. Thus the economic model followed as well as the legal environment and so the institutional legal structure are all equally important. For example, where we talk of international trade (import/export) we simply have to refer to laws on imports and exports; where we talk of monopolies or restrictions of competition in any market, Competition Law will be applied to the legal question at stake. In cases where international trade is concerned, the Constitution empowers the President to regulate foreign trade, and in order to regulate foreign trade for the interests of the national economy, the President may be empowered by law to introduce or lift additional financial duties on imports, exports and other foreign trade transactions, except taxes and similar duties.

Sometimes the question may be related to more than one of the above where these rules will be applicable all at the same time. For example, the acquisition of a company would require the application of commercial law, competition law, and where necessary, capital markets law and some sectorial rules (such as banking or energy, etc.) where appropriate.

In this Chapter, Law of Commercial Enterprise will be briefly covered. Commercial Enterprise forms the basis of Commercial Law. Within the purposes and coverage limitations of the book, the relevant topics are only generally referred. One should make further reading if detailed or specific information is required.

LAW OF COMMERCIAL ENTERPRISE WITHIN THE SYSTEMATIC OF TURKISH COMMERCIAL LAW

It is true that Commercial Law qualifies for one of the most significant areas of law in any jurisdiction. **Commercial Enterprise** within that context is one of the main legal concepts regulated in the first book (sub-section) of Turkish Commercial Code No.6102 ("TCC") which is enacted in 2011 and became effective in 2012. TCC is the primary legislation that focuses on commercial transactions, and therefore plays a vital role in business life.

As being a country of civil law (continental law), Turkey has been influenced from the Swiss Commercial Law in many areas of private law. The history of modernization of the Turkish laws on business and commerce has a history of nearly 200 years. Historical overview reflects that in addition to the reception of the Swiss Civil Code and Code of Obligations, the Turkish legislature enacted the first systematic Commercial Code, which had been prepared by the German-born Turkish-naturalised law professor Ernst E. Hirsch on the basis of, mainly, Swiss law, and to some extent, German law. The adoption of the Commercial Code in 1956

as well as that of the Swiss Codes in 1926 deeply affected the life of every Turkish citizen and played a very significant role in the Westernisation of the country. Following the first Commercial Law of the Turkish Republic enacted in 1926, with the Commercial Law enacted in 1956, Turkish legal institutions adopted not only Swiss and German rules, but also, progressively, the academic opinion on their interpretation in their own judgments and the academic knowledge and approach of these countries.

The TCC has introduced significant new issues to commercial business life some of which can be listed as **corporate governance** regarding good management and internal and independent audit that are to be applied to all capital stock companies; **creation of web sites, information society services and access rights of information; and single share holder (one-man) joint stock company and single member limited liability company.**

TCC is divided into six chapters:

- Book 1: (Articles 1 – 123) on Commercial Enterprise
- Book 2: (Articles 124 – 644) on Commercial Companies
- Book 3: (Articles 645 – 849) on Valuable Papers (Negotiable Instruments)
- Book 4: (Articles 850 – 930) on Transport (Carriage) Operations
- Book 5: (Articles 931 – 1400) on Maritime Law
- Book 6: (Articles 1401 – 1520) on Insurance Law

Law on Commercial Enterprise

TCC regulates several aspects of commercial business life. TCC is relatively a new Law as it has been thoroughly revised and as stated in the Preamble of the TCC there has been several factors which influenced the enactment of a new TCC. Rather than merely amending out-of-date provisions of the old Law (dating from 1950's), the legislature decided to pass a completely new law for a modern and contemporary legal environment for the commercial business life in Turkey. Recent developments in Turkish economic laws such as candidacy and negotiation process with the EU; technological developments and the Internet; international markets and global trade; new economic laws affecting commercial business; developments in transportation; developments related to corporate compliance and other company matters and the reforms in the commercial codes in several European states.

The first book of TCC regulates matters related to commercial business such as consequences and liabilities of a commercial enterprise; types of merchants and acting merchants; bankruptcy, trade registry, interest in commercial business; transfer of commercial enterprise; commercial litigation; consequences and liabilities of being a merchant; trademark and trade name, commercial books and unfair competition/trading.

your turn [1]

List the chapters of Turkish Commercial Code.

The scope of the TCC is set forth in the first Article. Article 1 TCC reads as follows:

I – Commercial Provisions

Article 1– (1) Turkish Commercial Code is an inseparable part of Turkish Civil Code dated 22/11/2001 numbered 4721. The provisions in this Law, together with other specific legislation related to the acts and transactions regarding a commercial enterprise are commercial provisions.

(2) The Court, in cases where there is not a provision applicable to the dispute, shall decide in accordance with commercial customary rules and in cases where commercial custom does not exist shall decide in accordance with general provisions.

Pursuant to Article 3 of TCC all matters regulated in the law are considered as **commercial business** and all matters (businesses and acts) concerning a commercial enterprise are considered as commercial. In this regard rendering goods and services for the commercial enterprise, making a lease agreement, concluding contracts with employees in a commercial enterprise, engaging

with a maintenance company for the work premises, signing a power of attorney for the representation of the commercial enterprise are all examples of commercial business.

What is a Commercial Enterprise?

Commercial Enterprise is simply defined in Article 11/1 of the TCC by way of a reference to a benchmark with the turnover threshold of a craftsman's business. The definition provides three essential elements that should be required for a commercial enterprise. Accordingly, in the light of the definition of the law, the ***essential elements of a commercial enterprise*** can be listed as follows:

i. to generate an income that will be above the craftsman's turnover to be announced: There should be a will/purpose of the enterprise to generate an income which shall be above a certain threshold to be announced by the Pesident. The criterion here is that the threshold would be above the level of the turnover of a craftsman's enterprise. The threshold for a craftsman's enterprise is announced by a presidential decree (Art.11/2).

ii. continuity: The commercial business should be continuous, not temporary.

iii. independence: This criterion qualifies a commercial enterprise from a "branch" which is not an independent unit. A branch or a commercial representative do not qualify as a commercial enterprise due to the lack of this criterion. Therefore, the criterion for independence is significant for defining a business unit as a commercial enterprise. Accordingly, a commercial enterprise has a legal capacity that is much broader than a branch which has a limited scope of activities.

Commercial enterprise serves as the core of the TCC as it stands at the centre of the systematic of the TCC. Within the scope of Commercial Law, enterprises are classified as commercial enterprises and craftsman enterprises. The term commercial enterprise is defined in the Law by way of a reference to the craftsman's activities.

On the other hand, the term "undertaking" which is quite a close concept to enterprise is defined in Competition Law No.4054 (Article 3) as "*natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole*". It is a broader term compared to commercial enterprise and the two definitions reflect the deliberate choice of the legislator in order to provide two different entities and definitions. "Undertaking" a broader and comprising concept compared to a "commercial enterprise". In other words, within the purposes of Competition Law, every commercial enterprise qualifies as an undertaking within the meaning Competition Law so long as it can take its decisions independently.

A commercial enterprise comprises of several different assets, such as human capital, tangible or intangible altogether which form the elements that the enterprise is founded upon. Such elements can be shown as follows:

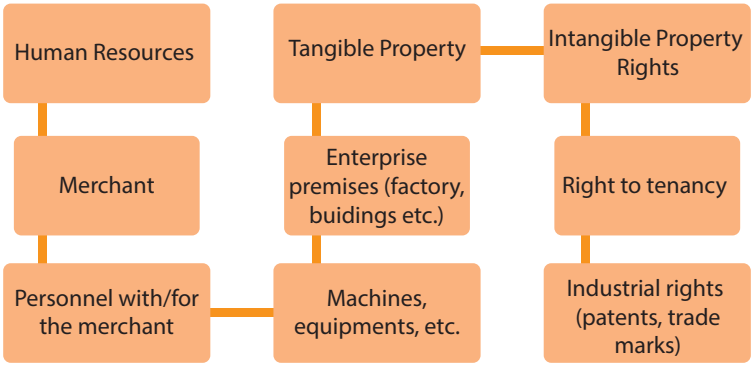

Table 2.1 assets of a commercial enterprise

Some of the assets given above are explicitly listed in the TCC (Art.11/3). Unless otherwise agreed by the parties, the acquisition of a commercial enterprise also covers the acquisition of the tangible property, as well as the intangible property such as the rights to tenancy (if any); goodwill (value) of the enterprise, trade name, intellectual property rights and all other elements within the scope of the property that is continuously attributed to the enterprise. Agreements which cover the intangible property and so causes a change in ownership are to be registered in the Trade Registry.

your turn 2

What are the essential elements of the commercial enterprise?

Acquisition of a Commercial Enterprise

For the acquisition of a commercial enterprise, the rules applicable to such legal transactions would be either the relevant provisions of TCO or alternatively the TCC depending on what basis the commercial enterprise has been acquired. In principle, the acquisition of a commercial enterprise is subject to Article 202 TCO, and where appropriate Article 7 of Competition Law , unless the acquisition comprises of the company shares where relevant provisions of TCC and where appropriate Capital Markets Law will be applicable.

The following are some important points relevant to the acquisition process of a commercial enterprise:

a. A commercial enterprise is to be acquired with all its credits and debts (Article 202 TCO). On the other hand, it is not obligatory to include all the elements (shown in Table 2.1 above) on which the commercial enterprise is founded. Thus, the parties to the acquisition can agree otherwise with a contract that not all the assets will be included in the scope of the acquisition.

b. Pursuant to the TCC, it is possible to acquire a commercial enterprise with all the elements therein without a need to separately conclude agreements or registrations for each of the elements concerned.

c. The acquisition needs to be agreed with a written agreement. In such a case, the acquisition of the immovable property included within the assets of the commercial enterprise and so covered in the written agreement, need not be registered or agreed separately.

d. In some cases, depending on the nature and turnover threshold of the acquisition, the agreement may need to be notified to the Competition Authority under Article 7 of the Law No.4054, for clearance.

Consequences of Acquisition of the Commercial Enterprise

The following are the legal consequences of acquisition of a commercial enterprise:

- The merchant who transfers his commercial enterprise leaves his commercial business and looses his status of being a Merchant.
- All the elements (assets) which are assigned to the commercial enterprise are considered to have transferred unless the parties agree otherwise.
- The acquisition of the commercial enterprise shall be subject to a sales agreement thus the agreement will be subject to the relevant provisions of TCO.
- The debts of the commercial enterprise subject to acquisition will be transferred to the acquiring party effective as of the date of announcement of the acquisition to the creditors or at the date of the announcement in the Trade Registry. As it was stated above, the debts will be transferred to the acquiring party without a need for a separate agreement on the debts.
- Together with the acquiring party, the merchant who is transferring the commercial enterprise shall continue to be jointly liable from the debts for two years. This legal obligation aims to minimize the risks arising from the transfer of the commercial enterprise without getting the consent of the creditor.

Commercial Business

The legal rules applicable to activities in the markets are based on whether or not the business concerned is qualified as a commercial or an ordinary activity. Accordingly, if there exists a commercial business, then commercial rules would govern that legal relation. For that reason, the definition of commercial business is of particular significance.

All matters regulated in the TCC are defined to be commercial business (Art.3 TCC). Pursuant to Article 3, without any exception and regardless of any relevance to a commercial enterprise all matters regulated in the TCC are defined as commercial business.

In addition to the subjects regulated in the TCC, as to Article 3, **any transaction or act which is relevant to a commercial business** is also considered to be commercial business. Despite the fact that this term is rather vague and broad, it has been accepted in literature that any act or transaction which is directly or indirectly related to commercial business, is deemed to be commercial business. For example, where a salesperson buys a computer for his business or where an art teacher rents an apartment for the purposes of giving seminars or courses or where an architect rents an office, these acts and agreements all qualify as commercial businesses as these agreements will be all made for the purposes of the commercial businesses concerned.

Pursuant to Article 19/1 TCC, principally all the debts of a merchant are commercial. Nevertheless, there exists an exception to this rule for the individual merchants (non-legal person merchants). If the individual merchant informs the other party that the transaction is not related to his/her commercial business or from the circumstances it is not appropriate that there is commercial business, then the debt is considered not as commercial but ordinary. The typical example is that where the merchant buys furniture for his office, this transaction is not commercial business. However, the exception stated in Article 19 TCC is only for the individuals, and so there is not such an exception for the legal persons as all of their transactions are considered as commercial business.

Unless otherwise provided in the law, agreements, which qualify to be commercial business for one of the parties, will also qualify as commercial business for all the parties concerned. Based on Article 19/2 TCC one can be subject to commercial rules although he/she is not a merchant.

Pursuant to Article 3 TCC, without any exception and regardless of any relevance to a commercial enterprise all matters regulated in the TCC are defined as commercial business.

Consequences of Being Defined as a Commercial Business

- Joint and several liabilities (presumption of joint and several liability)

In cases where more than one person is liable for the debts, unless they agree otherwise on the mode of their liability or this is specifically regulated in the Law, everyone is liable from certain amount of the debt.

- ***Commercial Interest***

In commercial business, there are different forms of interest:

as to its nature	as to its calculation	as to its sources	as to its commercial nature
• capital interest • interest for delay	• simple interest • compound interest	• contactual interest • statutory interest	• commercial interest • ordinary interest

Table 2.2 Types of interest

Interest as to its Nature

Capital interest is the interest payable to the creditor for being deprived of the amount of money that she/he lent to the debtor.

Interest for delay is the interest payable where the debtor fails to pay debts back in time. Pursuant to Article 10 TCC, unless otherwise provided, interest for delay is to be charged starting from the due date of the debt, and if there is not a specific date for delay, then from the date of notification of the debtor (by the creditor).

Interest as to its Calculation

Simple interest applies only for the capital and its is calculated for a certain period of time whereas **compound interest** is the interest calculated over the sum reached by the addition of a certain interest on the initial capital.

Interest as to its Source

Contractual interest is the interest which is based on an agreement between the parties whereas statutory interest is the interest rate which applies where the parties have not agreed otherwise. The parties can freely agree on the interest rates, however, if they have not so agreed, then the statutory interest rates apply.

Commercial Interest-Ordinary Interest

If the debt arises from a legal relation which falls within the scope of Article 3 TCC or Article 19 TCC, then as this legal relation will qualify as commercial business, the interest to be applied would be **commercial interest.** However, if the debt cannot be qualified as commercial, then the interest to be applied will be **ordinary interest.**

Statute of Limitations (Article 6 TCC)

Unless otherwise provided in the law, the statute of limitations in commercial business cannot be changed by contracts. Therefore, the provisions related to statute of limitations are obligatory provisions which the parties cannot agree otherwise.

Commercial Provisions

Commercial provisions are defined in the second sentence of Article 1/1 TCC.

As to of Article 1/1:

"In addition to the provisions in this Law, specific provisions in other laws regarding transactions and acts related to a commercial enterprise are commercial provisions."

Accordingly, there are other laws in which certain acts or transactions related to commercial enterprise are regulated, which will also be considered as commercial provisions. Law no. 1163 on Cooperatives, Law no.5411 on Banking, Law no: 6362 on Capital Markets, Law no.3905 on Statutory Interest and Interest for Delay can be stated as examples of such laws which comprise of commercial provisions.

Article 1 TCC also refers to a hierarchy for the application of commercial rules. According to Article 1 TCC, in the absence of a commercial provision applicable to a commercial business, commercial customary rules shall be applied, and in the absence of a commercial customary rule, general provisions shall apply.

Within the context of the provision above, although it is not explicitly stated in the Law, the list of category of rules applicable should be understood as in the following:

A. Commercial provisions
    1. Compulsory (obligatory) provisions
    2. Provisions in the Contract
    3. Non-compulsory provisions (complimentary and interpretative rules)
B. Commercial customary rules
C. General provisions

Merchants

A merchant within the scope of the TCC can either be an individual or a legal entity with a legal personality, and depending on the legal status of the merchant, there may arise different legal consequences.

(Individual) Merchants

According to Article 12 TCC, a person (individual), who even partially operates a commercial enterprise on his behalf, qualifies as a merchant. If a commercial business is owned by a person who is below the age of 18 (non-adult), but is operated either by the parent or by a guardian, then the parent or the guardian will not be considered a merchant (Article 13 TCC).

In Article 12/ (2) and (3) TCC, two special situations are regulated which set forth the obligations of merchants or acting merchants. As to Article 12/2 TCC, an individual who has not factually started to operate a commercial enterprise would also be considered a merchant if he/she announces through a circular or any sort of media, that he/she has opened and started to operate a commercial enterprise or who has announced in

the commercial registry that he/she has started to operate a commercial enterprise.

In addition to the above, someone, who acts like a partner of a company which does not legally exist or of an ordinary company or on his/her behalf or acting as if he/she has started a commercial business, will be liable as a merchant towards the third parties with good faith.

Pursuant to Article 14 TCC, those who are running a commercial enterprise, despite the fact that he/she is prohibited from trading either due to the requirements of their professions or jobs or due to a prohibition arising from law or court decision, or acting without a permission or consent where it is so required, will also be considered a merchant.

(Legal entity) Merchants

Article 16/1 TCC defines that merchants with a legal personality and accordingly commercial companies, foundations and associations, state, municipality, local authority and village authority and other public legal persons who operate a commercial enterprises regardless of their legal status under different branches of law will be considered as merchants.

Legal Consequences of Being a Merchant

There are certain legal consequences which arise as a result of being a merchant. These are not optional or subject to any choice or preference of the merchant but they arise as a consequence of the fact that someone is or acting as a merchant. These legal consequences can be listed as follows:

- ***Obligation to have and use a trade name:*** Within fifteen days following the commencement of the commercial enterprise all merchants are under the obligation to have and get it registered and use a trade name (business name/ commercial name) (Article 18 TCC).
- ***To be subject to bancruptcy for all kinds of debts:*** Regardless of the nature of the debts and regardless of having a legal personality, all merchants are subject to bankruptcy rules for all their debts.
- ***To be registered in the Trade Registry:*** A merchant is under the obligation to get his/ her enterprise and trade name registered in the Trade Registry within fifteen days following the commencement of the enterprise (Article 18/1 TCC).
- ***To keep books and documents:*** The merchant has to keep necessary books and keep documents as required by the law (Article 18/1 TCC).
- ***To get registered with the Chambers of Commerce and Industry:*** Pursuant to the Law on the Turkish Association of Chambers and Exchanges and Chambers and Exchanges, merchants registered in the Trade Registry have to get registered with the relevant chambers.
- ***To act as a diligent businessman:*** To act diligently indicates an expectation that a merchant has to foresee legal and economic circumstances and foresee future. Pursuant to the case law, to act diligently indicates a type of a behaviour from the merchant that he/she should reasonably foresee the future and act reasonably cautiously by taking into account the nature of commercial business (Article 18/2 TCC).
- ***The right to request payment and interest***: A merchant has the right to request payment for services or goods provided within the scope of commercial business and claim interest for the advance payments made (Article 20 TCC).
- ***Presumption of commercial business:*** As a presumption, debts of a merchant are considered to be commercial unless the merchant clearly states that the transaction concerned is not related to his/her commercial business or from the circumstances it is obvious that the business cannot be regarded as commercial (Article 19/1 TCC).
- ***To issue an invoice:*** Upon the request of the customer, a merchant who produces, or sells goods or provides services has to issue an invoice regardless of the fact that the requesting party is a merchant or not

(Article 21/1 TCC). The merchant does not have the obligation under the TCC to issue an invoice unless the customer requests, however to issue an invoice is an obligation under the Tax Law.

- ***Not to request the decrease in the payment and penalty:*** The merchant cannot request from the court a decrease in the interest or in the fine arising from commercial business (Article 22 TCC) where as these can be requested from the court by non-merchant persons under certain circumstances (Articles 121, 182, 525 TCC).
- ***Right to object to the receipt and confirmation letter within 8 days:*** If a merchant does not object to the contents of a receipt within 8 days following its receival, then the merchant is considered to have confirmed the contents therein Article 21/2 TCC).
- ***Enforcement of commercial customary rules:*** Commercial customary rules apply in between merchants only. However, in cases where the non-merchant party is also aware of the customary rule, then this rule can also be applied to non-merchants (Article 2/3 TCC).
- ***Notifications and warnings:*** In cases where both parties to a commercial transaction are merchants, then the notifications and warnings, such as the termination of contract, which are related to the commercial enterprise, are to be made in accordance with certain formalities set forth in the law (Article 18/3 TCC).
- ***Procedural rules in sales and changing of the goods:*** The rules applicable to sales and changing of the goods are subject to the provisions in Code of Obligations which is also applicable to merchants. However, there are special provisions applicable to merchants in sales and changing of the goods (Article 23/1 TCC).
- ***Easiness in benefiting from the right to lien:*** Lien is actually a right given to another by the owner of property to secure a debt, or one created by law in favour of certain creditors. (*Lien* is a French word meaning "knot or binding" that was brought to Britain with the French language during the Norman Conquest in 1066; and since then used in British English). The statement that someone's property is "tied up" describes the effect of liens on both real and personal property. Persons in commercial relations or business obtain liens for their services to personal property.

Auxiliaries (of a Merchant)

It is quite difficult for a Merchant to run the whole business on his/her own especially where the scope of the business requires a team of people to work together. For that reason, the merchants work together with some other people, the status of whom can be different as to the legal relation that they have with the merchant. These people are not themselves merchants, but they either independently or dependently work with the merchant in the operation of the commercial business.

Some of these people work under the directions and the supervision of the merchant, who in a way work with the merchant dependently. Dependent auxiliaries can be grouped as to their authority to represent the merchant where some of the auxiliaries have the authority to represent the merchant. Some of these auxiliaries are regulated in the TCO where as some are regulated in the TCC. A commercial representative (Article 547 TCO), commercial proxy (Article 551 TCO), other auxiliaries (Article 552 TCC) and marketing staff, sales commissioner (Article 532 TCO), commissioner for transportation business (Article 917 TCC), agency (Article 102 TCC) and brokers (Article 520 TCC) are independent trade ancillaries who have the authority to represent the merchant.

On the other hand, there can be many other people that the merchant is employing depending on the scope of the commercial business where those people do not have any authority to represent the merchant. For example, the security staff in a factory, the secretary of the manager, or the driver in the company are dependent ancillaries who do not have the capacity to represent the merchant.

There are also independent auxiliaries who work with the merchant, but while doing so they can individually arrange his methods and

time management and work load independently from the merchant. Those who work independently usually run their own business separate from the commercial business of the merchant. Some of the independent auxiliaries have the capacity to represent the merchant where some of those do not have such a representation capacity.

Dependent auxilliaries	Independent auxilliaries
with the capacity to represent the merchant such as a commercial representative, commercial proxy, marketing staff	with the capacity to represent the merchant such as an agency
no capacity to represent the merchant such as a driver, a secretary, a security officer, a cook	no capacity to represent the merchant such as as a commisioner

Table 2.3 People (auxiliaries) working with/ for the merchant

Commercial Courts

Commercial Courts are structured to have authority within the civil courts of first instance, and they are specifically authorised to hear commercial disputes. Commercial Courts are designed to be specific chambers within the organisation of civil courts, and they are established where the density of commercial disputes require the organisation of separate commercial courts; and otherwise the civil courts in that jurisdiction will have the authority to hear commercial disputes.

Commercial Cases are classified under three categories.

i. **(Absolute) Commercial cases:** These are the cases which, regardless of the status of the parties or the dispute concerned being commercial or not, are defined in the law as commercial cases. These are explicitly listed in the TCC and in other laws.

ii. **Cases arising from transfer, reserve and intellectual and industrial property rights (Article 4/1 TCC):** These are specific cases where the dispute arising from the legal relations should be related to the commercial enterprise of at least one of the parties.

iii. **(Relative) Commercial cases arising from disputes regarding commercial enterprises of both parties (Article 4/1 TCC):** The disputes which are not within the scope of the above categories but still related to the commercial enterprises of the parties, then the cases arising from such disputes are also regarded as commercial disputes and so heard before the commercial courts.

Trade Registry

Trade Registry is an official registry regulated in the TCC (Articles 24-38 TCC). Some aspects of business and transactions related to commercial enterprise are to be registered in the Trade Registry. Registered matters create legal consequences following the publication in the Trade Registry Journal of Turkey. The Registrar has the duty to review the existence of statutory requirements for registration. Following the registration of the transactions which is required to be registered, third parties cannot claim that they have lack of knowledge regarding such transactions since registration acts as a presumption that it is known by everyone. In the registration of legal entities, especially the legality and compliance of the required documents are to be reviewed.

A registration in the Trade Registry can be made based on the following motives:

i. **Upon request:** In principle, the registration in the Trade Registry is made upon request (Article 28 TCC).

ii. **Upon Registrar's initiative or notification:** Despite the fact that the principle is registration upon request, under certain

exceptional circumstances there may be a registration upon the Registrar's own initiative where the law so requires (Article 32 TCC).

If the matter to be registered becomes legally effective before the registration, and registration is only to declare that commercial act or transaction, then the effect of this registration is **declaratory.** Where, as if based on the explicit provision of the law, a registration is compulsory for the effectiveness of the legal transaction, then this registration is **constitutive.**

Those who intentionally provide misleading or wrong information to the Trade Registry for registration have to compensate the damages caused.

Commercial Books

The introduction and enforcement of modern accounting rules and new norms for commercial books stand as one of the most significant aspects of the TCC, among the newly introduced topics. It is required that all the accounting systems of Turkish enterprises shall be arranged in accordance with Turkish accounting standards, which have been and will be further enforced according to internationally accepted financial standards (IFRS). In addition to that, commercial enterprises shall document and file all of the commercial transactions, if necessary electronically, which means that electronic registry mechanisms shall be integrated within the accounting system of an enterprise (Article 64/2 TCC). One of the purposes with the change in the system is transparency and accuracy.

UNFAIR COMPETITION (UNFAIR TRADE PRACTICES)

One of the important headings of the TCC is unfair competition rules. Many states have adopted unfair trade laws either separately or within the scope of commercial laws to prevent unfair trade practices in business. In general, rules on unfair competition (unfair trade practices) consist of using various deceptive, fraudulent or unethical methods to obtain business. Unfair trade practices include misrepresentation, false advertising and acquiring and declaring other's business secrets and all other acts that are declared unlawful by the law. The core of unfair competition law is based on the protection of all the market participants. In order to avoid any misunderstanding in terms of terminology, the term unfair trade practices are used here interchangeably, to distinguish unfair competition. As despite 20 years of implementation of competition law, there is still some degree of misunderstanding in unfair competition and competition law partially due to the same terms competition used in both of the areas.

In Article 5 of the Constitution, titled *Fundamental aims and duties of the State* welfare of the individual and the society, removal of economic obstacles and principle of social state which are all relevant to the philosophy of protection of consumer welfare are explicitly referred among the fundamental aims and duties of the State.

> ***ARTICLE 5-*** *The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."*

Article 48 of the Constitution which regulates freedom of contract is directly related with commercial enterprise. It not only refers to freedom of work but also to the freedom of establishment of private enterprises. Article 48 of the Constitution reads as:

> ***Article 48:*** Freedom of Contract
> *Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free. The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability".*

Article 167/1 of the Constitution, on the other hand, is referred as the Constitutional basis of competition law. The same can also be argued for unfair competition (trade rules). Article 167 of the Constitution titled Protection of Competition envisages as follows:

> ***Article 167***
> *The State shall take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, capital, goods and services; and shall prevent the formation of monopolies and cartels in the markets, emerged in practice or by agreement. In order to regulate foreign trade for the benefit of the economy of the country, the Council of Minsters may be empowered by the law to introduce or lift additional financial impositions on imports, exports and other foreign transactions in addition to tax and similar impositions."*

The second sentence specifically refers to competition (antitrust) rules but the first part stated in the rule broadly refers to sound and orderly functioning of all the markets. Thus, to avoid unfair competition by laws is also a tool to serve to this aim.

In Article 171 of the Constitution, the State is given the duty to take measures, in line with national economic interests, to ensure the development of cooperatives, which shall primarily aim at increasing production and protection of consumers.

Article 172 of the Constitution is a specific provision for the protection of consumers that sets forth the duty of the State to take measures to protect and inform consumers and encourage the initiatives to protect themselves.

Article 173 of the Constitution sets forth the duty of the State on measures to protect and support craftsmen and artisans.

In the broadest sense, the following can be listed as the legislation related to competition, and thus, each of the following set of rules regulate protection of competition relations in the markets from different perspectives.

1. *Unfair Trade Rules (TCC and Code of Obligations)*
2. *Non-Compete Agreements/Restrictive Covenants (TCC and Code of Obligations)*
3. *Law No. 4054 on the Protection of Competition*
4. *Law No.3577 amended with Law No.4412 on the Prevention of Unfair Competition in Imports*
5. *Law No.6015 on the Surveillance and Control of State Incentives*

Within the scope of this Chapter only unfair trade rules in the TCC will be covered, an advisory reading list will be provided for the others at the end of the Chapter.

Unfair competition rules aim to protect not only the competitors but also the buyers, consumers, the public, the economic order and the competitive environment.

Unfair Competition/Trade Rules in Turkish Commercial Law

Unfair competition in trade relations is mainly regulated in the TCC. There are also further general and specific provisions in some other legislation. These are regulated in Turkish Code of Obligations and in some specific laws such as intellectual and industrial property laws and in consumer protection law.

Unfair Competition in Code of Obligations

Unfair Competition in Turkish Commercial Code

Unfair Competition in Intellectual Property Law (Copyright Law No.5846 amended by Laws No.5101 and No.4630)

Unfair Competition in Industrial Property Law No.6769

Unfair Competition in Consumer Protection Law No.6502

According to in Article 2 of the Turkish Civil Code, "*everyone is bound to comply with the principle of honesty in exercising their rights and perform obligations".* The misuse of a right which constitutes an offending/damaging act to others is not protected by law. Article 2 of the Turkish Civil Code requires that everyone shall comply

with the rules of good faith when exercising rights and performing obligations. The misuse of a right which constitutes an offending/damaging act to others is not protected by law. The principle stated in Article 2 of the Turkish Civil Code is also reflected in Article 57 of the Code of Obligations which stipulates that *"... any person whose business goodwill is damaged or decreased by false publications or other schemes which are contrary to good faith, may claim an injunction to restrain the continuation of such acts and in case of fault claim damages …".*

Article 57 of TCO regulates unfair competition as a special type of tortious activity for non-commercial relations. It is based on the idea and general principle of protection of freedom to act in the economic area in order to protect the economic personality stated in Article 24 of the Turkish Civil Code.

Article 57 of the TCO reflects this general provision specifically for debt relations and sets forth that:

> *"... any person whose business goodwill is damaged or decreased by false publications or other schemes which are contrary to good faith, may claim an injunction to restrain the continuation of such acts and in case of fault claim damages. For unfair trading in commercial business the provisions of TCC is reserved…"*

Despite an explicit reference to unfair trading in commercial business in Article 57 of TCO, due to lack of a limitation in the TCC on the scope and coverage of unfair competition rules, there are arguments in literature on the scope of the two legislation in some areas.

TCC sets forth a specific provision for the protection of principle of honesty in trade relations where unfair competition is described as *"... misuse of economic competition in any manner by means of deceitful behaviour or other acts incompatible with good faith..."*

Unfair competition among merchants is regulated under a separate section in the Turkish Commercial Code in Articles 54-63. Article 54 TCC sets forth an objective and broad criterion, and unlike the earlier version of the Law, also makes clear that unfair competition may not be only between two rivals. There are also specific provisions dealing with unfair competition regarding intellectual property law such as unfair trading in trademarks, trade names and other intellectual properties usages. Yet the criteria given in Article 54 TCC are rather vague, if public interest is damaged due to misleading acts, this also constitutes unfair competition. In Article 55 TCC, some types of acts are listed as a non exhaustive list of acts which might be considered as acts contrary to good faith.

These include passing off one's products as though they were made by someone else, using a trade name confusingly similar to that of another, stealing trade secrets, and various forms of misrepresentation.

Under the wording of Article 54 of the TCC any misuse of economic competition by acts contrary to principle of honesty/good faith is deemed unfair competition. Both goods and services are considered within the scope of this provision.

Following a general description of unfair trading/competition in the Law, a non-exhaustive list of certain acts is given in Article 55 TCC comprising examples of unfair competition:

Pursuant to Article 55/1 TCC the listed acts are major examples of unfair competition:

a) in addition to other unlawful acts, the advertisement and sale methods that are against the principle of honesty and especially
   1. degrading a competitors' business, products, prices or activities with false and misleading declarations,
   2. providing false or misleading information on himself/herself, his/her commercial enterprise, logos, products, goods, activities, prices, sales campaigns, business relations or by this way letting a third party lead in competition,
   3. despite the fact that he/she does not hold a diploma or a certificate acting as if he/she holds such degrees in order to cause an image that he/she has an exceptional capability,
   4. causing and benefiting from confusion deliberately created with a competitors' business, products or works,

5. providing false or misleading information about himself/herself, his/her commercial enterprise, products, goods, activities, prices, or by providing degrading information about competitors, or compare with others, goods, products or prices or letting a third party lead in competition,
6. more than once, selling some selected products below the supply prices and notably declaring these in its advertisements, and misleading its customers concerning its own, or its competitors' talents, by selling these products at their supply prices,
7. misleading customers as to the real value of products using bundling practices,
8. restricting the choice of customers using aggressive sale tactics, and/or
9. using provisions containing false or missing information as to the price, payment conditions, contract period, consumers' right in an instalment sale, or consumer loan agreements,
10. not anoouncing its trade name explicitly in the sales with instalments or in similar legal transactions or overall or total sales price or not announcing the additional cost in Turkish Liras in sales with instalments or the annual ratios,
11. announcing its trade name or net value of the credit or the total costs or the effective annual interest in consumer credits,
12. within the framework of its enterprise, using incomplete or incorrect information on the contractual formulations where subject, price, payment conditions, contract period, withdrawal or termination right or the right of the consumer to pay before the due date.

b) to influence customers to breach or terminate their agreements, with the intention to conclude agreements with them, constitutes unfair competition. In this respect, the same provision underlines certain examples such as
   1. concluding contracts with customers by influencing them to breach their agreements with competitors,
   2. influencing the employees, attorneys or other associates of competitors to disclose or providing confidential production/work information,
   3. influencing a consumer or a customer to cancel or terminate his/her sales agreement or consumer loan agreements in order to be able to execute similar agreements with him/her,

c) to prohibit unauthorized benefiting from the products of a third party, such as offers, calculations or plans that are consigned or owned by third parties, or by transferring them through duplication techniques.
   1. to exploit a work product such as a proposal, plan or accounts delivered to himself/herself,
   2. to exploit a work product such as a proposal, plan or accounts of a third person delivered to himself/herself, knowing that he/she is not authorized to do so,
   3. without an appropriate contribution, to transfer the products of others ready to be marketed by way of technical reproduction and benefit from those products,

d) to disclose unlawfully the production or business secrets especially the information obtained confidentially and without a permission or information obtained unlawfully,

e) not to comply with business conditions, especially the conditions set by law or by contract or within a profession or ordinary conditions of business which apply also for the competitors are considered to have acted against the principle of honesty,

f) to use general contract terms that violate principle of honesty.

Examples of acts which may constitute unfair competition

- Advertisement and sales methods and other illegal acts, which violate the rule of good faith,
- Inducement breach or termination of contract,
- Unauthorized utilization of others' business products.
- discrediting others or their merchandise, products, works, activities or business transactions by wrong, misleading, unnecessarily offending statements,"
- Revealing production and business secrets unlawfully,
- Not complying with general business conditions,
- Using general business terms and conditions, which violate the rule of good faith,
- acts or statements aiming to distort a competitor's commercial reputation,
- lodging an unjustified lawsuit only to offend,
- predatory exploitation of another's services or achievements

Article 55 TCC provides examples which constitute trade practices considered unfair either to competitors or to consumers. The examples provided in Article 55 TCC do not constitute an exhaustive list, therefore other acts which mislead the competitors or violate the principle of honesty (good faith) between the competitors may also be considered as unfair competition.

As to Article 55, it is contrary to principle of honesty and therefore constitutes unfair competition *"… to give untrue information about another person's character or financial status …"*. In this regard, to give untrue information about another person's character, moral values or financial status is unfair competition irrespective of any *"rival relationship"* between the person who commits such an act and the merchant.

Incorrect or misleading statements made in favour of oneself or of third persons to put them in a more favourable position with regard to their competitors are also considered to be unfair competition. Comparative advertising about products, works, business activities or transactions which refer to a competitor's standing, business, merchandise, prices, etc. may also constitute unfair competition where it is declared misleading.

To misuse free economic competition by trying to create an impression of having exceptional capabilities, as by acting as if in possession of a degree, certificate or prize, is unfair competition. For example, if someone who is not entitled to use the title "authorized dealer" uses such a title, this may constitute unfair competition.

Trade names, trademarks are protected under unfair competition law when copyrights are violated or those names and marks are imitated and so caused confusion. Within the meaning of this provision, imitating someone else's trade mark or trade name or packaging style may constitute unfair competition.

Where certain products can only be produced under a patent, only those enterprises who have the patent or the patent license can produce and sell those products. Therefore, if someone produces or sells a patented product without a patent license, such an activity also constitutes unfair competition.

It is contrary to principle of honesty to procure, or to promise associates of third persons, interest to which they have no right in return for their violation of their contractual obligations, especially by abnormal rewards, monetary or otherwise, direct or indirect. Economic interests herein need not be financial. What is necessary is that these interests should be of a nature to cause persons to violate their obligations by an abnormal commercial reward. To provide certain advantages to persuade the competitor's employees to breach their business obligations is considered to be unfair competition.

Furthermore, it is also considered unfair competition to misuse economic competition by causing persons to divulge trade or production secrets. If confidential lists of addresses, agents, customers, suppliers, credit risks and similar lists are deemed "trade secrets", it is unfair competition to obtain these lists in a manner contrary to good faith and to benefit unjustly from them or to divulge them.

To issue incorrect or untrue certificates which may deceive persons with good faith constitutes unfair competition.

Further, it would constitute unfair competition if a merchant does not comply with commercial standards found in laws, regulations, and contractual terms or by established professional or local customs which are also applicable to all other competitors.

Who May Bring a Legal Action in the Case of Unfair Trading

Those who suffer damages from unfair trading/competition can seek far-reaching remedies against the committers. The courts can issue cease and desist orders and have other sanctions to wield as well. Article 56 explicitly lists those who are entitled to bring a court action in cases of unfair competition. Accordingly, the following can take the following legal actions:

i. **Persons whose economic interests are damaged or infringed:** Any person whose economic interests are damaged or endangered by unfair competition is entitled to claim remedies against unfair competition. Every competitor who has suffered damages is entitled to take a legal action.

ii. **Customers whose economic interests are infringed:** Customers have the standing to sue only where their economic interests are injured. For customers to have a cause of action, there must be actual damages. Prospective damages are not sufficient.

iii. **Professional or economic associations**: Professional and economic associations such as chambers of commerce, chambers of craftsmen, unions, consumer associations established to safeguard the economic interests of their members and public institutions are only entitled to bring actions for declaratory relief, prohibition, and termination of unfair competition.

Types of Legal Actions

In cases where there arises an unfair trading, the legal remedies that can be exhausted by the sufferers can be classified as civil law and criminal law remedies.

Civil Law Claims

The (civil law) legal actions which may be taken before the courts in an unfair trading situation are listed in Article 56 TCC:

Legal action for a declaratory relief (TCC Article 56/1(a))

A person who is injured or is in danger of suffering damages can ask for a declaratory judgement on the "unfairness" of the act. The unfairness of competition and existence of damages - if any - are to be proved by the claimant under the general rules of tort and law of civil litigation procedure. The purpose of this legal action is generally to ascertain a legal ground for a future action for damages, indirectly to prevent damages which may arise from the acts of unfair competition or to stop the running of the statue of limitations.

Legal action on the termination of the practices constituting unfair competition (Injunction) (TCC Article 56/1(b))

If the act constituting unfair competition is continuing or if there is the risk of repetition of the committing the unfair trading, it can be requested from the court to decide on the termination of the unfair trading. For example, within this legal action the court may decide to put an end to deceptive advertisements, to stop the use of trademark, an enterprise name or trade name, causing confusion, the disclosure or usurpation of business and production secrets, to secure the observance of legal or contractual business conditions.

Legal action for restitution of the unlawful situation (TCC Article 56/1(c))

The plaintiff may request from the court to order on the restitution of the position held prior to the acts of unfair competition. For example, if certain goods are put on the market with trademarks causing confusion with the original trademark of the claimant, it is possible for the owner of the trade mark to request from the Court that these marks be removed from the goods, or if these trademarks cannot be removed, to request to keep the goods completely off the market and/or to destroy them. Acts of unfair competition through misleading declarations may be restituted by the correction of these declarations.

Legal action for damages situation (TCC Article 56/1(e))

Damages are recoverable only if there is fault on the part of the person who has committed unfair competition subject to the general rules on tort. All other legal remedies can be exhausted without the requirement of fault on the party who commits the unfair trading. But in order to take a compensation case to court, the person who has committed the unfair trading should be at fault so that a compensation claim is brought before the court against him. Damages may be material, and in exceptional cases, immaterial. Accordingly, there must be damage or loss of profits suffered by the plaintiff and an adequate relation of causality between the act and damages (or loss) and in any case the plaintiff claiming compensation has to prove damages.

The kind of civil action allowed for unfair competition depends on the existence of fault of the person who committed unfair competition. In cases where there is no fault, one can bring only the first three category of cases, namely the actions for declaratory relief, prohibiting actions, or for the restitution of an unlawful situation. But if fault exists, in addition to those causes of action already cited, actions to recover material and/or immaterial damages are allowed and the court may order for the claimant "the equivalent of what the defendant may have obtained if there had not been unfair competition". Intention is not a requisite in the above stated cases but what is important is the claimant's actual or imminent suffering of economic loss or damages.

Criminal Law Actions

Those acts of unfair competition to which a criminal law sanction is attached are listed in Article 62/1 TCC. According to Article 62/1 TCC those who

a) intentionally commit the acts of unfair competition listed in Article 55 TCC,

b) intentionally provide false or misleading information on his/her personal situation, products, business, commercial activities in order that his/her offer or proposal be given preference above its competitors,

c) entice employees, officers or other workers to reveal their employers' or customers' production or commercial secrets, or

d) have not prevented a punishable act of unfair competition performed by their employees, workers or representatives, and/or have not restored the action of the misrepresentation, shall be punished by two years of imprisonment, or shall be fined, accordingly.

In addition to the above, it is an offence to continue acting in unfair competition in spite of a final and absolute decision of the courts on the matter. A person who does not comply with the judgement of the court is not only liable for the damages caused, but if complained about, may also be imprisoned for not less than six months or/and charged with a heavy fine.

your turn 3

In the case of an unfair trading/competition under the Turkish Commercial Code list who may bring a legal action?

Publication of the Judgement

Upon the request, if the plaintiff whose request has been upheld the Court deciding on the unfair competition may also decide, at the expense of the defendant, to publish the judgement once it becomes final. The judge determines on the form and substance of the part of the judgement to be published. The plaintiff has the right to request from the court to publish the judgement at the expense of the defendant irrespective of the existence of fault.

Precautionary Measures (TCC Article 61) and Civil Procedural Law Article 389-399

If delay might be harmful or if such remedies are just necessary to prevent serious damages to occur, precautionary measures may be requested and granted before or after lodging a case, the grounds for seeking a precautionary remedies include the preservation of the status quo, prohibition of unfair competition, restitution of the claimed

unlawful situation and correction of an incorrect or misleading declaration.

Liability of Employers and Legal Entities

Legal Entities (merchants with a legal personality) are liable for the unlawful acts of their organs committed in the course of their business. Employees are also solely and personally responsible for the unlawful acts which are outside the scope of their duties.

If unfair competition is committed by workers or employees in the course of their employed term, actions for declaratory relief, removal of the unlawful situation and a prohibiting action can be brought against the employee or against the perpetrator. If there is no dependency between the principal and the agent or if damages are not caused in the course of employment, the principal with fault is jointly liable together with the agent.

Statute of Limitations in Unfair Competition Cases

In unfair competition cases, the claimant must bring a cause of action within three years from the date of the existence of the right to take an action and one year from the date when he/she learns about the damages. In cases of criminal offences arising out of unfair competition, statute of limitations is five years.

Liability of the Press

Pursuant to Article 58 TCC, if unfair competition is committed by means of the press, an action may be brought, in principle against the author of the article or the editor. However, actions of unfair competition against press are allowed only where the article or advertisement has been published without the consent or contrary to the will of the author or the editor or for some reason it is not possible to reveal the author or to sue her/him in the Turkish courts. Liability of the press includes the responsible editor or the head of the advertisement department (where unfair competition is committed through advertisement). If either of these persons is not known, then the publisher is liable; and if the publisher is unknown, then the printing company/person is liable.

The types of actions that may be brought against those persons affiliated with the press are only actions for declaratory relief, prohibiting actions and actions for restitution. For damages the claimant must show the defendant's fault. Defendants who are at fault are jointly and severally liable for the damages caused.

your turn 4

List the civil law actions which may be taken before the courts in an unfair trading situation.

LO 1 Define the characteristics of a commercial enterprise and its basic features within the system of Turkish Commercial Code and list the legal consequences of acting as a commercial enterprise.
Define commercial business and its legal consequences

Summary

It is true that Commercial Law qualifies for one of the most significant areas of law in any jurisdiction. **Commercial Enterprise** within that context is one of the main legal concepts regulated in the first book (sub-section) of Turkish Commercial Code.

Commercial Enterprise is simply defined in Article 11/1 of the TCC by way of a reference to a benchmark with the turnover threshold of a craftsman's business. The definition provides three essential elements that should be required for a commercial enterprise. Accordingly, in the light of the definition of the law the ***essential elements of a commercial enterprise*** can be listed as follows:

i. to generate an income that will be above the craftsman's turnover to be announced: There should be a will/purpose of the enterprise to generate an income which shall be above a certain threshold to be announced by the President. The criterion here is that the threshold would be above the level of the turnover of a craftsman's enterprise. The threshold for a craftsman's enterprise is announced by a presidential decree (Art.11/2).
ii. continuity: The commercial business should be continuous, not temporary.
iii. independence: This criterion qualifies a commercial enterprise from a "branch" which is not an independent unit. A branch or a commercial representative do not qualify as a commercial enterprise due to the lack of this criterion. Therefore, the criterion for independence is significant for defining a business unit as a commercial enterprise. Accordingly, a commercial enterprise has a legal capacity that is much broader than a branch which has a limited scope of activities.

Commercial enterprise serves as the core of the TCC as it stands at the centre of the systematic of the TCC. Within the scope of Commercial Law, enterprises are classified as commercial enterprises and craftsman enterprises. The term commercial enterprise is defined in the Law by way of a reference to the craftsman's activities. A commercial enterprise comprises of several different assets, such as human capital, tangible or intangible altogether which form the elements that the enterprise is founded upon.

The legal rules applicable to activities in the markets are based on whether or not the business concerned is qualified as a commercial or an ordinary activity. Accordingly, if there exists a commercial business, then commercial rules would govern that legal relation. For that reason, the definition of commercial business is of particular significance.

All matters regulated in the TCC are defined to be commercial business (Art.3 TCC). Pursuant to Article 3, without any exception and regardless of any relevance to a commercial enterprise all matters regulated in the TCC are defined as commercial business.

As to Article 3, **any transaction or act which is relevant to a commercial business** is also considered to be commercial business. Despite the fact that this term is rather vague and broad, it has been accepted in literature that any act or transaction which is directly or indirectly related to commercial business, is deemed to be commercial business. For example, where a salesperson buys a computer for his business or where an art teacher rents an apartment for the purposes of giving seminars or courses or where an architect rents an office, these acts and agreements all qualify as commercial businesses as these agreements will be all made for the purposes of the commercial businesses concerned.

Pursuant to Article 19/1 TCC, principally all the debts of a merchant are commercial. Nevertheless, there exists an exception to this rule for the individual merchants (non-legal person merchants). If the individual merchant informs the other party that the transaction is not related to his/her commercial business or from the circumstances it is not appropriate that there is commercial business, then the debt is considered not as commercial but ordinary. The typical example is that where the merchant buys furniture for his office, this transaction is not commercial business. However, the exception stated in Article 19 TCC is only for the individuals, and so there is not such an exception for the legal persons as all of their transactions are considered as commercial business.

Unless otherwise provided in the law, agreements which qualify to be commercial business for one of the parties, will also qualify as commercial business for all the parties concerned. Based on Article 19/2 TCC one can be subject to commercial rules although he/she is not a merchant.

LO 2 Distinguish the acts which constitute unfair competition (trade) and recognize the differences between unfair trading and competition law and list types of acts that may constitute unfair trading and list/describe the possible legal actions that can be taken against unfair trading

Summary

Unfair competition in trade relations is mainly regulated in the TCC. There are also further general and specific provisions in some other legislation. These are regulated in Turkish Code of Obligations and in some specific laws such as intellectual and industrial property laws and in consumer protection law.

The civil law actions that can be taken in the case of unfair competition are as follows:

- Legal action for a declaratory relief (TCC Article 56/1(a))
- Legal action on the termination of the practices constituting unfair competition (Injunction) (TCC Article 56/1(b))
- Legal action for restitution of the unlawful situation (TCC Article 56/1(c))
- Legal action to claim damages (TCC Article 56/1(e))
- There are also criminal law actions in addition to the civil law actions listed above.

Test Yourself

1 Which of the following is **not** among the sub branches Turkish Commercial Code?

A. Contract Law
B. Maritime Law
C. Law of Companies
D. Law of Obligations
E. Insurance Law

2 Which of the following is **not** placed at its correct order within the rules that apply to commercial business in Turkish legal system?

A. General provisions
B. Compulsory (obligatory) commercial provisions
C. Commercial Provisions in the Contract
D. Non-compulsory provisions (complimentary and interpretative rules)
E. Commercial customary rules

3 Which of the elements listed below are **not** covered within the acquisition of the commercial enterprise?

A. Equipment
B. Intellectual property rights
C. Tenancy rights
D. Factory Buildings
E. Shareholders' personal assets

4 Which of the following may **not** constitute unfair competition?

A. to restrict the choice of customers using aggressive sale tactics
B. to use provisions containing false or missing information as to the price, payment conditions, contract period, consumers' right in an instalment sale, or consumer loan agreements
C. not to announce its trade name explicitly in the sales with instalments or in similar legal transactions or overall or total sales price or not to announce the additional cost in Turkish Liras in sales with instalments or the annual ratios
D. not to announce its trade name or net value of the credit or the total costs or the effective annual interest in consumer credits
E. to sell a product of the company from a relatively high price compared to the market price

5 Which of the sets of acts given below are **not** both among the legal obligations arising from being a merchant?

A. to act as a diligent businessman and to have a LinkedIn account
B. to keep books and documents and to have the right to request payment and interest
C. to be subject to bankruptcy for all kinds of debts and to get registered with the Chambers of Commerce and Industry
D. to be able to know all laws related to business and to be registered in the Trade Registry
E. to be a part of the civil society and participate in some projects and to attend to all the meetings related to business

6 Which of the below auxiliaries to the merchant are dependent?

A. commercial representative
B. general manager
C. agency
D. marketing director
E. Both (a) and (d)

7 Which of the following are **not** required in the acquisition process of a commercial enterprise?

A. A commercial enterprise is to be acquired with all its credits and debts.
B. To acquire a commercial enterprise with all the elements therein, there is not a need to separately conclude agreements or registrations for each of the elements concerned.
C. The acquisition of all the immovable property.
D. All debts of the commercial enterprise should be cleared before the acquisition.
E. Depending on the nature and turnover threshold of the acquisition, the agreement may need to be notified to the Competition Authority under Article 7 of the Law No.4054, for clearance.

8 Which of the following are the effectiveness dates of the earlier Commercial Code and Turkish Commercial Code?

A. 1926-2001
B. 1926-2002
C. 1923-2002
D. 1926-2011
E. 1932-2011

9 Which of the below legislation specifically regulates competition rules in the markets for goods and services?

A. Unfair Trade Rules (in TCC and Code of Obligations)
B. Non-Compete Agreements/Restrictive Covenants (TCC and Code of Obligations)
C. Law No. 4054 on the Protection of Competition
D. Law No.3577 amended with Law No.4412 on the Prevention of Unfair Competition in Imports
E. Turkish Commercial Code No. 6102

10 Which of the below statements is **not** among the legal consequences of a commercial enterprise?

A. Joint and several liabilities for the debts (presumption of joint and several liability)
B. If the debt arises from a legal relation which falls within the scope of Article 3 TCC or Article 19 TCC, then as this legal relation will qualify as commercial business the interest to be applied would be commercial interest.
C. Unless otherwise provided in the law, the statute of limitations in commercial business cannot be changed by contracts.
D. In addition to the provisions in the Law, specific provisions in other laws regarding transactions and acts related to a commercial enterprise are commercial provisions.
E. A commercial enterprise should not have unpaid debts or delay its credits.

Answer Key for "Test Yourself"

1. A	If your answer is wrong, please review the "Part titled Law of Commercial Enterprise within the systematic of Turkish Commercial Law" section.
2. A	If your answer is wrong, please review the "Part titled Law of Commercial Enterprise within the systematic of Turkish Commercial Law" section.
3. E	If your answer is wrong, please review the "Part titled Acquisition of a Commercial Enterprise" section.
4. C	If your answer is wrong, please review the "Part given within the box as examples which may constitute unfair competition" section.
5. A	If your answer is wrong, please review the "Part titled Legal consequences of being a merchant" section.
6. E	If your answer is wrong, please review the "Part titled Auxiliaries of a merchant" section.
7. D	If your answer is wrong, please review the "Part titled Acquisition of a Commercial Enterprise" section.
8. C	If your answer is wrong, please review the "Part Titled Law of Commercial Enterprise within the Systematic of Turkish Commercial Law" section.
9. C	If your answer is wrong, please review the "Part titled Unfair Competition/Trade Rules in Turkish Commercial Law" section.
10. E	If your answer is wrong, please review the "Part Titled what is a commercial enterprise" section.

Suggested answers for "Your turn"

List the chapters of Turkish Commercial Code.

your turn 1

Turkish Commercial Code is divided into six chapters:

- Book 1: Commercial Enterprise (Articles 1 – 123)
- Book 2: Commercial Companies (Articles 124 – 644)
- Book 3: Valuable Papers (Negotiable Instruments) (Articles 645 – 849)
- Book 4: Transport (Carriage) Operations (Articles 850 – 930)
- Book 5: Maritime Law (Articles 931 – 1400)
- Book 6: Insurance Law (Articles 1401 – 1520)

(If your answer is not correct please refer to the title Law of Commercial Enterprise within the Systematic of Turkish Commercial Law.)

What are the essential elements of the commercial enterprise?

your turn 2

Essential elements of the commercial enterprise areas follow:

to generate an income above the threshold of a craftsman's turnover announced: The will of the enterprise should be to generate an income above a certain threshold. The criterion here is that it should be above the level of a craftsman's enterprise. The presidential should announce the turnover threshold for a craftsman's enterprise by Decree.

continuity: The commercial business should be continuous, not temporary.

independence: It is the criterion that qualifies a commercial enterprise and makes it different than a "branch" which is not an independent unit. A branch or a commercial representative do not qualify as a commercial enterprise due to the lack of independence.

(If your answer is not correct please refer to the section on elements of commercial enterprise.)

In the case of an unfair trading/competition under the Turkish Commercial Code list who may bring a legal action?

your turn 3

Those who suffer damages from the unfair trading/competition can seek remedies against the committers. Article 56 TCC explicitly lists those who are entitled to bring a court action in cases of unfair competition. Accordingly, the following can take legal actions:

i. Persons whose economic interests are damaged or infringed

ii. Customers whose economic interests are infringed

iii. Professional or economic associations

(if your answer is not correct pelase refer to section III titled as Unfair Competition)

List the civil law actions which may be taken before the courts in an unfair trading situation.

your turn 4

- Legal action for a declaratory relief (TCC Article 56/1(a))
- Legal action on the termination of the practices constituting unfair competition (Injunction) (TCC Article 56/1(b))
- Legal action for restitution of the unlawful situation (TCC Article 56/1(c))
- Legal action to claim damages (TCC Article 56/1(e))

(If your answer is not correct please refer to the final subsection above titled types of legal actions.)

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Chapter 3 Law of Contracts

After completing this chapter, you will be able to:

Learning Outcomes

1. Understand the meaning and concept of contract
2. Explain analytically the conclusion of a contract
3. Explain the form of the contract and types of form
4. Understand simulation and count the defective intentions and understand their results
5. Explain the meaning of performance of contracts and non-performance resulting from default
6. Count the reasons of discharge of an obligation resulting from contracts and explain them

Chapter Outline

Introduction
Concept of Obligation and Contracts as a Source af Obligation
Conclusion (Formation) of a Contract
Classification of Contracts
Form of a Contract
Contractual Freedom
Genuineness of Intention
Unconscionable Contracts
Performance of Contracts
Default
Discharge of Obligations

Key Terms

Obligation
Contract
Offer and Acceptance
Form of a contract
Simulation
Defective Intentions
Unconscionable contracts
Performance of contracts
Default of the creditor
Default of the debtor
Discharge of obligations resulting from contracts

INTRODUCTION

In this chapter, the concept of contract shall be discussed. Contracts are the most important legal tool in the business world. Every person, either real or legal, dealing with business, should have a relation with other persons who are dealing with business. The best way to regulate these relations and even to start these relations is to conclude a contract.

In Turkish legal system contracts, are a part of law of obligations. Actually, they are one of the sources of an obligation. The field of law of obligations is regulated by the Code of Obligations. Code of Obligations is taken from Switzerland by way of reception in 1926, and in 2012 it has been changed according to the needs of the developing law and country, but again mostly the Swiss model was followed.

Code of Obligations is formed of two main parts, "general provisions" and "specific types of contracts". In the general provisions part, the concept of obligation, sources of obligation, conclusion of contracts, form of contracts, simulation, defective intentions, agency, tort, unjust enrichment, performance of an obligation, non-performance, default of the debtor and the creditor, special modalities of an obligation and discharge of obligations are regulated. In the specific types of contracts part, different types of contracts are regulated in detail.

In this chapter, mostly the provisions regarding the contracts in the general provisions part of the Code of Obligations shall be examined. Especially, the conclusion of the contract and the performance of the contract together with the subject of non-performance shall be evaluated. Since the main aim of this chapter is the topic of contracts, other sources of obligations shall not be discussed in detail. Also, only some examples are to be given from the special types of contracts part.

CONCEPT OF OBLIGATION AND CONTRACTS AS A SOURCE OF OBLIGATION

Law of obligations is the branch of civil law particularly concerned with the relations that create obligations. These relations are very important for everyone and even in our daily lives, nearly every day we enter into these kinds of relations but mostly we do not understand the legal meaning and significance of them. The main legal source of law of obligations is the Code of Obligations.

your turn 1

Make a list of the three things you did yesterday and write them down.

1.

2.

3.

Take a look at your list and try to find out whether you have actually concluded a contract or not.

The Code of Obligations is composed of two main parts. The first part is named as "General Provisions" and the second part is named as "Specific Types of Contracts". General provisions part is concerned with the formation, the effects and the discharge of obligations, obligations with special modalities, the assignment of claims and the assumption of obligations. Specific types of contracts part contains provisions affecting various types of contracts, such as sale, loan, rental, service, surety, etc.

Concept of Obligation

As stated above, the law of obligations deal with the relations that create obligations. The term 'obligation' comes from the Latin word *obligare* and means 'to bind'. Though in our daily lives mostly we use the term obligation in a narrow sense, just meaning a money debt, legally it has a wider meaning. Obligation refers to any kind of relation between the creditor and the debtor. Obligation is a legal tie between two persons, namely the creditor and the debtor, which binds one of them to do or to forbear from something in the benefit of the other.

It can be stated that an obligation has three elements:

1. Creditor: Creditor is the party who is entitled to request the consideration. In a donation (gift) contract the parties are named as the donor and the donee. Donee is the creditor. Whereas in a sales contract

the parties are named as the seller and the buyer and both of them are creditors since sales contract is a contract in which both of the parties are under a burden of a consideration. The "seller" is under the liability of delivering the sold goods to buyer, the "buyer" is liable to pay agreed price to seller, in return. Similarly in an employment contract the parties are named as the employer and employee and again both of them are creditors. Employee is under the liability to do the work; whereas employer is under the liability to pay the wage.

2. Debtor: Debtor is the party who is bound to perform a certain act given as consideration. In a donation contract, the donor is the debtor, whereas in a sales contract both the seller and buyer are debtors. Similarly in an employment contract both the employer end the employee are debtors.
3. Consideration: Consideration is an act, which the debtor is obliged to perform as the content of his/her obligation. Consideration is actually the subject-matter of the obligation. It may be an act of giving something, like in sales contract-giving the good and giving the payment (price of the good), it may be an act of doing something, like in employment contract-employees cleaning the room, or it may be an act of refraining from doing something, like in an agreement of restraint of trade.

Considerations can be classified as follows:

a. Positive consideration and negative consideration: If the subject matter of the consideration is to do something or to give something, the consideration is a positive consideration whereas if the debtor is obliged to refrain from doing something, the consideration is a negative consideration.
b. Divisible consideration and indivisible consideration: If the subject matter of the consideration can be divided into several parts without any harm and any change in its nature, then the consideration is divisible; on the contrary, it is indivisible. Refraining from doing something is always indivisible; in the sales of a race horse, the horse is indivisible whereas a money debt is divisible.
c. Personal consideration and material consideration: Where an obligation requires a physical power and/or a mental talent of a person for performance, this consideration is a personal consideration. If fulfillment of an obligation is performed out of the property; this consideration is a material consideration. An architect's drawing a plan is a personal consideration whereas transferring the ownership on the good or paying the sales price in a sales contract are material considerations.
d. Recurring consideration and non-recurring consideration: Where an obligation is performed by an act continuing over a certain period of time, this consideration is a recurring consideration. Where an obligation, is performed by an act or a number of acts performed on a single occasion the consideration is a non-recurring consideration. Paying the sales price is a non-recurring consideration. In an employment contract, the employee's doing the work is a recurring consideration.

Sources of an Obligation

According to Turkish Code of Obligations there are three sources of obligations. These are:

1. Contracts
2. Torts
3. Unjust Enrichment

It should be mentioned that these sources are not limited in number. These are the sources that very frequently create an obligation, but besides them there are other sources as well. For example an obligation may be created directly from the law itself.

As can be seen, the first source of an obligation is named as the contracts in the Code of Obligations. But the Code actually means not only the contracts, but all legal transactions as the source of an obligation. Since nearly 95% of all legal transactions are contracts, in other words contracts form most of the legal transactions, the law-maker named only the contracts.

The second source of an obligation is torts. Every person has freedom of activity within the limits of law. Law restricts this freedom by the rights of the other persons. When a person acts beyond the restrictions of law, the acts become wrongful and such wrongful acts are named as "torts". Torts are actually civil wrongs and most of the torts also give rise to criminal liability as well.

According to article 49 of the Code of Obligations, any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation. This liability is named as tortuous liability. For a person to have tortuous liability, first of all there must be an act. This may be a positive act (for example to fire a gun to another person) or an act of omission (for example a nurse on a night shift sleeping and not giving the medicine and care to the patients). An act of omission can only be a basis for liability if there is duty to act. Secondly this act must be an unlawful act. Unlawfulness is the avoidance of the compulsory legal rules that safeguard a person in his/her person and/or property. Thirdly the person who is committing this unlawful act should have fault. Fault is either a willful act or a negligent act. For a person to have fault, being able to make fair judgments is a necessity. Fourthly there must be damage. Damage is the loss either given to a person or to his property or both. Lastly, for tortuous liability there should be a proximate causal relation between the unlawful act and the damages. In other words, the damage must be result of the unlawful act.

Third source of an obligation is unjust enrichment. It is a gain acquired in an unjustifiable manner out of the property of another person. According to article 77 of the Code of Obligations, a person who has enriched himself without just cause at the expense of another is obliged to make restitution.

The main subject of this chapter is contracts. Therefore the other sources of obligations shall not be evaluated in detail. First the meaning of legal transactions and the types of legal transactions are to be explained, and the place of contracts among the legal transactions shall be discussed below.

Legal Transactions and Contracts as a Legal Transaction

As the first source of obligation, contracts are regulated in the Code of Obligations. But actually it is obvious that the Code does not only refer to the contracts, but to all the legal transactions. A legal transaction can be defined as a declaration of intention to which the legal order binds legal effects. A legal transaction is directed to a specific legal result.

Legal transactions may be classified into several different groups; but the best classification is made with regard to the intention declared, since declaration of intention is the most important point of a legal transaction. According to this classification there are three types of legal transactions:

1. Unilateral legal transactions: These legal transactions are formed by the assent of a single person. In other words, in unilateral legal transactions, there is only one intention declared. The legal order binds effect only to this single declaration of intention. The best and known example to that is a will. A will is the last wishes of a person. Some other examples are recognition of a child, withdrawal from a contract, resignation, and establishment of a foundation.
2. Bilateral legal transactions: If at least two intentions are declared mutually, they are named as bilateral legal transactions. All contracts are bilateral legal transactions. These transactions are concluded by two or more persons. In bilateral legal transactions, the assents of the parties must be declared in accordance with each other, but towards a contrary legal interest or benefit.
3. Decisions (Multilateral legal transactions): There are several declarations of intentions that are declared in the same direction. In these legal transactions the assents of more than two persons are declared towards a common legal interest. As an example, a resolution in the general assembly of an association or a decision taken by the general assembly of a corporation or a limited liability company can be given.

As mentioned above among the whole groups of legal transactions, contracts form the largest and

most important group. Because of that reason, the law-maker in the Code of Obligations mentioned contracts as the source of obligations. Actually, even compared with the other main sources of obligations, namely torts and unjust enrichment, contracts occupy the largest place.

CONCLUSION (FORMATION) OF A CONTRACT

A contract is a bilateral legal transaction concluded by a mutual exchange of assent of two or more persons. Therefore, for the formation of a contract, there is a need of two mutually declared intentions. From these intentions, the first one declared is named as an "offer" and the second one declared is named as an "acceptance". According to the first article of the Code of Obligations, the conclusion of a contract requires a mutual expression of intent by the parties. The first article of the Code of Obligations reads as follows: "The contract is concluded by mutual and consentaneous expression of intent of the parties". The parties who are concluding a contract are named as the offeror and the offeree.

Offer

An offer is a declaration of intention by one party, known as the offeror, whereby he/she expresses his/her willingness to enter into a contract. Offer is the first intention that is declared and aimed to conclude a contract. There are some requirements for a valid offer:

1. First of all, an offer must be definite and certain. The offer must, with no doubt, include all the essential terms of the contract. In article 2 of the Code of Obligations, it is stated that where the parties have agreed on all the essential terms, it is presumed that the contract shall be binding notwithstanding any reservation or secondary terms. Therefore, in order to conclude a contract, the offer should very clearly include all the essential terms of the aimed contract.
2. Secondly the offer must be communicated to the offeree. But it should be mentioned that it is not necessary that the offer is communicated to a particular person. It can also be communicated to the general public as well. The display of goods with a price quotation in a shop window is considered to be an offer. In that case, the offer is named as an offer made to the public. According to article 8/II of the Code of Obligations, the display of merchandise with an indication with its tariff or price lists and the like does generally constitute an offer unless otherwise is estimated clearly and easily.
3. Lastly the offer must be seriously declared. In other words, an offer must be made with the real intention of the offeror. The offeror should have the aim to be bound with the offer. The offeror should have the intention to create a legal relation.

When a declaration of intention has these three requisites, it is considered as an offer. But if a person declares an intention without having the purpose of being bound with it, or if the declaration does not include all the requisites, it is named as an "invitation to an offer". For example if Ms. X enters into a boutique and asks for a black dress, since this declaration does not include all the essential elements of the sales contract, it shall be considered as an invitation to an offer. Invitation to an offer is not binding.

attention

What are the essential terms of a contract? They are the terms that determine the type of the contract. Without the essential terms it is not possible to conclude a contract. For example the essential terms of a sales contract ate the good to be sold, the price and the transfer of ownership of the good to the other party; whereas the essential terms of a donation contract are the good to be donated and the transfer of the ownership of this good to the other party. By taking into consideration these essential terms it is possible to differentiate the type of the contract. Why is it sales or donation? In both of them the consideration is a good and the aim is to transfer the ownership of this good. But in donation there is only one consideration and no sales price. On the other hand the considerations in the sales contract are mutual considerations.

An offer, until it is terminated, gives the offeree a continuing power to create a contract by declaring an acceptance. The important question here is when an offer is to be terminated or in other words how long shall the offeror be bound with his/her offer. First of all, it should be mentioned that the offeror may set a time limit for his/her offer. A person who offers to enter into a contract with another person and sets a time limit for acceptance is bound by his/her offer until this time limit expires. He/she is no longer bound with the offer if no acceptance has reached him/her at the moment of expiry of the time limit. If an acceptance is sent after the expiry of the time limit, it shall no longer be considered as an acceptance, but it shall be considered as a "new offer". Declaring an offer with a time limit is regulated in article 3 of the Code of Obligations. According to that article, it is stated that: "The party who offers to conclude a contract under a time limit for acceptance is bound by his offer until the time limit expires. The offeror is relieved from the bound of his offer, if no acceptance has reached him on time".

The offeror actually does not have to set a time limit while declaring his/her offer. If no time limit is set by the offeror, then the Code of Obligations makes a distinction between the offers declared to the parties who are present and who are absent. Where an offer is declared in the presence of the offeree and no time limit for acceptance is set, it is no longer binding on the offeror unless the offeree accepts this offer immediately. Offer declared by telephone, computer and such communication devices, on the condition that the parties may understand and respond simultaneously are considered to be made in the offeree's presence. For example during simultaneous chat on the computer, the parties are present, but if the offeror writes an e-mail, it shall not be considered as the presence of the offeree since it is not at the same time and the parties may not respond simultaneously.

Where an offer is made in the absence of the offeree, and no time limit for acceptance is set by the offeror, according to article 5 of the Code of Obligations, the offer remains binding on the offeror until such time as he/she might expect a reply sent dully and promptly to reach him/her. The offeror may assume that his/her offer has been promptly received. For example, if the offeror has sent the offer by post, the time this post reaches the offeree, the offeree thinks and replies and the time for this reply to reach the offeror should be calculated.

As a rule, it is not possible for the offeror to withdraw his offer. If the offer is declared in the presence of the offeree, it is certain that the offeror shall not be able to withdraw his/her offer. But if the parties are absent according to the Code of Obligations, there is a possibility for the offeror to withdraw the offer. An offer is deemed not to have been made if its withdrawal reaches the offeree before or at the same time as the offer itself or, where it arrives subsequently, if it is communicated to the offeree before he/she becomes aware of the offer.

The offer is terminated if the offeree rejects the offer. In Turkish legal system, "keeping silent (silence)" means, as a rule, a rejection. Unless the nature of the transaction or the circumstances or the law regulates the contrary, it shall be regarded as a rejection. Therefore as a rule if the offeree keeps silent it shall mean a rejection and the offer shall be terminated.

Death or loss of capacity of the offeror as a rule does not terminate the offer unless the consideration is a personal consideration. A personal consideration is a consideration, which is performed by using the physical power, mental talent or experience of the debtor.

Acceptance

An acceptance is a declaration of intention to agree to the terms of the offer. Offeree is the party who declares the acceptance. An acceptance must exactly comply with the requirements of the offer. In other words, the acceptance should be the mirror image of the offer. All the essential terms of the contract, as stated in the offer, should be accepted with the acceptance.

A declaration of intention that requests a change or addition to the terms of the offer shall not be regarded as an acceptance, but a "counter-offer". A counter-offer is considered to be a new offer. For example A declares B that he wants to sell his bicycle for 500 TL. B wants to buy the bicycle, but he declares that he shall only pay 350 TL. This declaration of intention of B is changing one of the essential terms of the sales contract, namely the price, therefore it shall not be considered as an

acceptance, but a counter-offer. This time A may accept this offer or make another offer.

The offeree as a rule is bound by his/her acceptance; however, the rules concerning the withdrawal of an offer also apply to the withdrawal of the acceptance according to article 10 of the Code of Obligations.

It is important to know the exact time when a contract is concluded. As a rule, provided that all of its elements are complete, a contract starts to take effect at the moment it is concluded. The benefit and risks, as a rule, start arising from this date. The interest rates are also effective from this date.

The time a contract is concluded and this contract starts to take effect is the same if the parties are present. If the parties are present when the offeree declares the acceptance, at that moment the contract is concluded and it starts to take effect as well. But if the parties are absent, a contract starts to take effect before on the condition that it is concluded. According to article 11 of the Code of Obligations, a contract concluded in the parties' absence takes effect from the time the acceptance is sent by the offeree to the offeror. This contract is concluded at the moment the acceptance reaches to the offeror.

CLASSIFICATION OF CONTRACTS

Contracts can be classified as unilateral contracts and bilateral contracts. In unilateral contracts, only one of the parties is under the burden of fulfilling a consideration while the other party does not owe any consideration. The best example is a donation contract.

Bilateral contracts are also classified into two groups: Equal bilateral contracts and unequal bilateral contracts. In equal bilateral contracts ,there are mutual promises between the two parties and they involve an exchange of equivalent mutual obligations. Examples to equal bilateral contracts are sales contract, rental contract and employment contract. On the other hand, in unequal bilateral contracts, the parties are both under an obligation, but their obligation is not mutual, and in other words one obligation is not exchanged for the other. Contract of agency and loan contracts can be given as examples.

FORM OF A CONTRACT

Form is the appearance of the intention declared through a certain medium. In Turkish law, the principle is "freedom of form". This principle does not mean that there is no form in a contract. In order to conclude a contract the intentions should be declared and while declaring the intentions the parties shall definitely use a form. But the freedom means, the parties are free to choose the form they want to declare their intentions. This freedom is clearly expressed in article 12; the validity of a contract is not subject to compliance with any particular form unless a particular form is prescribed by law.

According to the principle of freedom of form, the parties are free to choose any type of form they want in concluding their contract. In that sense in terms of its appearance there are three types of form:

1. Oral form: This is the easiest type of form, and especially in the contracts that are daily concluded, parties mostly choose this form.
2. Written form: This type of form consists of two elements: the text part and the signature part. The text can be written by any kind of device. But the signature should be either handwritten or it should be signed by way of secured electronic signature. All persons on whom the contract imposes obligations should sign the contract.

As stated above, signature must be appended by hand by the parties to the contract. Secured electronic signature has the same effect as the signature written by hand. A signature reproduced by mechanical means is recognized as sufficient only where such reproduction is customarily permitted, and in particular in the case of signature on large number of issued securities.

According to article 14, unless otherwise specified by law, a signed letter, telegram, of which originals have been signed by debtors, fax messages provided that they are confirmed or texts which can be sent and preserved by similar communication devices or by secure electronic signature are also deemed as written form.

3. Official form: The official persons who may give an official form are notaries, land registrars and peace court judges, though the latter does not serve this purpose any

more, unless it is a necessity. The notaries may give the official form in two different ways. In the first one, the parties conclude a written contract, and then take it to the notary and they sign the contract in front of the notary. By that way the signatures of the parties are authenticated by the notary. In the second way, the parties go to the notary and explain what they want to conclude, the contract is drawn up by the notary himself/herself. Here the notary acts ex-officio. The land registrar only acts ex-officio, but the contracts that can be concluded by the land registrar are limited only to the contracts on the real rights of immovable property.

As mentioned before, the rule in Turkish legal system is the freedom of form. But for some types of contracts the law-maker has prescribed a particular form. At this point this form is regarded as a "form required for validity (form of validity)". In other words, the specified form stipulated by law for contracts is the form of validity. Form required for validity may only be brought by law. In that case, the contract shall be valid only if this particular form is followed by the parties and the contract is concluded by using this form. For example, marriage is a family law contract and it should be concluded in oral form. Assignment of claims contract should be concluded in written form. Contract for sales of an immovable property should be concluded in official form only by the land registrar. The deed should be drawn by the land registrar. Therefore, if there is a form of validity prescribed by law, the parties have to follow this form, if not their contract shall be null and void.

Apart from the form of validity brought by the law, the parties may also, according to their choice, prescribe a form by themselves as well. According to article 17, where the parties agree to make a contract subject to form requirements not prescribed by law but by them, it is presumed that the parties do not wish to assume obligations until such time as those requirements are satisfied. But if the parties have stipulated a form by themselves, again if they agree, they may change this form as well. If they insist on this form in concluding the contract, this form should be followed.

Lastly "form as means of proof" should be mentioned. This form is prescribed by the Civil Procedural Code in order to prove an enacted contract. According to the Civil Procedural Code, legal transactions to establish, transfer, convert, renew, satisfy or release a right must be proved by a written document, namely a "deed", if at the time of transaction , the value involved exceeds 2590 TL. Unless the transaction exceeding the stated value is made in a written form, in case of dispute it may not be proved. But this does not affect the validity of the transaction.

CONTRACTUAL FREEDOM

The main principle of the law of obligations is the free discretion of the parties in a legal relation. Free discretion means the freedom to act according to wishes of a person. One of the most important results of free discretion is "contractual freedom". This freedom finds its roots in article 26 of the Code of Obligations which states that the terms of a contract may be freely determined within the limits of law.

Contractual freedom may be summarized as five different types of sub-freedoms:

1. Freedom to enter into a contract: This freedom means that a person is free to conclude a contract and as a rule no one may be forced to conclude a contract. But of course mostly in law when there is a rule, there are also exceptions of this rule as well. For example if there is a monopoly, then the person having the monopoly should conclude a contract.
2. Freedom to choose the other party of a contract: A person as a rule may enter into a contract with the party he or she wishes to conclude a contract and as a rule again may not be forced to conclude a contract with a certain person. But again there are exceptions to this rule as well.
3. Freedom of form: Parties to a contract as a rule are free to choose the form of their contract and they may conclude the contract in oral, written and official form. But form of validity is the exception to this rule.
4. Freedom to withdraw a contract: Even if a person concludes a contract, this person as a rule may not be forced to continue with this contract and by taking all the risks

may withdraw this contract. Of course if the withdrawal does not have a just cause the person withdrawing the contract shall have to compensate the damages of the party resulting from the withdrawal of the contract.

5. Freedom to choose the type and subject-matter of a contract: Parties are free to conclude any type of contract, they may choose a contract among the ones regulated by the Special Types of Contracts part of the Code of Obligations or from any other law or even they may conclude a contract that has not been regulated by law just by themselves. Also the subject-matter of a contract may again be freely chosen by the parties. But the law brings a framework to this freedom. In other words the type and subject-matter of a contract may not be against the compulsory provisions of law, may not be against the rules of morality, may not be against public order, may not violate the personality rights and the subject-matter may not be impossible. Within these five limits the parties have a freedom. If they do not act within these limits then the contract they have concluded shall be null and void.

As stated above contractual freedom is the rule, but contractual freedom does not have an absolute meaning. There are some restrictions to this freedom prescribed in the article 27 of the Code of Obligations. According to it, a contract is null and void if its terms are impossible, unlawful or immoral. However, where the defect pertains only to certain terms of the contract, those terms alone are void unless there is a cause to assume that the contract would not have been concluded without them.

GENUINENESS OF INTENTION

A contract is formed by the declaration of intentions of the parties. The parties should first have an intention and then they have to declare this intention. The intention they really have should be the same with the one that is declared. This is named as the genuineness of intention. In other words a party to a contract should declare his or her genuine intention. But sometimes because of different reasons the intention declared by a party or by both of the parties is not the genuine intention. That is to say the manifested intentions may conflict with the real intentions of the parties. This conflict may occur intentionally and a simulated contract arises, or this conflict may be unintentional and one of the three situations of defective intention is created.

Simulation

In simulations, the parties actually do not want to conclude a contract at all or a certain type of contract, but they seem as if they are concluding a contract and they declare an intention which is actually not their real intention. There are two types of simulation: Absolute simulation and relative simulation.

Absolute Simulation

In absolute simulation, parties of the contract give the appearance that they are entering into a contract although actually they are not. The parties actually do not want to conclude a contract, but they give the appearance that they are concluding a contract. For example (A) is indebted to many people and he is afraid that there will be a seizure in his house soon. In order to prevent the seizure of his antique carpet for payment of debt, s/he pretends to be selling it to his friend (B).

In absolute simulation, there are actually two transactions. One of them is the visible transaction, which the parties have made with the purpose of deceiving others. The other is the simulation agreement whereby the parties assent that the visible transactions is fictitious. First the parties have to agree to make simulation, in other words make the simulation agreement. Then they conclude the fictitious contract. It is the visible contract, but since the parties actually do not have an intention to enact a contract, this contract is null and void.

Relative Simulation

In relative simulation, parties want to enact a contract, but they do not want others to understand the type of their contract. Therefore they hide the contract they have actually concluded behind a fictitious contract. For example (A) wants to give a precious necklace to his friend (B) as a gift. But

to avoid arguments he might have with his family over this donation, he pretends to be selling the necklace to (B).

In relative simulation, in addition to the above mentioned transactions, there is another transaction, a hidden transaction which consists of the real intentions of the parties. Therefore, first the parties make a simulation agreement, and then they conclude the real transaction, in other words the hidden transaction. Lastly, they conclude a visible contract, but this is the fictitious contract.

The visible transaction is null and void, since the parties do not have an intention to conclude a contract like that. The hidden transaction is valid provided that it fulfills the requirements ordered by the law for its validity. For example in the above mentioned case since the donation is performed it shall be valid.

Defective Intentions

Unintentional conflict between the manifested and real intention may arise from three different grounds. These are named as mistake, fraud and duress.

Mistake

Mistake is a state of mind which unintentionally conflicts with the declared assent. The Code of Obligations distinguishes material from immaterial mistakes. In other words, there are two types of mistakes. According to the Code of Obligations only material mistakes may invalidate a contract.

Mistakes relating solely to the motives for entering into the contract are not considered to be material. Nor do mere errors of calculation invalidate the contract, but are to be corrected. Generally, material mistakes are errors in the declaration of intention. Mistakes are material in the following cases;

- Mistake as to nature of the contract: If the mistaken party had the intention of entering into a contract other than that to which he expressed his assent, the mistake is said to be material involving the nature of the contract. For example a person thinks that he is concluding a donation contract, whereas actually the nature of the contract is a sales contract.
- Mistake as to the identity of the subject-matter of the contract: If the mistaken party had in mind a subject-matter other than the subject-matter of the contract entered into, there is a material mistake as to the identity of the subject-matter. If a person wants to buy a carpet and goes to a shop selling carpets and if he likes one of the carpets and declares his intention to buy it, but he shows accidentally the carpet nearby, thinking that it is the carpet he liked, this is mistake as to the identity of the subject-matter.
- Mistake as to the identity of the other party: If the mistaken party had in mind a person other than the one with whom he entered into the contract, the mistake is considered material and it is named as mistake as to the identity of the other party. For example, a person wants his portrait to be drawn by a famous artist, but the artist has an identical twin brother who is also a painter and by mistake asks the twin brother to draw his portrait.
- Mistake as to the quantity: If the mistaken party undertook an essentially greater consideration or accepted an essentially smaller one than that was his intention, the mistake is considered to be material. For example, (A) wants to buy 10 tons of apples but instead he declares his intention to purchase 100 tons.
- Mistake as to requisite circumstances of the aimed contract: If the mistake is related to circumstances which the mistaken party in the course of commercial honesty believes to be an essential basis of the aimed contract, the mistake is considered to be material though it is not in the declaration of intention. Mistake of motives, as a rule, is not considered material. But where the requisite circumstances are considered essential in the course of business, such mistakes become material. For example, when (A) learns that he is appointed to Mersin and goes there to rent a house, and after the rental contract is concluded learns that he is actually appointed to Trabzon, he will be considered to have made a material mistake.

When a mistake in the declaration of intention is knowable by the other party, then there is either a contract concluded according to the genuine intention of the mistaken party or no contract at all (Code of Obligations article 35). When a contract is entered into, and the offer or the acceptance has been wrongly communicated by a messenger or interpreter or otherwise, the provisions relating to mistake shall apply.

The legal result of mistake is that the contract concluded by mistake becomes a voidable contract. In other words, contracts made by mistake are voidable. According to article 30 of the Code of Obligations, a party who fell into a material mistake while entering into a contract is not bound by the contract. But it should not be forgotten that according to article 34, a person may not bring forward his mistake contrary to the principle of honesty.

The mistaken party must notify the other party of the rescission of the contract or demand the return of the other party within one year running from the time he discovers the mistake. Otherwise the contract shall be deemed ratified. The one year period is a period of prescription, so if this period expires; the mistaken party loses all the right to rescind the contract. Where the mistake is due to negligence of the rescinding party, he is bound to compensate the damages resulting from the rescission of the contract unless the other party knew or should have known the mistake (Code of Obligations article 35).

Fraud

Fraud is a false representation of fact with the intention of inducing the other party to conclude a contract. The defrauded party being deceived by the other party of the contract is induced to make a contract. Where a party has been induced to enter into a contract by the willful fraud of the other party, the defrauded party is not bound by the contract (Code of Obligations Art.36).

There are certain requisites to be fulfilled to be able to talk about fraud. These are:

- First of all, there must be a false representation of fact which leads to a false impression or causes an already existing false impression to continue. A false representation may be either made knowingly or carelessly.
- Secondly, the misrepresentation must be made willfully, with the intention of deceiving the other party. Statements with the aim of advertising cannot be taken as fraud. Also statements of value or opinion cannot amount to fraud as well.
- Thirdly, for fraud to take place there must be a misleading conduct. Fraud may be carried out by an action, a misstatement, or by merely keeping silent. So, silence is also considered as fraud when speaking is necessary.
- Lastly, there must be a causal relation between the fraud and the contract. That is to say the defrauded party would never have consented to that contract if he had not been deceived.

The legal result of fraud is similar to the legal result of mistake. Contracts made under fraud are voidable. The defrauded party should notify the other party of the rescission of the contract or demand the return of the given consideration within one year running from the date he discovers the fraud.

Fraud may also be made by a third person. In such a case, the defrauded party is bound by the contract unless the other contracting party had or should have had knowledge of the fraud when entering into the contract as regulated by article 36/II of the Code of Obligations.

Duress

Where a contracting party was illegally induced to enter into a contract under effective duress by the other contracting party or by a third person, the party under duress is not bound by the contract. If the party under duress has a good cause to believe that an imminent and serious danger of life, body, honor or property to himself or someone closely connected with him shall take place, it is deemed that duress has taken place. There should be an imminent and substantial risk of loss to his personality rights or property or to the personality rights or property of others close to him.

Contracts made under duress are also voidable. The party under duress may notify the other party of the rescission of the contract or demand the return of the given consideration within one year running from the date of removal of the threat or in other words after the effect of duress ceases to exist.

In case of duress by a third person, if the party under duress wishes to rescind the contract, he may do so even if the other contracting party does not have knowledge about the duress; but he must compensate the damages of the other contracting party when it is equitable, unless the latter had or should have had knowledge of the duress of the third person.

your turn 2

(S), dealing with trade of washing machines and refrigerators, displays its products with its price tag in its shop window. (B) enters the shop with the belief that one of the products exhibited in the shop window, has a fast washing program. (B) explains (S) that she definitely wants a fast washing program and tells that she wants to buy the machine on the display if it has the mentioned program. (S), with a big smile on his face, says "perfect choice" and (B) buys the machine. But when she brings the machine home and runs it, she notices that it does not have a fast washing program.

1. Explain the legal meaning of displaying goods in a shop window with a price quotation?
2. What is the legal problem in this case?
3. What do you suggest (B) to do? Why?

UNCONSCIONABLE CONTRACTS

In an equal bilateral contract, the considerations of the parties are mutual, but these mutual considerations are not required to be equal in value. For example (A) wants to rent his house. The normal rental price is 1.000TL. He may rent the house to his friend (B) who is having financial problems at a lower price, like 750TL; or if (A) has financial problems, his friend (C) may rent the house at a higher price, like 1250TL to help him. In such a case, as a rule, legal order does not interfere. But when an apparent disproportion in the mutual considerations is due to one party taking advantage of the circumstances, this shall not be allowed. For example (A) must buy a medicine for his daughter who has very high fewer, but the only pharmacist in the town gives the medicine from 200TL, whereas the real price is only 30TL.

Hence according to Article 28 of the Code of Obligations, in the case of an evident disproportion in the relative considerations passing between the contracting parties due to one party taking advantage of the distress, the inexperience or the improvidence of the other party, the prejudiced party may within one year rescind the contract and demand restitution of the consideration already given. Or the prejudiced party may keep the contract, but demand the elimination of imbalance between the considerations. The period of one year commences with the time of noticing the inexperience or the improvidence or the distress has ceased to exist. In any case, this right should be used within five years after the contract is concluded.

PERFORMANCE OF CONTRACTS

Performance is the fulfillment of the obligation. The main aim of all obligations is performance and normally an obligation is discharged by performance. The subject-matter of the performance should be the same as the consideration which obligates the debtor. According to article 83 of the Code of Obligations, the debtor is not obliged to perform the obligation in person unless the creditor has an interest in having it performed by the debtor himself. Therefore as a rule a debtor is not obliged to discharge his/her obligation in person unless so required by the creditor or it is required by the law.

The subject of the performance of the obligation is the exact execution of the consideration stipulated in the contract or by law with regard to the proper place, the proper time, the proper kind, the proper quality, and the proper value. A debtor (obligor) who fails to perform an obligation at all or as required must make amends for the resulting loss or damage unless he/she can prove that he/she was not at fault. This is regulated in article 112 of the Code of Obligations. According to the mentioned article: "Where the obligation has not been performed at all or as required, the obligor shall compensate the damage or loss of the creditor unless the obligor proves that he was not at fault".

A creditor may refuse partial payment where the total debt is established and due. But if the creditor accepts the partial performance, the debt shall be discharged in the amount of partial performance.

The parties are free to determine the place of performance. But if they fail to do so, the Code of Obligations brings a complementary provision to fill the gap. According to article 89:

- Pecuniary debts must be paid at the place where the creditor is resident (domiciled), at the time of performance,
- Where a specific object is owed, it must be delivered at the place where it was located when the contract was entered into,
- Other obligations must be discharged at the place where the debtor (obligor) was resident at the time they arose.

Again the parties are free to determine the time of performance. According to article 90, where no time of performance is stated in the contract by the parties or evident from the nature of the legal relationship, the obligation may be discharged or called in immediately. In other words unless a due date is decided by the parties, every obligation becomes due immediately.

Where the time of performance or the last day of a time limit falls on a day officially recognized as a public holiday, the time of performance or the last day of a time limit is deemed to be the next working day. Time limit defined as week expires on the same day of the conclusion of the contract in the previous week. Time limit defined as month expires on the same day of the conclusion day of the contract of the last month. But if there is no corresponding day in that month, it is estimated that the time limit expires on the last day of that month.

A bilateral contract is a contract in which both of the parties are under the burden of a consideration to fulfill, that is to say both of them are at the same time debtor and creditor. In bilateral contracts a party to this contract may not demand performance until he/she has discharged or offered to discharge his/her own obligation, unless the terms or nature of the contract allow him/her to do so at a later date.

DEFAULT

Default of the Debtor

Default of the debtor is a form of failure of performance of an obligation where the performance is still actually possible. A debtor is in default when he delays the performance of an obligation which is already due. Therefore when an obligation is due, the creditor may put the debtor in default by demanding the performance. For the debtor to be in default, there are two conditions to be fulfilled:

1. The obligation should be due
2. The creditor has to draw a notice (formal reminder)

The debtor shall be in default as soon as he receives the notice from the creditor. But where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right, there is no need to draw a notice, the debtor shall fall into default automatically. It should be mentioned that for the default of the debtor "fault" is not a requirement, it is only important for some of the results of default.

There are certain results of default; these results may be classified as general results and specific results. The first general result is even if the debtor is in default; he/she still has to perform the delayed performance. Together with the delayed performance unless the debtor proves that he/she does not have any fault in being in default, the debtor has to compensate the damages of the creditor because of late performance.

The second general result is liability from accidental situations or in other words accidental damages. A debtor in default is liable even from an accidental loss and damages unless he/she proves that the default has occurred through no fault of his/her own or the object of performance would still have suffered the loss or damage to the detriment of the creditor even if performance had taken place promptly on due date.

There are two specific results of the default of the debtor. The first one is in pecuniary debts (monetary obligations) and the second one in bilateral contracts.

In pecuniary debts the most important result is to pay an interest, named as default interest. The debtor in default definitely has to pay interest even if he/she does not have fault being in default and the other party is not suffering from any loss due to late performance. If the creditor suffers more damage that cannot be covered with the default interest and if the debtor has fault being in default this time the debtor has to pay the additional damages as well.

In bilateral contracts when the debtor is in default, the creditor is entitled to set an appropriate time limit for subsequent performance or to ask the court to set such time limit. But there are some exceptions regulated in the Code of Obligations for setting an additional time limit. There is no need to set a time limit:

- where it is evident from the conduct of the debtor that a time limit would serve no purpose,
- where performance has become pointless to the creditor as a result of the debtor's default,
- where in the contract it was made clear that the parties intended the performance to take place at a precise point in time.

If performance has not been rendered by the end of the time limit or if there is no need to set a time limit, the creditor has three options that he/she can choose:

- delayed performance and compensation for default,
- non-performance and damages because of non-performance (positive damages),
- withdraw the contract and damages resulting from the withdrawal of the contract (negative damages).

For the payment of compensation or damages, the debtor should have faulted, otherwise fault is not necessary for the other results. If the creditor does not make choice among the above mentioned three options, it is accepted that the first option is chosen, but if the transaction is a commercial transaction among merchants, it is accepted that the second option is chosen.

Default of the Creditor

It is also possible for the creditor to be in default as well. The creditor who has been offered a proper performance but refrains from accepting it or from carrying out preparations that has to be made to provide the debtor to perform his obligation, without a valid ground, is in default.

According to article 107 of the Code of Obligations, where the creditor is in default, the debtor can discharge his debt by depositing the object at the expense and risk of the creditor. The judge at the place of performance determines the place of deposit. If the subject-matter of the contract is a commercial good, then even without the order of the judge the debtor may deposit them to a warehouse.

Where the subject-matter of the contract is a good that may not wait due to its nature, the debtor may sell them and deposit the money. Also if the subject-matter is to do something rather than to give something, this time the debtor may withdraw the contract.

DISCHARGE OF OBLIGATIONS

Discharge of an obligation means that this obligation shall no longer exist. If all the obligations resulting from a contract are discharged, then the obligative relation terminates. The normal way to discharge an obligation is performance. Apart from performance, there are some other ways to discharge an obligation regulated in the Code of Obligations.

1. Discharge (extinction) by Agreement (Release): The parties to a contract may agree to discharge an obligation. No particular form is required for the discharge of an obligation by agreement even if the obligation itself could not be assumed without satisfying a certain form requirement. The release should be concluded as a contract.
2. Novation: It constitutes a new obligation in the place of an old one. The pre-existing obligation is discharged and a new obligation is created. The parties should conclude an agreement and in

this agreement the intention of novation should be clearly stated. Unless the parties clearly agree, a new receivable bill or a new surety bond issued shall not be deemed as novation. Registration of various items into a revolving account also does not mean novation of the debt.

3. Merger: The obligation is deemed to be discharged by merger where the capacities of creditor and debtor are united. In other words where the creditor and the debtor become identical, the obligation is discharged by merger. Nonetheless, the existing rights of the third parties on the credits are not affected by the merger. In a rental contract when the lessee buys the house he has rented, the obligation of paying rental money is discharged by merger.
4. Impossibility: Impossibility means it is no longer possible to perform the obligation. An obligation is deemed to be discharged where its performance is made impossible by circumstances not attributed to the debtor, in other words the debtor should not be faulty in the obligation's becoming impossible. If the debtor has fault then the obligation is nor discharged but turned to a compensation payment.
5. Set-off: Where two persons owe each other sums of money or performance of identical obligations, and provided that both claims have fallen due, each party may set-off his/her debt against his/her claim. A set-off takes place only if the debtor notifies the creditor of his/her intention to exercise his/her right to set-off.

Summary

LO 1 Understand the meaning and concept of contract

The Turkish Code of Obligations has two main parts. Those are "general provisions" and "specific types of contracts". Even in the general provisions part, contract is one of the most important topics. The source of obligation, form of contracts, and conclusion of contracts are some of the provisions that are regulated in this part.

The concept of the contract is mainly based on daily life. Nearly every day we conclude a contract sometimes even without noticing it. The contract is a bilateral legal transaction concluded by a mutual exchange of assent of two or more persons. It is obliviously clear that there should be two mutually declared intentions. From these intentions, the first one declared is named as an "offer" and the second one declared is named as an "acceptance".

The second part of the Turkish Code of Obligation is the specific types of contracts. Those are the different types of contracts regulated in detail.

LO 2 Explain analytically the conclusion of a contract

As stated above, a contract needs two mutual declarations of intentions. Therefore, in order to conclude a contract there should be two parties and they have to declare their intentions. The first intention declared is named as the offer. For a valid offer, it should include all the essential elements of the aimed contract, it must be communicated to the offeree and it must be seriously declared. If one of these requisites are missing then this declaration of intention shall not be an offer, but an invitation to an offer. The second intention declared is named as acceptance. It should exactly be the same of the offer, in other words it should be the mirror image of the offer.

LO 3 Explain the form of the contract and types of form

The contracts cover the large amount of the Turkish Code of Obligations. Nearly % 95 of the all legal transactions is contracts. Most of the legal transactions are based on the contracts. Because of that reason the law-maker wanted the conclusion of the contracts to be an easy process and wanted to give freedom to the parties. The rule in Turkish legal system is the freedom of form. The parties are free to choose the form that they want to use. Form is the means we use to declare our intentions. There are three types of form, namely oral form, written form and official form. Though the rule is freedom, there are exceptions to this rule as well. For the conclusion of some contracts the law brings a certain form requirement, this is the form of validity and unless the parties conclude the contract in accordance to that form, the contract shall be null and void.

Summary

LO 4 Understand simulation and count the defective intentions and understand their results

The parties while concluding a contract should declare their genuine intention. However sometimes knowingly and sometimes unknowingly what they declare is not their genuine intention. If the parties are of the same mind that they shall not declare a genuine intention, this situation is named as simulation and there are two types of simulation, absolute simulation and relative simulation. First, the parties make a simulation agreement and they conclude a fictitious contract. This visible contract does not reflect their real intention; therefore it shall be null and void. In relative simulation, they also conclude another contract, the hidden transaction and if this transaction includes all the requisites of a contract it shall be valid.

Defective intentions arise from unintentional conflict between the manifested and real intention. There are three types of defective intentions, mistake, fraud and duress. They create voidable contracts and the party suffering from the defective intention may demand the rescission of the contract. There is a period of prescription for that, which is one year.

LO 5 Explain the meaning of performance of contracts and non-performance resulting from default

The obligations normally should be concluded by performance. The main aim is to discharge all obligations by performance. As it is declared in the Code of Obligations, the debtor is not obliged to perform the obligation in person unless the creditor has an interest in having it performed by the debtor himself. Place of performance and time of performance are very important. The parties may decide on both in their contract. But if they do not decide the place and time of performance, there are complementary provisions in the Code of Obligations that help the parties.

Default of the debtor is a form of failure of performance of an obligation, where the performance is still actually possible. A debtor is in default when he delays the performance of an obligation, which is already due. Therefore when an obligation is due, the creditor may put the debtor in default by demanding the performance. There are two main results of default of the debtor, namely general results and special results. The most important result is the creditor may still want the late performance and ask for compensation because of the damages due to late performance.

LO 6 Count the reasons of discharge of an obligation resulting from contracts and explain them

The discharge of a contract means that the contract has come to an end. The performance of the contract is the normal way to discharge. The Code of Obligations regulated some other ways to discharge an obligation. These are discharge by the agreement, novation, merger, impossibility, and set-off.

1 Which of the following is **not** a unilateral legal transaction?

A. Recognition of a child
B. Decision taken by the general assembly of a corporation
C. Will
D. Withdrawal from a contract
E. Resignation of an employee

2 Which of the following is **not** a personal consideration?

A. Drawing a portrait of a person
B. Constructing a building
C. Letting the house to the use of the lessee
D. Singing songs to an audience
E. Giving private lessons to a high school student

3 Which of the following contracts is a unilateral contract?

A. Contract of agency
B. Sales contract
C. Donation contract
D. Rental contract
E. Employment contract

4 Which of the following is the name of the party who declares the acceptance in the conclusion of a contract?

A. Creditor
B. Debtor
C. Offeror
D. Offeree
E. Promisor

5 Where a new obligation is constituted in the place of the old one, the obligation is discharged by .....

Which of the following completes the blonked part of the sentence above?

A. Novation
B. Merger
C. Set-off
D. Mutual agreement
E. Performance

6 (A) offers to sell his computer to (B) for 1000 Turkish liras. (B) accepts this offer in principle, but declares his intention to pay only 750 Turkish liras.

Which of the following statements is **not** true for the declaration of (B)?

A. It is considered as rejection of the offer.
B. It terminates the original offer.
C. It is a conditional acceptance.
D. It is a new offer.
E. It is a counter-offer.

7 An intentional conflict between the manifested (declared) and the real intention may arise from .....

Which of the following completes the blonked part of the sentence above?

A. Simulation
B. Mistake
C. Duress
D. Fraud
E. Impossibility

8 Which of the following does **not** operate to discharge an obligation?

A. Set-off
B. Merger
C. Novation
D. Performance
E. Statute of limitations

9 Which of the sentences is false about the unconscionable contracts?

A. There should be an apparent disproportion in the mutual considerations.
B. The disproportion should be result of one party's taking advantage of the circumstances.
C. It is possible to rescind the contract or to ask for a balance between the considerations.
D. The right to rescind the contract should be used within five years after the contract is concluded.
E. It is a type of defective intentions.

10 (A) has borrowed 10.000TL from (B) and has to return the money after two months, but the parties have not decided on the place of performance. According to the complementary provision in the Code of Obligations which one of the following should be the place of performance?

A. At the place where the debtor resides at the time of performance
B. At the place where the creditor resides at the time of performance
C. At the place where the debtor resides at the time when the contract was concluded
D. At the place where the creditor resides at the time when the contract was concluded
E. At the place where the money is located

Answer Key for "Test Yourself"

1. B	If your answer is wrong, please review the "Legal Transactions and Contracts as a Legal Transaction" section.
2. C	If your answer is wrong, please review the "Concept of Obligation" section.
3. C	If your answer is wrong, please review the "Classification of Contracts" section.
4. D	If your answer is wrong, please review the "Acceptance" section.
5. A	If your answer is wrong, please review the "Discharge of Obligations" section.
6. C	If your answer is wrong, please review the "Conclusion (Formation) of a Contract" section.
7. A	If your answer is wrong, please review the "Defective Intentions" section.
8. E	If your answer is wrong, please review the "Discharge of Obligations" section.
9. E	If your answer is wrong, please review the "Unconscionable Contracts" section.
10. B	If your answer is wrong, please review the "Performance of Contracts" section.

Suggested answers for "Your turn"

Make a list of the three things you did yesterday and write them down.
1.
2.
3.
Take a look at your list and try to find out whether you have actually concluded a contract or not.

your turn 1

Your list can be as follows:

1. I got up in the morning and washed my face.
2. I took the bus to the school and I bought a sandwich.
3. I went to the cinema with my friends.

Are they related with law of contracts? Have we concluded a contract?

1. If we want to wash our face we have to use water, and in order to use water a contract with the water supply company (for example in Ankara with ASKİ) should have been concluded.
2. "Taking the bus" means we have actually concluded a contract with the bus company to carry us to the place we want to go. In order to buy a sandwich again, we have to conclude a contract.
3. In order to go to the cinema we have to buy a ticket, this means that again we have to conclude a contract.

This example shows us that in our daily lives most of the time even without recognizing we conclude many contracts and when they are performed without any dispute, we do not realize them. Actually many persons think that contract should be a written document, but this is not correct, we can conclude a contract in the oral form as well, if there is no form of validity regulated by the law.

(S), dealing with trade of washing machines and refrigerators, displays its products with its price tag in its shop window. (B) enters the shop with the belief that one of the products exhibited in the shop window, has a fast washing program. (B) explains (S) that she definitely wants a fast washing program and tells that she wants to buy the machine on the display if it has the mentioned program. (S), with a big smile on his face, says "perfect choice" and (B) buys the machine. But when she brings the machine home and runs it, she notices that it does not have a fast washing program.

1. Explain the legal meaning of displaying goods in a shop window with a price quotation?
2. What is the legal problem in this case?
3. What do you suggest (B) to do? Why?

your turn 2

1. Displaying goods in a shop window with a price quotation is considered as an offer. It is an offer made to public. Because displaying goods in a shop window contains all the essential elements of the aimed contract. The good to be sold is shown, the price is given, and therefore it is an offer. It is not directed to a particular person, so it is made to the public.
2. There is fraud in this case. (B) wants to buy a washing machine with a fast washing program and (S) creates an appearance as if there is a fast program. Though (S) does not say anything explicitly, he does not correct (B) and on the contrary by smiling makes (B) believe that there is a fast program. Therefore by that way (B) is induced to enter into this sales contract.
3. Since there is fraud in that case, the contract concluded is a voidable contract. (B) may demand the rescission of the contract. But she has to use this right in one year period starting from the time she learns about the fraud.

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Chapter 4 Company Law

After completing this chapter, you will be able to;

Learning Outcomes

1. Have basic legal information on the types of companies in Turkish Commercial Law.
2. Identify different types of companies in Turkish Law from the viewpoint of the structure of each different type of company.
3. Learn the legal consequences of being incorporated as a company under Turkish Law.

Chapter Outline

Introduction
Types of Companies in the TCC
Legal Features of Companies

Key Terms

Types of companies in Turkish Commercial Code
Basic features of a company / of companies
Company structures and liabilities of shareholders in different types of companies
Legal requirements for the establishment of different types of companies
Limited Liability Company-Joint Stock Corporation

INTRODUCTION

Company Law is a vital part of any legal system within which commercial business is conducted. This Chapter is primarily concerned with the basic principles of company law in Turkey and within this scope it will set the scene for the system of company law which provides the legal basis on which companies are formed and operated.

Where do we find the law relating to companies?

What are the basic features of each type of a company?

What are the liabilities of companies?

How can you establish a company? Are there any formal requirements?

Company law in Turkey is set out in the Company Law Chapter of Turkish Commercial Code ("TCC") enacted in 2011 and majority of the related articles in there became effective in 2012. The rules on company law regulate the requirements for the formation, incorporation, organs and functioning of each specific type of company and furthermore the liability of the shareholders, and auditing and dissolution of the companies. Company Law as set forth in the TCC is not the only relevant legislation regarding companies but it is also complemented with some other legislation such as Capital Markets Law, Banking Law, Competition Law where appropriate.

The TCC which is enacted in 2011 after a long period of consultation with all the interested parties has introduced a new regime for companies. When compared to other chapters of the TCC, there has been significant amendments in the company law regime. The second chapter of TCC on companies aims to provide a legal environment as simple and as accessible as possible for firms and to avoid imposing unnecessary burdens on the ways companies get established and operate and on the other hand protect investors. It is aimed to provide a simpler, more efficient and cost effective framework for companies in commercial business life. The new company law regime extended not only to cover some new types/structures of companies; such as the single-shareholder joint stock company but also introduced some new principles.

One of the most significant introductions of the TCC is that it introduces **single-shareholder company/incorporation** and **single-member limited liability company** as the two new models of companies. The introduction of a "one-man company" has been modelled on the Twelfth Council Company Law Directive (89/667/ EEC) from EU company law to Turkish company law.

In terms of the new principles, **corporate governance** is one of the new key concepts in the TCC. Corporate governance should not be understood as a principle which applies only to publicly traded companies but with the enactment of TCC it applies to all capital companies.

Fundamentals of corporate governance under the TCC can be listed as in the following:

1. Corporate governance principles aim to maintain (i) transparency, (ii) fairness, (iii) accountability, (iv) responsibility.
2. Transparency is required in (i) financial statements, (ii) boards of directors' annual reports, (iii) independent audits, (iv) transactional auditors, (v) all audit reports of individual companies and group of companies.
3. Fairness has been ensured by establishing a balance of interests and by objective justice.
4. Accountability is aimed to be provided with the requirements sought for the Board of Directors reports, flow of information, right to information and oversight.
5. The rights of shareholders to sue, obtain information and perform oversight have been created along with smooth-running legal mechanisms.
6. The minority rights have been expanded.
7. Privileged shares have been restricted.
8. Representation opportunities for group of shareholders and the minority in the Board of Directors have been increased.
9. The Capital Markets Board has been provided with exclusive authority to regulate corporate governance.
10. The publicly held companies are now obliged to publish corporate governance reports.

A company has a legal personality separate from the personalities of its founding partners. Partnership is a type of a business model regulated

in the Turkish Code of Obligations. However, there is a key difference between a partnership and a company that a partnership (for e.g. ordinary partnership, partnership for inheritance or even marriage) does not confer any limited liability on its partners. In ordinary partnership for example, it is possible for each partner to be liable without any limits for the debts incurred by other partners where as in company law the nature of liability of the partners may vary and mostly limited.

There are significant differences between different types of commercial companies regulated in the TCC in terms of the legal requirements in the foundation and structure of the company. These differences between the company structures are mainly based on the type and allocation of liability of the shareholders. Joint stock companies and limited liability companies are the most commonly chosen corporate structures by foreign investors. For this reason, these two types of companies will be dealt with in more detail then the others below.

TYPES OF COMPANIES IN THE TCC

Within the systematic of the TCC general common provisions applicable to all companies are regulated in the Company Law section of the Law which is then followed by rules regulating each specific type of company in detail. Company Law is a broad area of commercial law and all the the companies regulated in the law are dealt with in detail from the establishment to the dissolution stage. In that respect, within the limits of this Book only the general features of each type of company is reviewed herein below without going into details. Readers who need further detailed information on companies should refer to other sources.

General Features Of Companies

As stated above, the types of commercial companies in Turkish law are listed under an exhaustive list in the TCC. In this Chapter we will first deal with some general principles applicable to all companies where we will then deal with limited liability company and joint stock corporations as being the most common type of companies in Turkish business life as to the data related to 2017 figures.

Incorporation is the process by which a new or existing business registers as a company. A company is a legal entity with a separate identity from those who own or run it. A business cannot operate as a company until it has been incorporated under the TCC. Establishing your business as a company means there are certain legal requirements to be met under the TCC. Companies are separate legal persons who are incorporated with the aim to make profit and who are independent of their directors and shareholders.

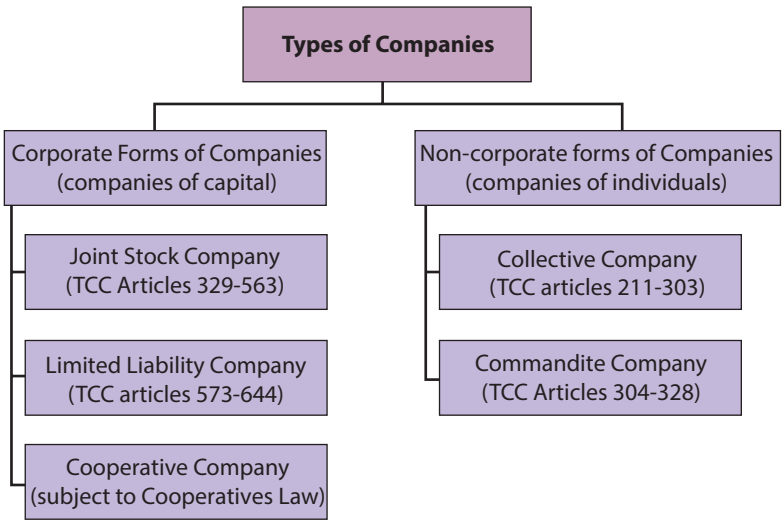


Figure 4.1

your turn [1]

List the types of Companies listed and regulated in the Turkish Commercial Code. (see Part I Types of Companies)

Type	Number of Companies active
Limited Company	733.353
Commercial enterprises	705.715
Branches	191.361
Joint Stock Corporations	118.765
Cooperatives	35.066
Collective Companies	10.862
Comandite Companies	1.784
Association of ship owners	0
Total	1.796.906

Table 4.1 Number of active companies as of 2017

There are key differences in the structures of different types of companies defined under an exhaustive list. Depending on the type of the company the liability of the shareholders and the directors vary.

Not only in the incorporation stages but also during its operation, the statutory meetings, changes in the shareholders, changes in the company structure, amendment in the company charter also need to be notified with the relevant authorities. It may be worthwhile seeking professional advice from a lawyer and an accountant before deciding whether an incorporated company and which type of a company is the best way to run a specific business.

The general provisions set forth apply to all kinds of companies unless the Law sets forth specific rules on the matter concerned. Pursuant to Article 124/1 TCC, the types of companies with a legal personality under Turkish commercial law are listed exhaustively and there are five different types of companies. These are collective, comandite, joint stock corporation, limited liability and cooperatives. From this exhaustive list, the types **joint stock corporation** and **limited liability company** are the most common types preferred in business life in Turkey. Thus the features of these two types of companies will be elaborated in further detail below.

	Ordinary Partnership	Commercial Company
Contract	Not subject to any formal requirement	Written contract required Specific features and requirements in the contract
Legal Personality	No legal personality	Legal personality
Representation	All partners have the right to represent the company	Only the authorized organs or persons
Establishment	No formal requirements	Statutory requirements and registration
Partners	At least two persons	At least two (except for single shareholder joint stock company and limited liability companies)

Table 4.2 Differences between ordinary partnership and commercial companies

Article 126 TCC provides the link and the applicability of Turkish Civil Code and Turkish Code of Obligations to commercial companies.

Article 126
Applicable laws
Based on the condition that specific rules related to each special type of a company is reserved, the general rules of the Turkish Civil Code applicable to legal persons and in cases where there is not a provision in the TCC, the rules in the Code of Obligations concerning the ordinary partnership will also be applicable to commercial companies to the extent appropriate.

To invest a capital in the company is a duty for the shareholders and it is subject to the agreement between the parties. The following can be invested in the companies as capital:

Unless otherwise regulated in the law, the following can be invested in a company as capital (Article 127/1 TCC):

a. Money, credit, negotiable instruments, shares of a capital company
b. Intellectual property rights,
c. Movable and all kinds of immovable property
d. Usage and benefiting rights of movable and immovable property
e. Personal labour,
f. Commercial reputation,
g. Commercial enterprises,
h. Lawfully used assets such as transferrable electronic platforms, areas, names and signs,
i. Mining licences and other rights such as that which has an economic value,
j. Any economic asset which is transferrable

There are some common statutory requirements to be complied with by all the companies at the stage of establishment. These can be listed as follows:

- **Legal personality:** All companies regardless of the number of its partners or the nature of liability of the shareholders have a legal personality separate from the personality of the founder partners.
- **Profit making purpose:** Commercial companies are established for profit making purposes which is a distinctive feature of commercial companies compared to associations and foundations.
- **To operate with a trade name:** All companies should have and operate under a trade name to be registered with the commercial registry.
- **Registration with the Commercial Registry:** All companies should get the foundation and the required info with the Commercial Registry.

Companies are separate legal persons who are incorporated with profit making purposes, independently of their directors and shareholders There are key differences in the structures of different types of companies defined under an exhaustive list in the TCC. Depending on the type of the company, the liability of the shareholders and the directors vary.

A company is a business association formed by two or more parties who bring together their capital to achieve common purposes of making and sharing profit.
The parties (shareholders/partners) establishing the company enter into a contract titled **"Articles of Association (AoA)".**
Every company is required to have an AoA which is legally binding on the company and all of its shareholders and which can be regarded as its internal rules, prepared by the shareholders. The AoA cannot contain rules that are against the law.
AoA of a company must be in a written form and should bear the signatures of all the shareholders, authenticated by the notary public.

your turn 2

What are the essential elements of companies?

Unless some further requirements are also required in the law, the AoA should comprise of the following points:

- Headquarters (registered office) and corporate title of the company
- The objectives of the company
- Capital, nominal value of shares, number of shares and the terms of payment
- In case of capital commitment in kind (rather than or together with cash), the value should be appraised appraised for the in kind capital
- Special privileges, if any, for the shareholders, directors or other persons
- Provisions concerning the election of the members of Board of Directors and statutory auditors; their rights and duties and the persons authorized to represent the company
- Rules of general assembly meetings (quorum etc.)
- The duration of the company
- The form of announcements of the company
- Portion of the capital each shareholder has undertaken

Further to the above requirements, within the boundaries of the law, the shareholders are free to include any other provision in the AoA of the company. Additionally, it is also possible for the shareholders to separately sign and execute another agreement between themselves named a **'Shareholders Agreement'**.

The documents which are required to be prepared and submitted to the Trade Registry by the founding partners at the establishment stage are regarded as foundation documents. Copies of these documents need to be kept for five years after the establishment. These documents are AoA, Memorandum of Association, Assessment Reports, and the contracts signed between the company and the shareholders or third parties.

Legal Consequences Of Incorporation as a Company

The legal consequences of being incorporated under a separate legal personality and the liabilities of shareholders at the establishment stage can be listed as follows:

- A company's property belongs not to its directors, management or shareholders but to the legal personality created by the establishment of the company.
- A company is responsible for its own debts and liabilities. The shareholders and, as a general rule, directors are not liable from the total amount of debts of the company. However, the directors have several liabilities arising from company law.
- The immovable property, the date registered in the land title and the intellectual property rights and other assets from the date they are registered in the relevant registries and the movable property when it is transferred to a trustful person will be considered as a property capital invested in the company. Registration in the statutory registries removes the good faith. (prevails the good faith arguments)
- The agreements made on the subscription of an immovable property or some similar rights like ownership rights on the property are valid without a requirement of statutory form.
- For economic assets or movables subscribed, the company as the owner may conclude transactions on the assets defined.
- Where the ownership on immovable property or other similar rights are subscribed as capital, than there has to be a registration in the Land Title in order for the company to carry out transactions on such property.
- In cases of registration in the Land Title and in other registries, the registrations shall be made promptly. The company has the right to unilaterally request for that.
- The Company may request from each shareholder to comply with their undertakings and and it is entitled to take a legal action before the courts and where delays cause losses, then can claim compensation. For claims, there should be a formal in advance warning. In companies in person, the partners can also take such legal actions.

- For the protection of the rights undertaken, the founders can request an injunction from the court against the partners.

Merger, Division (Spin off) and Conversion

In addition to the provisions related to the capital to be invested in the company, the rules on mergers, divestitures and conversion (change of the type) of companies are also regulated in detail in the Law (Article 134-194 TCC). Most of these provisions aim to provide protective rules for the protection of the partners, the partnership creditors, the employees and and to secure their rights and credits.

Mergers and Acquisitions

Two types of mergers as "merger by acquisition" and "merger by formation of a new company" are defined in the TCC. The law also lists in Article 137 TCC which type of companies can merge with which companies or cooperatives. Compared to the previous Commercial Code, the TCC regulated the legal process and consequences of mergers and acquisitions in details. Mergers and acquisitions are not only regulated in the TCC but also in the Law on Protection of Competition No.4054 and the relevant communiques enacted by the Competition Board. Thus a merger and acquisition planned should not only be in compliance with the TCC and registered in the Trade Registry but also, where necessaryi should obtain the approval of the Turkish Competition Board.

Division (Spin-Off/Split-Up)

Despite the fact that these three issues all require a restructuring in the company, except for limited rules on company mergers, certain rules in tax law and a communique of the Ministry of Trade, the previous Commercial Code was silent on the methods, procedures and restructuring as a result of division and conversion. TCC, taking into account the Sixth Council Directive No. 82/891/EEC in EU Law and Swiss merger law, has introduced the concepts of split-up and spin-off of capital stock companies and cooperatives.

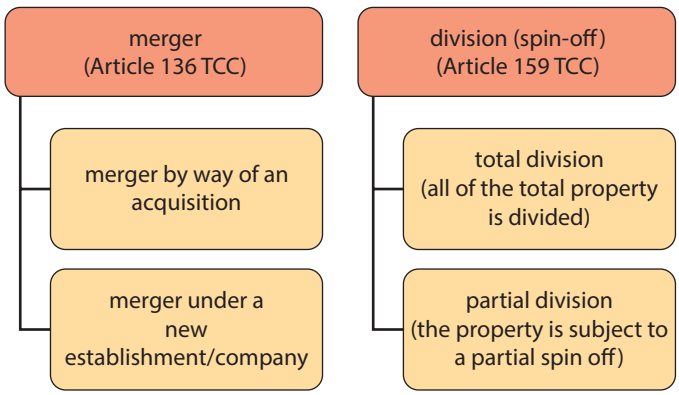


Figure 4.2

Article 135 provides a definition article for the purposes of merger, division and conversion.

Pursuant to Article 159 TCC, a company can be divided under two different models. These are by way of splitting-up and by way of spinning-off. A split-up is the type of division in which all the assets of a commercial company are divided into units and transferred to an existing or a new company or companies, where the partners of the company subject to spin-off acquire shares and rights in the transferee companies, and where the divided company ceases to exist.

A spin-off on the other hand is a division in which the assets of a commercial company are divided into units and one or some parts of these divided units remain with the company subject to spin-off, and other part(s) are transferred to an existing or new company or companies, where the partners of the divided company acquire shares and rights in the transferee companies, and where the divided company continues to exist with the remaining part.

Although the company subject to spin-off is dissolved without liquidation in a split-up (also losing its legal personality after dissolution), in a spin-off the divided company reserves its legal personality. The division becomes valid upon the registration at the Trade Registry. A subsidiary is created when the company subject to spin-off becomes a partner in the transferee company. Capital stock companies and cooperatives can be divided into capital stock companies and cooperatives.

In addition to the methods and procedure set forth in the TCC, there are certain protective measures which aim to protect the shareholders', creditors 'and the employee's rights during and after the merger or division process.

In terms of the transparency and supervision of all the transactions to be concluded, the following measures need to be taken:

a. The contents of contracts, plans, and reports are defined in the Law.
b. Audits will be conducted by expert, independent auditors.
c. All spin-off-related documents will be posted on the company's web site.

Mergers and acquisitions are not only regulated in the TCC but it is also one of three main issues regulated in Competition Law. In Article 7 of Law No.4054 on the Protection of Competition, mergers and acquisitions which may distort competition as a result of the dominant position created by the merger or acquisition are prohibited. In that regard, mergers and acquisitions which are above a certain threshold are subject to the review of Turkish Competition Authority.

The data annually provided by the Competition Authority reflects an overview of the mergers and acquisitions from several different viewpoints. As to the data provided by the Competition Authority in 2017, 184 mergers and acquisitions were filed to the Competition Authority. In 90 of those notifications, the target company or the joint venture is a company established as to Turkish laws. The overall amount of these transactions is approximately TL 22-5 billion. The Dutch and Japanese investors seem to have notified more transactions then any other company.

LEGAL FEATURES OF COMPANİES

The types of companies regulated exhaustively in the TCC are individually dealt with following the general provisions applicable. The relevant rules applicable regulate each specific type of company from establishment to dissolution as well as the rights and duties and liabilities of the shareholders.

Collective (Liability) Company (General Partnersip) (Articles 211-303 TCC)

According to Article 211 TCC, a collective company is a type of company which can be established only by persons (individuals) for the purposes of operating a commercial enterprise under a commercial title. Shareholders' liability is joint and unlimited with all their property and this principle is an obligatory rule which the parties cannot agree otherwise. The shareholders' unlimited liability for the debts of the Company is not a direct liability which means that a creditor should first refer to the Company for the debts and only if the Company is unable to pay, then refer to the shareholders. In such a case the shareholders are jointly and severally liable for the debts.

Like all other companies, the collective company should also have a title (company name), the AoA should be written and the signatures of the founding partners need to be notarized. There is not a requirement of getting the consent of any State authority for establishment. Compared to joint stock and limited liability companies, a collective liability company has less number of shareholders so it is relatively easier to take decisions. Still, one of the new introductions of the TCC is that it is also possible to meet via electronic media. All partners have the duty and authority for the management of the company. There is not a minimum capital requirement for collective partners.

In the light of the above, the essential requirements for a collective company can be listed as follows:

- establishment with a separate legal personality,
- by at least two individuals as partners,
- whose liability is not limited towards the creditors of the Company,
- to operate a commercial enterprise,
- with a trade name,
- under a written Articles of Association

Commandite Company (Limited Partnership) (Articles 304-328 TCC)

Pursuant to Article 304 TCC, a comandite company is a company which is established to operate a commercial enterprise under a trade name, where the liability of one or more shareholders are not limited against the creditors and where the liability of others is limited with the capital subscribed. Those partners whose liability is unlimited can only be individuals not legal entities.

There is not a minimum capital requirement to establish a comandite company. The capital subscribed by the partners is not divided into shares. Regardless of the status of each partner, all partners have one vote and agreements contrary to this principle are void. Company management is to be undertaken by any of the partners whose liability is unlimited. The partners with a limited liability are not eligible for management and cannot object to the management of the limited liability partners. The unlimited liability partner would only have a say for certain exceptional and extra ordinary tasks.

In some cases, where the capital of the comandite company is shared then there are special rules which apply to such circumstances **(Articles 564-572 TCC).** There are two types of comandite companies in the TCC. In ordinary comandite company, the capital is not divided into shares, and the limited liability partner cannot transfer his/her shares without the consent of other partners. In the other type of comandite company where the capital is shared, the limited liability partners can transfer these shares like the shares in joint stock corporation.

In the light of the above, the essential requirements for a comandite company can be listed as follows:

- establishment with a separate legal personality,
- to operate a commercial enterprise,
- with a trade name,
- under a written Articles of Association,
- by at least one individual partner with unlimited liability (comandite partner)
- whose liability is not limited towards the creditors of the Company and
- at least one partner whose liability is limited with certain amount of capital

Joint Stock Corporation (Articles 329-563 TCC)

Joint Stock Corporation is a capital company which is established for operating a commercial enterprise in any subject which is not prohibited by law and where the liability of the shareholders is limited with the amount of capital undertaken. The consent of Ministry of Trade is required at the establishment stage who then have the authority to supervise the activities of the company (Article 333 TCC). The shares of a joint stock company are transferable, so for a public joint stock company, the shares may be traded on a registered exchange, but for a private joint stock company, they are transferable between private parties.

When a joint stock corporation is established, the incorporation will be subject to several areas of commercial law as well as contract law. Together with its operations and functioning, in addition to contact law and company law, all other areas of law of obligations and commercial law will be on the agenda of the company as well as the rules on labour law, tax law, competition law, consumer protection law and some sectorial rules where applicable. In that context, the scope of business law actually provides to the businessmen and to those who are involved in the business a broadly defined set of rules that the the company will/may be subject to.

There are three periods in the process of establishment of joint stock corporations all of which create different rights and obligations in between the shareholders and in between the third parties and the company. These periods can be defined as the **pre-establishment period (Article 335 TCC), establishment period (Article 339 TCC) and the registration period by which legal personality is acquired (Article 354-355 TCC).**

There is not a minimum number of shareholders set forth in the TCC and joint stock corporations mostly have many shareholders. On the other hand, the TCC had introduced a new type of a joint stock corporation which was not possible before the TCC was enacted. **Single shareholder joint stock company** is a new concept for Turkish company law and this can be possible either from the date of establishment or after establishment during the course of activities. In any case there are certain procedural requirements to be complied with such as the notification requirements to the Board of directors and/or to the Trade Registry.

Unless otherwise required by the law for certain type of companies, there is a minimum capital requirement of 50.000TL for joint stock corporations set forth in the TCC (Article 332 TCC). A joint stock company may or may not offer its shares traded publicly. Family companies are usually joint stock corporations where shares are not sold publicly but transferred only to/from family members. If a joint stock company offers its shares for sale to the general public, it would be quoted on the stock exchange. The shares of a joint stock company cannot be traded publicly unless the company is incorporated as a public joint stock company where there are further statutory requirements to be complied with for the protection of the investors. Shares can be in cash or in-kind. The shares in-kind in the capital cannot be transferred to others.

Those joint stock corporations where the shares are not traded publicly are mostly family companies where there are not too many partners. Capital Market Law applies for the public joint stock corporations and the provisions of TCC apply only where the issue is not regulated in the Capital Market Law. Public joint stock corporations are subject to the supervision of the Capital Market Board.

Pursuant to Article 276 of the previous Commercial Code, joint stock corporations could be established in two ways, namely immediate and gradual establishment procedures. The gradual establishment is eliminated in the TCC. Thus all joint stock corporations are subject to the same rules for establishment.

Unlike the previous Commercial Code, the minimum number of shareholders required (5) is amended. Accordingly, single shareholder joint stock company is now possible under the TCC. In cases where the number of shareholders decreases and becomes one, then the Board of Directors shall be informed within 7 days following the relevant transaction which caused this result. The Board of Directors upon being informed that the company has become a single shareholder should be registered and announced. Furthermore, the place of domicile and the nationality of the single shareholder should also be registered and announced. As single-shareholder companies are very common in European countries, companies that want to invest in Turkey can make their investments directly as a single shareholder companies without a need to add other shareholders in the company.

There are certain principles applicable to the joint stock corporations. These principles can be summarised as follows:

a. **Principle on Majority Management:** A joint stock corporation is managed by those who hold the majority of the votes. The decisions taken by the majority votes are binding for those who have not attended or voted in the same direction. Nevertheless, the legislator also set forth certain rules in the TCC for the protection of the minority shareholders.

b. **Principle on Limited Liability of the Shareholders:** The shareholders are not directly liable for the debts of the company. The shareholders are liable with the share capital that they have undertaken to subscribe. If a shareholder concerned has already paid his share of capital, then his liability ends. A creditor to whom the company owes, cannot apply to the shareholders who have not yet paid the share capital he has undertaken.

c. **The Principle on the Protection of Capital:** In order for the protection of the creditors interests, the property and the capital of the company should be protected since in a joint stock corporation the shareholders are liable only with the capital share they have undertaken where as the Company is liable with all its property.

d. **The Principle of State Supervision:** In addition to the auditing of the Company by the auditors, also the State has certain authority on the joint stock corporations. As well as its authority on the auditing and supervision, the State also has some other functions such as the requirement of consent in the establishment; supervision by the Capital Markets Board in case of public joint stock corporations; the Ministry's authority regarding a legal action for dissolution.

e. **The Principle on Informing the Public:** One of the significant principles is to protect the investors and it is equally important to inform the public on the relevant issues about the company and let public have accurate and correct information. For that reason, both TCC and Capital Market Law set forth certain statutory requirements and cases where announcement for public information is a statutory requirement.

f. **The Principle on Equal Treatment:** The organs of the Company shall treat the partners with the same status equally unless otherwise is justified for the reasons of interests of the company or of all the shareholders.

The issues which are required to be included in the AoA are stated in the TCC. Pursuant to Article 340 TCC, the AoA can differ from the provisions related to joint stock corporations only if the Law so enables explicitly. Therefore, unless the Law enables, the relevant provisions of TCC on the AoA are to be complied with as obligatory provisions. According to some scholars, with this provision of the TCC, the general principle on freedom of contract and the complementary nature of private law and commercial law relations has significantly changed.

There is a minimum capital requirement for joint stock corporations. TCC has set forth two capital systems for all the joint stock companies, namely **basic capital** and **registered capital.** The Ministry of Trade is authorised to regulate the capital system.

The organisation of the joint stock corporation is defined in the law and these organs authorized to act on behalf of the company are responsible for both the representation and management of the company.

Organs of the Joint Stock Company

General Assembly

General Assembly is the decision making organ of a joint stock company where each shareholder has the right and duty to participate and vote either personally or through a proxy. The General Assembly meets regularly at least once a year (ordinary general assembly meeting/annual meeting) and where necessary extraordinarily. General Assembly meetings are held subject to a duly made correspondence to all the shareholders and this is the forum where all the shareholders come together to discuss, get informed and decide on some relevant issues concerning the Company. Since certain legal consequences arise from/by the decisions of the General Assembly, the decisions of the General Assembly are legal transactions and the decision taking mechanism, the conditions for its effectiveness and the effects are all subject to Article 27 of TCO.

The authority of the General Assembly which cannot be transferred to other organs are listed explicitly in Article 408/2 of TCC. The non transferrable duties of the General Assembly are as follows:

- Amendment of the AoA
- Appointment and termination of the Board of Directors and the accountants; decision on the period of their duties and their numeration;
- Appointment and termination of duties of the accountants based on the reasons other than those listed in the Law
- Based on the end of year financial tables, annual reports of the Board of Directors

decisions on the declarations of reserves, interest and income shares; usage of the reserve shares,

- Apart from the exceptions in the Law, termination of the Company,
- The sales of the significant portion of the property of the Company,
- Decide on the merger, acquisition and changing of the type,
- to authorize the Board of Directors to take decisions on the acquisition of the Company's own shares,
- Other issues left to the authority of the General Assembly

There are certain limitations on the decisions of the General Assembly which can be listed as in the following:

- **Third Parties' Rights:** The General Assembly of a joint stock company cannot take a decision on the rights of a third party. Thus a contract made between the Company and a third party cannot be declared void by the General Assembly.
- **The exclusive jurisdiction of the other organs and persons:** Those duties which are given to the Board of Managers or to other organs by the Law cannot be performed by the General Assembly. For example, although the accountants are to be appointed by the General Assembly, the General Assembly can perform this duty but cannot replace the accountants' financial supervision duties.
- The General Assembly should also be sensitive and refrain from violation of **minority rights and the individual rights** of the shareholders.
- The General Assembly should also **protect and refrain from taking decisions concerning the rights with privileges.**
- General Assembly **Meeting via electronic platforms** is also possible with the new TCC.

Board of Directors (BoD)

The Board of Directors is the representative organ of the joint stock company which can be composed of one or more persons as Directors to be assigned by the AoA. Board of Directors is the organ to whom the General Assembly may delegate partially or fully the authority of the management of the company.

Those who represent the company can carry out all transactions on behalf of the company. Unless otherwise agreed in the AoA regarding the quorum for meeting and for taking decisions, pursuant to the law, the Board of Directors meets with simple majority and decides with the majority of those directors who are present in that meeting.

The previous TCC had limitations in the number of Directors in the Board. However, the TCC amended this limitation on the number of Board Members. Except certain specific laws explicitly regulating a limitation such as the number of board of directors in banking where there should be at least five members, it is set forth that there can be one or more directors. In any case at least one of the Directors should be based in Turkey and hold a Turkish nationality. At least one quarter of Directors shall have a university degree. In case of a single Director in the Board, this requirement is not sought. Unlike the previous Commercial Code, under the TCC it is possible that the legal entities can also become a Director in the Board. In that case the legal entity shall be represented by an individual with a full capacity to act and only that assigned person can act as the representative of the legal entity in the Board of Directors.

Subject to an explicit description in the AoA on the mode of meetings, the meetings of the Board of Directors can be held via electronic media or some of the members of the Board may attend the Board meetings in this way. This is one of the new provisions which provides a significant change in the way that the Board Meetings are held.

The membership in the Board of Directors may end in several ways. The membership of any Board member may terminate based on several statutory reasons such as bankruptcy or the loosing of the statutory conditions such as the legal capacity to act as a Board member or if further requirements set forth in the AoA, where such requirements no longer met.

In addition to the causes stated above, resignation and termination of membership by the General Assembly on the grounds stated in the law are the other reasons where membership in the Board of Directors ends.

Pursuant to Article 396/1 TCC, the members of the Board have the obligation not to get engaged in a business which competes with the Company in the areas of business, or become an unlimitedly liable partner in a company which is operating in the same area as the company without the consent of the General Assembly. If this obligation is not complied with then the company may request either compensation or recognize the transaction concerned as a transaction made with the company or sue for the benefits arising from transactions on behalf of third parties.

Auditing

TCC has introduced a new system on the auditing of joint stock corporations where financial statements of companies are subject to the financial review in accordance with Turkish auditing and international standards which will be announced by the Authority of Public Supervision, Accountancy and Auditing. The auditing of the joint stock companies shall be made both internally and externally.

For internal auditing, the auditing shall be carried out by auditors (Article 397 TCC) to be appointed by the General Assembly. External auditing is performed primarily by the Ministry of Trade.

Pursuant to Article 397 TCC, the financial statements of a joint stock company and group of companies shall be audited in accordance with Turkish Auditing Standards which are in compliance with international auditing standards. Whether the financial information included in the annual report prepared by the Board of Directors is consistent with the audited financial statements and whether they have a true and fair view are to be included in the scope of audit.

The financial statements and the annual report prepared by the Board of Directors are not regarded as sufficient unless audited by the auditor. Pursuant to Article 400 TCC, the auditor must be an independent auditing firm whose shareholders hold the title of sworn financial advisor or a certified public accountant. Small and medium-sized joint stock companies can elect one or more sworn financial advisors or certified public accountants as auditors. The incorporation and performance rudiments of independent auditing firms and the qualifications of auditing personnel shall be arranged by a regulation that shall be drawn up by the Ministry of Trade and put into effect by the President. There are certain limitations set forth in the Law where the certified public accountant or sworn financial advisor cannot become auditors.

In the light of the above, the essential requirements for a joint stock company can be listed as follows:

- establishment with a separate legal personality,
- for any economic purpose,
- with a trade name,
- under a written Articles of Association,
- whose capital is certain and divided into shares,
- by at least one or more individual or legal entity partner(s),
- with a liability limited with the subscribed capital,
- whose liability is not limited towards the creditors of the Company and
- at least one partner whose liability is limited with certain amount of capital
- capital cannot be less than 50.000 TL and 100.000TL in joint stock corporations where shares are traded publicly (where the minimum capital requirement can be increased by the Ministry of Customs and Industry)

Limited Liability Company (Articles 564-572 TCC)

Limited liability company can be established by one or more individuals and legal entities with a defined capital of shares, and the liability of each partner is limited to the amount paid or undertaken. The partners are not liable for the debts of the company and only liable with the share capital subscribed or paid and for the commitments undertaken by the AoA of the

company. Unlike the previous Commercial Code and parallel to the provisions introduced for single share joint stock Corporation, the limited liability company can also be established by a single shareholder or during the course of activities the company can become a single shareholder. The minimum capital of the limited liability company cannot be less than 10.000TL (Article 580 TCC). The capital contribution in cash is paid at once. Capital contribution in-kind is permitted. The immovable properties where invested in the capital are to be registered at the Land Title on behalf of the company. The shareholders can structure the transfer of the capital share. The transfer of shares can be made easier with specific clauses in the AoA. If the shareholders aim to have a closed company, the transfer of shares can be made difficult or prohibited.

A limited liability company to be formed by one or more individuals or legal entities should have a commercial title and a predetermined (fixed) capital and also have limited liability to the corporate assets. Unlike the previous Commercial Code, the TCC regulates limited liability company in many aspects like a small joint stock corporation in terms of its structure, management and decision mechanisms. Nevertheless, there are still differences such as the recovery of balance sheet deficits, secondary performance obligations, loyalty commitment and non-competition clauses.

TCC requires two organs for the management and representation which are Shareholders **General Assembly** and the **Directors.** Unlike the previous Commercial Code where each shareholder had the duty and authority to act as a manager, the TCC requires that managers be elected.

The general assembly of a limited liability company is similar but less formal compared to the shareholders' assembly of a joint stock company. Ordinary shareholdings assembly meets once a year, within three months following the end of the fiscal year and extraordinary meeting is to be held when necessary.

Limited liability can be managed by one or more directors. The Director(s) may be individual(s) or legal entities. If there is more than one manager in a company, one of them should be appointed as the Chairman of the Board of Directors. All the authorities of the shareholders related to the management of a limited liability company may be granted to a General Manager to be appointed or alternatively to one of the shareholders. The Law requires that statutory auditors shall be appointed where the number of shareholders are more than twenty in a limited liability company. Despite the fact that both of the above stated companies are corporate companies, there are some financial threshold (i.e., **minimum capital**) requirements. The liability of shareholders in both joint stock and limited liability companies is limited to the amount of their capital undertaken.

The types of general assembly and board of execution meetings of joint stock corporations and limited liability companies where a government representative is required to be present is to be determined by the Ministry of Trade.

Joint stock corporations and limited liability companies are the mostly preferred types among the business cycles. Yet there are some basic differences between joint stock companies and limited liability companies in terms of their personal assets. A joint stock company can go public and offer shares traded publicly where as a limited liability company cannot offer its shares to the public.

your turn 3

List the basic features of a joint stock corporation.

Cooperatives (Cooperatives Law No.1163 and Relevant Provisions of TCC)

Cooperatives are defined among the types of companies in the TCC. Based on the specific nature and the usage of cooperatives in practice, the legislator had regulated cooperatives with a special law. Therefore, all kinds of cooperatives are subject to Law No.1163. For the areas not regulated in this special law, one should refer to the general provisions of TCC. The rules in the TCC which relate to the legal consequences arising from the status of operating as a merchant apply to the cooperatives.

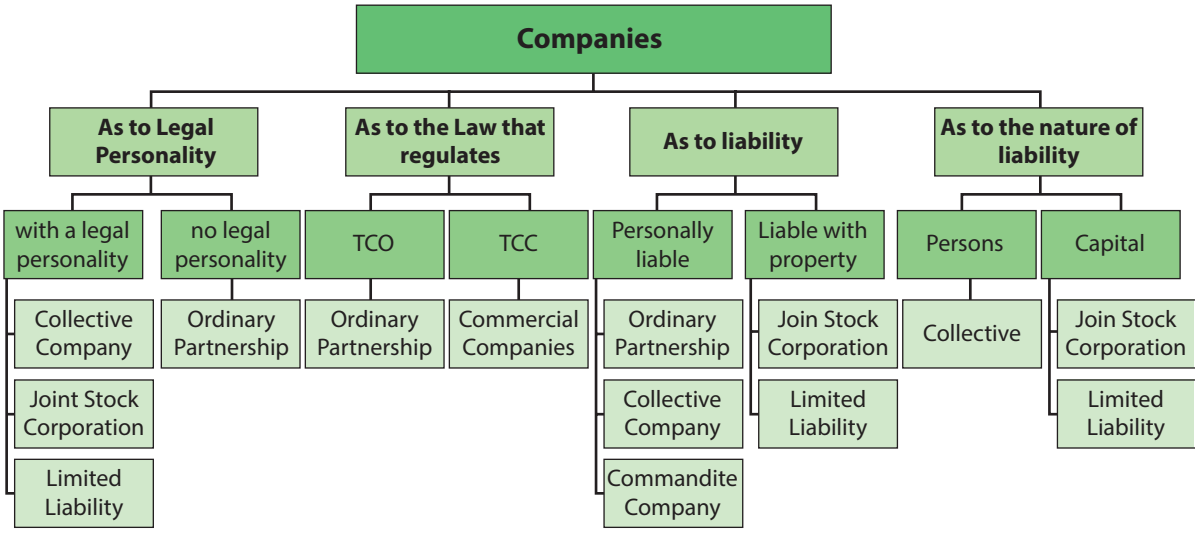

Companies
As to Legal Personality
As to the Law that regulates
As to liability
As to the nature of liability
with a legal personality
no legal personality
TCO
TCC
Personally liable
Liable with property
Persons
Capital
Collective Company
Joint Stock Corporation
Limited Liability
Ordinary Partnership
Ordinary Partnership
Commercial Companies
Ordinary Partnership
Collective Company
Commandite Company
Join Stock Corporation
Limited Liability
Collective
Join Stock Corporation
Limited Liability

Figure 4.3

Summary

LO 1 Have basic legal information on the types of companies in Turkish Commercial Law.

Company law in Turkey is set out in the Company Law Chapter of Turkish Commercial Code ("TCC") enacted in 2011. The rules on company law regulate the requirements for the formation, incorporation, organs and functioning of each specific type of company and furthermore the liability of the shareholders, and auditing and dissolution of the companies.

When compared to other chapters of the TCC, there has been significant amendments in the company law regime. It is aimed to provide a simpler, more efficient and cost effective framework for companies in commercial business life. The new company law regime extended not only to cover some new types/ structures of companies; such as the single-shareholder joint stock company but also introduced some new principles.

One of the most significant introductions of the TCC is that it introduces single-shareholder company/ incorporation and single-member limited liability company as the two new models of companies. The introduction of a "one-man company" has been modelled on the Twelfth Council Company Law Directive (89/667/ EEC) from EU company law to Turkish company law.

In terms of the new principles, corporate governance is one of the new key concepts in the TCC. Corporate governance should not be understood as a principle which applies only to publicly traded companies but with the enactment of TCC it applies to all capital companies.

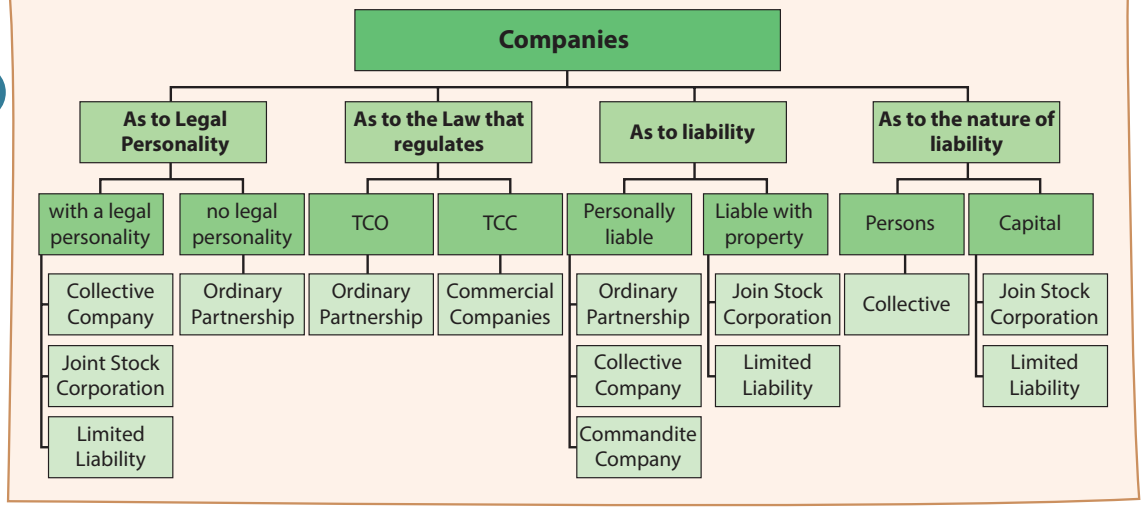
Fundamentals of corporate governance under the TCC can be listed as in the following:

1. Corporate governance principles aim to maintain (i) transparency, (ii) fairness, (iii) accountability, (iv) responsibility.
2. Transparency is required in (i) financial statements, (ii) boards of directors' annual reports, (iii) independent audits, (iv) transactional auditors, (v) all audit reports of individual companies and group of companies.
3. Fairness has been ensured by establishing a balance of interests and by objective justice.
4. Accountability is aimed to be provided with the requirements sought for the Board of Directors reports, flow of information, right to information and oversight.
5. The rights of shareholders to sue, obtain information and perform oversight have been created along with smooth-running legal mechanisms.
6. The minority rights have been expanded.
7. Privileged shares have been restricted.
8. Representation opportunities for group of shareholders and the minority in the Board of Directors have been increased.
9. The Capital Markets Board has been provided with exclusive authority to regulate corporate governance.
10. The publicly held companies are now obliged to publish corporate governance reports.

A company has a legal personality separate from the personalities of its founding partners. Partnership is a type of a business model regulated in the Turkish Code of Obligations. However, there is a key difference between a partnership and a company that a partnership (for e.g. ordinary partnership, partnership for inheritance or even marriage) does not confer any limited liability on its partners. In ordinary partnership for example, it is possible for each partner to be liable without any limits for the debts incurred by other partners where as in company law the nature of liability of the partners may vary and mostly limited.

Summary

LO 2 Identify different types of companies in Turkish Law from the viewpoint of the structure of each different type of company.



LO 3 Learn about the legal consequences of being incorporated as a company under Turkish Law and the liability of the shareholders

i. A company's property belongs not to its directors, management or shareholders but to the legal personality created by the establishment of the company.

ii. A company is responsible for its own debts and liabilities. The shareholders and, as a general rule, directors are not liable from the total amount of debts of the company. However, the directors have several liabilities arising from company law.

iii. The immovable property, the date registered in the land title and the intellectual property rights and other assets from the date they are registered in the relevant registries and the movable property when it is transferred to a trustful person will be considered as a property capital invested in the company. Registration in the statutory registries removes the good faith. (prevails the good faith arguments)

iv. The agreements made on the subscription of an immovable property or some similar rights like ownership rights on the property are valid without a requirement of statutory form.

v. For economic assets or movables subscribed, the company as the owner may conclude transactions on the assets defined.

vi. Where the ownership on immovable property or other similar rights are subscribed as capital, than there has to be a registration in the Land Title in order for the company to carry out transactions on such property.

vii. In cases of registration in the Land Title and in other registries, the registrations shall be made promptly. The company has the right to unilaterally request for that.

viii. The Company may request from each shareholder to comply with their undertakings and entitled to take a legal action before the courts and where delays cause losses then can claim compensation. For compensation claims there should be a formal in advance warning. In companies in person, the partners can also take such legal actions.

ix. For the protection of the rights undertaken, the founders can request an injunction from the court against the partners.

1 Which of the following is **not** one of the new principles introduced by the TCC regarding Company Law?

A. Single-shareholder company/incorporation
B. Single-member limited liability company
C. Corporate governance
D. New standards and procedures for auditing
E. Limited liability of the shareholders of a joint stock corporation

2 Which of the following companies is **not** regulated in the TCC?

A. Comandite company
B. Limited liability company
C. Collective company
D. Ordinary partnership
E. Joint stock Corporation

3 Which of the following is **not** a requirement (consequence) for the incorporation as a company?

A. The Company may request from each shareholder to comply with their undertakings, and it is entitled entitled to take a legal action before the courts and where delays cause losses, then it can claim can claim compensation.
B. For economic assets or movables subscribed, the company as the owner may conclude transactions on the assets defined.
C. The shareholders of the company should all be unlimitedly liable individuals to be able to act in the Board of Directors of a Company.
D. Where the ownership on immovable property or other similar rights are subscribed as capital than there has to be a registration in the Land Title in order for the company to carry out transactions on such property.
E. In cases where registration in the Land Title and in other registries is required, the company has the right to unilaterally request for the prompt registration.

4 Which of the following is an essential requirement for a collective company?

A. At least one individual partner with unlimited liability
B. At least two individual partners with unlimited liability
C. At least five individuals with unlimited liability
D. At least one legal entity with limited liability
E. At least two partners

5 Which of the following is **not** a statutory requirement to be inserted in the AoA of a joint stock company?

A. Headquarters (registered office) and corporate title of the company
B. Capital, nominal value of shares, number of shares and the terms of payment
C. In case of capital commitment in kind (rather than or together with cash), the value appraised for the in kind capital
D. Provisions concerning the election of the members of Board of Directors and statutory auditors; their rights and duties and the persons authorized to represent the company
E. The credit-debt position of each legal entity shareholder.

6 Which of the following is **not** required in the acquisition process of a commercial enterprise?

A. A commercial enterprise is to be acquired with all its credits and debts
B. To acquire a commercial enterprise with all the elements therein, there is not a need to separately conclude agreements or registrations for each of the elements concerned.
C. In every acquisition, the acquisition of the immovable property included within the assets of the commercial enterprise and so covered in the written agreement.
D. A commercial enterprise when it will be acquired needs to clear all debts to others.
E. Depending on the nature and turnover threshold of the acquisition, the agreement may need to be notified to the Competition Authority under Article 7 of the Law No.4054, for clearance.

Test Yourself

7 Which of the following concepts is **not** regulated in Turkish Company Law?

A. Partial spin off
B. Trustee
C. Conversion
D. Total spin off
E. Merger

8 Which of the following is **not** among the features of companies in Company Law regulated in the TCC?

A. A company is responsible for its own debts and liabilities. The shareholders and, as a general rule, directors are not liable from the total amount of debts of the company. However, the directors have several liabilities arising from company law.
B. The immovable property, the date registered in the land title and the intellectual property rights and other assets from the date they are registered in the relevant registries and the movable property when it is transferred to a trustful person will be considered as a property capital invested in the company. Registration in the statutory registries removes the good faith. (prevails the good faith arguments)
C. The agreements made on the subscription of an immovable property or some similar rights like ownership rights on the property are valid without a requirement of statutory form.
D. For economic assets or movables subscribed, the company as the owner may conclude transactions on the assets defined.
E. A shareholder of a company should in any case be unlimitedly liable for all the debts incurred by the company at the pre-establishment stage.

9 Which of the below concepts is only recently regulated in the new TCC?

A. Mergers and acquisitions
B. Commercial companies
C. Single shareholder joint stock company
D. Trade registry
E. Commandite company

10 Which of the following is **not** among the principles applicable to the joint stock corporations:

A. Principle on the majority management
B. Principle on informing the public
C. Principle on the equal shares in the capital
D. Principle on limited liability of the shareholders
E. Principle on the state supervision

1. E	If your answer is wrong, please review the "Part Titled Introduction" section.	6. D	If your answer is wrong, please review the "Part Titled Legal Features of Companies" section.
2. D	If your answer is wrong, please review the "Part Titled Types of Companies in the TCC" section.	7. B	If your answer is wrong, please review the "Part titled Merger Division and Conversion" section.
3. C	If your answer is wrong, please review the "Part Titled Legal Consequences of Incorporation as a Company" section.	8. E	If your answer is wrong, please review the "Part Titled Legal Consequences of Incorporation as a Company" section.
4. B	If your answer is wrong, please review the "Part titled Collective (Liability) Company" section.	9. C	If your answer is wrong, please review the "Part titled Joint Stock Corporation" section.
5. E	If your answer is wrong, please review the "Part Titled Joint Stock Corporation" section.	10. C	If your answer is wrong, please review the "Part Titled Joint Stock Corporation" section.

List the types of Companies listed and regulated in the Turkish Commercial Code.

your turn 1

Turkish Commercial Code classifies and regulates five different kinds of companies. These are as follows:

1. Collective Company
2. Comandite Company
3. Joint Stock Company
4. Limited Liability Company
5. Cooperatives

(see Part I Types of Companies)

What are the essential elements of companies?

your turn 2

Essential elements of companies are as follows:

- **Legal personality:** All companies have legal personality.
- **Profit making purpose:** All commercial companies are established for profit making purposes.
- **Operate with a trade name:** All companies should have and operate under a trade name to be registered with the Trade Registry.
- **Registration with the Trade Registry:** Certain information regarding the companies needs to be registered with the Trade Registry.

(see Part II Legal Features of Company Law)

Suggested answers for "Your turn"

List the basic features of a joint stock corporation.

your turn 3

- establishment with a separate legal personality,
- for any economic purpose,
- a trade name,
- under a written Articles of Association,
- whose capital is keratin and divided into shares,
- by at least one or more individual or legal entity partner(s),
- with a liability limited with the subscribed capital,
- whose liability is not limited towards the creditors of the Company and
- at least one partner whose liability is limited with certain amount of capital
- capital cannot be less than 50.000 TL and 100.000TL in joint stock corporations where shares are traded publicly (where the minimum capital requirement can be increased by the Ministry of Customs and Industry)

(See heading 3 Joint Stock Corporations under Part II)

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Chapter 5 Organization of the Judiciary

After completing this chapter, you will be able to;

Learning Outcomes

1. Explain the basic concepts and principles regarding judiciary
2. Analyze the main institutions of the Turkish Judiciary Organization

Chapter Outline

Introduction
Judiciary as a State Organ
The Basic Concepts and Principles Regarding Judiciary
Supreme Courts in the Turkish Judicial System

Key Terms

Judiciary
Judge
Court
Trial
Legal Action
Independence and Impartiality of Justice
Security of Tenure of Judges and Public Prosecutors
Natural Judge
Seperation of Jurisdictions
Principal of Procedural Economy
The Constitutional Court
The Court of Jurisdictional Disputes
The Court of Cassation
District Courts of Appeal
Civil Courts
Criminal Courts
The Council of State
District Administrative Courts
Administrative Courts
Tax Courts
The Court of Accounts
The Supreme Election Board and other election boards
Directorates of Enforcement and Bankruptcy
Ministry of Justice

INTRODUCTION

A state can be defined as a politic body of a particular sovereign power used in a specific territory occupied by a community. Each state needs a government which can be defined as the direction of the various affairs of a state.

A state comprises three basic organs : (1) The legislature, (2) The Executive and (3) The judiciary.

Each state organ is responsible for a different function of the government. The legislative branch is responsible for making laws which are implemented by the executive and interpreted by the judiciary branches.

In the following section, the term judiciary as a state organ, the basic concepts and principles regarding judiciary, and the main institutions constituting the Turkish Judiciary Organization shall be studied in general.

JUDICIARY AS A STATE ORGAN

The Republic of Turkey has adopted the principle of separation of powers. In the preamble of Turkish Constitution it is clearly stated that *"the separation of powers does not imply an order of precedence among the organs of the State, but it refers solely to the exercising of certain state powers and discharging of duties, and is limited to a civilized cooperation and division of functions; and the fact that only the Constitution and the laws have the supremacy"*. Also, according to the article 6 of Turkish Constitution with the title "sovereignty", "The Turkish Nation shall exercise its sovereignty through the authorized organs, as prescribed by the principles set forth in the Constitution". Finally, according to article 9 of Turkish Constitution, judicial power shall be exercised by impartial and independent courts on behalf of the Turkish Nation. Independence of courts, security of tenure of judges and public prosecutors, organization of courts, the profession of judges and prosecutors, supervision of judges and public prosecutors, the powers and duties of high courts are specificly regulated by the Constitution between Articles 138 and 160. Main function of the judiciary is to strengthen the fundamental rights and freedom by the realization of rule of law and respect for human rights.

The judiciary is the system of courts that interprets and applies the law in the name of the state. The judiciary also provides a mechanism for the resolution of disputes. As judiciary consists of a group of independent but interrelated elements (courts) comprising a unified whole, it can be considered as a system. Thus, the judiciary, which is also known as the judicial system, is defined as the organizational system and principles of court that administer the justice and constitute the judicial branch of government.

Government is the organization that is the governing authority of a political unit. Judiciary is the branch of government that is endowed with the authority to interpret and apply the law, adjudicate legal disputes and otherwise administer the justice.

The Turkish Judiciary refers to the courts which are responsible for the enforcement and the interpretation of Turkish laws. It comprises a system of courts and some administrative bodies, as well as the judges and other judicial officials who preside over them.

Under seperation of powers doctrine, the judiciary shares power with executive and legislative branches of government. The judiciary is delegated the duty of interpreting and applying the laws that are passed by the legislature and enforced by the executive branch. The judiciary is granted the power to adjudicate the law-suits that arise under the law.

The judiciary is hierarchical system of trial and appellate courts. In general a law-suit is originally filed with a trial court that hears the suit and detemines its merits. Parties aggrieved by a final judgment have the right to appeal the decision. They do so by asking an appellate court to review the decision of a trial court. The structure of the court system varies but three levels generally can be identified: courts of first instance, intermediate appellate courts and supreme courts.

Courts of first instance handle the cases at the first step. With a very few exceptions, the majority of the cases are dealt by courts of first instance as trial courts. Each court has jurisdiction over a certain geographic area, and may hear cases only within that jurisdiction.

Intermediate appellate courts, which are also called as district courts of appeals, review some cases that have been decided by courts of first instance (if they are not a final decision). They are also trial courts and they hear new evidence. They decide

whether the lower court (court of first instance) correctly applied the law in the relevant case.

Supreme courts are the nation's highest appellate courts. They review the decisions of the lower courts at the last instance and render a final judgment, further appeals can not be made. So they are called as the court of last resort.

Some courts are ordinary courts. Many of law suits begin in an ordinary court. Such courts can hear almost every type of cases. On the other hand, some courts are special courts: only some special law-suits begin in such a court. Such courts are expressly designated to hear spesific types of cases. For example, tax courts handle disputes between tax payers and the tax administration. Juvenile courts are example for such a special court in penal cases involving juveniles. Family courts are special civil courts to hear cases involving domestic issues.

attention

Judiciary is the branch of government that is endowed with the authority to interpret and apply the law, adjudicate legal disputes and otherwise administer the justice.

THE BASIC CONCEPTS AND PRINCIPLES REGARDING JUDICIARY

The Basic Concepts Regarding Judiciary

The basic concepts regarding judiciary can be stated as the judge, the court, the trial and the legal action.

The Judge

Personnel Structure of the Turkish Judiciary

The personnel working in Turkish judicial system are split into three categories: judges, public prosecutors and auxiliary personnel.

A judge is a public officer appointed to decide cases in a law court. Judges are the public officials who preside over civil, criminal and administrative trials in relevant courts.

Turkish Constitution has adopted the principle of professional judge.

Judges are split into two categories as ordinary jurisdiction judges and administrative jurisdiction judges while starting the profession in line with the segregation in the judicial system. Ordinary jurisdiction judges are selected from among graduates of law faculties and administrative jurisdiction judges are selected from among the graduates of either law schools or faculties of political science and faculties; of social sciences, which include law courses in their programs at a sufficient level. Those who pass the central written exam will be subject to an oral exam by a board consisting of the representatives of the Ministry of Justice and supreme courts, and then, the ones who pass the oral exam can become "candidate judges". "Candidate judges" who receive training for 2 years in the courts andby the Department of Training of the Ministry of Justice will be branched off as judge or public prosecutor (in terms of the candidate judges to serve in the ordinary judiciary) at a certain stage of the training. Those who successfully complete the training are accepted into the profession by the "Council of Judges and Prosecutors" "CoJP" as judges or public prosecutors and they are appointed to the courts.

"Judge class" will be the most appropriate are split into four levels as third level, second level, candidate for first level and first level by the period of office and their achievements.

A judge is a person entrusted with giving, or taking part in, a judicial decision opposing parties who can be either natural or physical persons, during a trial.

In Turkish judicial system, the concept "judge" is used to describe an occupational group. Nevertheless, not all of those in this group serve as judges in practice.

Nevertheless, Turkish Constitution has adopted the principle of "professional judge". This principle requires that decisions in courts must be rendered by professional judges, and the Turkish judicial system does not allow non-professional judges to render or take part in a judicial decision.

As well as the judges at benches, the persons in the following positions are considered as "judge":

- All of the public prosecutors,
- Almost all of the middle level and senior bureaucrats assigned in the central organization of the Ministry of Justice, the CoJP and justice inspectors,

- President and members of supreme courts and the public prosecutors assigned in these courts,
- Most of the judges assigned as rapporteurs in the supreme courts.

For those appointed to administrative positions, it is guaranteed by the Constitution to be appointed as judges to the courts by the CoJP upon their request.

Unless they are the members of the supreme courts, the judges are promoted and appointed to a court by the CoJP regardless of their positions. However, they are appointed to administrative positions and relieved of their duties by the relevant administrative unit in accordance with the legal arrangements.

Those working under the judge class are split into four levels as third level, second level, candidate for first level and first level by taking into account the period of office and their achievements. These levels are taken into account while they are appointed for certain positions or places. For example, members of supreme courts can only be appointed from among the judges at first level.

attention

Judges are split into two categories as ordinary jurisdiction judges and administrative jurisdiction judges while starting the profession in line with the segregation in the judicial system.
Ordinary jurisdiction judges are selected from among the graduates of law faculties; and administrative jurisdiction judges are selected from among the graduates of either law schools or faculties of political science and faculties of social sciences, which include law courses in their programs at a sufficient level.

The Public Prosecutors

The recruitment, trainings, personal rights and other issues for judges and prosecutors are arranged completely in parallel with each other. Although it is not very common, the transition between two professions is also possible. As it is emphasized above, those involved in both professions are defined as "judge class."

The different status of the public prosecutors from other countries might be very confusing. Public prosecution in Turkey is a duty carried out by persons from judge class. In this regard, the public prosecutors have tenure of judges, and their appointments, promotions and discipline provisions are finalized by the CoJP as for the judges. Public prosecutors do not have any relation with the Bar Associations and other occupational organizations for lawyers. Their rights for election as members of supreme courts, being a member of the CoJP or other rights are the same with the judges. However, they are in the same position with the defence counsels during trial and they cannot intervene in the decisions of the judges.

attention

The recruitment, trainings, personal rights and other issues for judges and prosecutors are arranged completely in parallel with each other. Although it is not very common, the transition between two professions is also possible.

The Prosecution Service

Turkish prosecutors form part of the judicial system, although they have distinct powers and functions to those of judges. Prosecutors have powers and competences in civil and criminal, and administrative jurisdictions. Only those working in civil and criminal jurisdictions are named as "public prosecutors". They include the chief public prosecutor of the High Court of Appeals-Court of Cassation, chief public prosecutors of cities and districts, deputy-chief public prosecutors and ordinary public prosecutors. In the administrative jurisdiction, prosecutors work for the Council of State, except in the first instance and district administrative courts. Chief and deputy-chief prosecutors of the High Court of Appeals-Court of Cassation are appointed by the President of the Republic. The chief public prosecutor of the Council of State is elected by the Council's plenary.

The role of public prosecutors is particularly important in Turkey during the pre-trial phase of criminal proceedings. They have the duty to investigate the facts promptly after being informed about a crime and must gather and secure

evidence both in favour of and against the suspect. Throughout the investigation, the judicial police are under the command of public prosecutors. If the public prosecutors believe that there is sufficient suspicion of a crime, they are obliged by law to file indictments.

The Auxiliary Judiciary Personnel

Auxiliary personnel working in the judicial system are mainly assigned in courts, public prosecution offices and other judicial institutions as clerks or mid-level managers. It is also exceptionally possible for them to hold certain high-level positions. They can also be assigned as "expert" in certain areas that require expertise. Auxiliary judiciary personnel serve as civil servant and have the same rights with the other civil servants.

The Role of Lawyers in the Judicial System

Under Turkish law, the work of lawyers is described as an independent public service. In order to practice law, a lawyer must be registered with the bar association of the city where he/she resides, after the end of a one-year internship. The bar associations, including the Union of Turkish Bar Associations at national level and the regional bar associations, are responsible for the admission of candidates to the profession, the regulation and the conduct of their internship and disciplinary investigations.

The Ministry of Justice retains a significant role in the admission of lawyers to the profession and in their disciplinary system. The admission decisions of the Union of Turkish Bar Associations are subject to the approval of the Ministry, which is also needed to launch criminal investigations and impose some disciplinary measures against lawyers.

Lawyers, along with judges and prosecutors, are one of the pillars on which protection of the rule of law and access to justice against human rights violations rests. If the justice system is to be effective, then lawyers must be free to carry out their professional duties independently, without interference from the Executive or from other powerful interest groups, and must be protected, in law and in practice, from attack or harassment as they carry out their professional functions.

The government and law enforcement authorities should take all the measures within their powers to protect lawyers under threat from violence, harassment or persecution and should refrain from all statements or actions that compromise their safety or identify them with the causes of their clients.

The Court

A court can be defined as a place where trials and other legal cases happen or the people present in such a place especially the officials and those deciding who is right or guilty.

Court is a body of people presided over by a judge or a number judges and acting as a tribunal in civil, criminal and administrative cases. A court is generally established as a government institution, with the authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal, and administrative matters in accordance with the rule of law.

Court is a body of people presided over by a judge or a number judges and acting as a tribunal in civil, criminal and administrative cases. A court is generally established as a government institution, with the authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal, and administrative matters in accordance with the rule of law.

The Trial

Trial is a judicial examination and determination of facts and legal issues arising between parties to a civil, criminal or in some cases administrative action. Two main types of trials are civil trials and criminal trials. Civil trials resolve civil actions which are brought to enforce, redress or protect civil rights. Types of actions which are other than criminal actions are called as civil actions. In a criminal trial, a person charged with a crime is found guilty or not guilty and sentenced. The goverment brings a criminal action on behalf of the citizens to punish an infraction of criminal laws.

attention

Trial is a judicial examination and determination of facts and legal issues arising between parties to a civil, criminal or in some cases administrative action.

Parties in a Trial

The term party refers to an individual, organization, or government that participates in the trial and has an interest in the trial's outcome.

The main parties to a lawsuit are the plaintiff and the defendant. In a civil trial, the plaintiff initiates the lawsuit and seeks remedy from the court for private civil wrongs allegedly committed by defendant or defendants. There may be more than one plaintiff in a civil trial if they allege similar wrongs against a common defendant. In a criminal trial, the plaintiff is the government, and the defendant is an individual accused of a crime. A party in a civil trial may be presented by counsel or may represent himself. In a criminal trial, the government is represented by the prosecutor who seeks to prove the guilt of the criminal defendant.

attention

The main parties to a lawsuit are the plaintiff and the defendant.

Legal Action

A legal action, legal proceedings or a lawsuit is defined as the act of using a court to help settle a disagreement. It can also be defined as a process to have a court of law to settle an argument. It is a process of enforcing a in the meaning of "national laws, national legislature" by proceeding within the court system. In such a judicial proceeding, one party (the plaintiff) prosecutes another (defendant) for a wrong done or protection of a right or prevention of a wrong. It can be considered as a lawful pursuit for justice or decision under the law, typically leading to proceeding within the jurisdiction's court system.

attention

A legal action or a lawsuit is defined as the act of using a court to help settle a disagreement.

The Basic Principles Regarding Judiciary

The basic principles regarding judiciary can be stated as the principle of independence and impartiality of the Judiciary, the security of tenure of judges and public prosecutors, the principle of natural judge, the principle of separation of jurisdiction, and the principle of procedural economy.

The Principle of Independence and Impartiality of the Judiciary

The principle of the rule of law is enshrined in article 2 of the Turkish Constitution which describes the State as *"a democratic, secular and social state governed by the rule of law"*. In the Turkish legal system, the Constitution is the supreme law of the land, and all laws, executive, legislative and judicial organs, administrative authorities, institutions and individuals are bound by its provisions and must comply with them.

The separation of powers, particularly between the political branches of government and the judiciary, is a core precept of the rule of law. Central to this principle is that the judiciary must be, structurally and in practice, independent. Thus, according to the universally accepted principle of independence of the courts, the independence of the judiciary is be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. In accordance with international standards on the independence of the judiciary, the governing bodies of the judiciary must be independent of the executive and legislative powers.

attention

It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary and the governing bodies of the judiciary must be independent of the executive and legislative powers.

Independence of judges require from the Judges to be independent when discharging their duties.

The executive and legislative authorities should refrain from all actions and rhetoric contrary to the separation of powers. Legislation, administrative measures and public statements by representatives of the executive should respect the role and independence of the judiciary and should respect and enforce court decisions.

Under article 9 of the Constitution, the judicial power is exercised by "impartial and independent courts on behalf of the Turkish nation."

The independence of the Turkish courts is stipulated in article 138 of the Constitution as follows: *"Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law. No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions. No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution."*

Judicial independence and impartiality are closely linked, and in many instances tribunals have dealt with them jointly. However, each concept has its own distinct meaning. In general terms, "independence" refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts. This independence pertains to the judiciary as an institution (independence from other branches of power, referred to as "institutional independence) and to the particular judge (independence from other members of the judiciary, or "individual independence"). "Independence" requires that neither the judiciary nor the judges who compose it be subordinate to the other public powers. On the contrary, "impartiality" refers to the state of mind of a judge or tribunal towards a case and the parties to it. Impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.

The Security of Tenure of Judges and Public Prosecutors

Article 139 of the Constitution establishes the security of tenure of judges and public prosecutors. It stipulates: *"Judges and public prosecutors shall not be dismissed, or unless they request, shall not be retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or a post. Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties because of ill health, or those determined as unsuitable to remain in the profession, are reserved."*

Article 140 of the Constitution and article 4 of the Law No. 2802 on Judges and Prosecutors establish that *"judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of the tenure of judges."*

attention

The most appropriate method for guaranteeing judicial independence and impartiality together with the security of tenure of judges and public prosecutors is the establishment of a special institution, namely a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy and that such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.

The most appropriate method for guaranteeing judicial independence and impartiality together with the security of tenure of judges and public prosecutors is the establishment of a special institution, namely a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy and that such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.

Such an institution is established in article 159 of the Constitution and called as the Council of Judges and Prosecutors. The Council of Judges and Prosecutors (CoJP) is an administratively and financially independent council performing its duties by considering the principle of independence of courts and the security of tenure of judges and prosecutors within the framework of the principles of fairness, impartiality, accuracy, honesty, consistency, equality, competence and qualification.

The CoJP shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges. It consists of thirteen members and functions as a Plenary Session and two Chambers (as the first and the second chambers of the CoJP).

The Plenary Assembly consists of thirteen members. The President of the Council is the Minister of Justice. The Deputy Minister of the Ministry of Justice shall be an ex-officio member of the Council. Four of the members of the Council, the qualities of whom are defined by law, shall be appointed by the President of the Republic, and the remaining seven members by the Grand National Assembly of Turkey. Members of the CoJP are appointed for a term of four years from the administrative or civil judges and prosecutors, the members of the Court of Cassation and the Council of State, from academicians of law faculties and lawyers as stated in article 159 of the Constitution.

The Council is independent in the exercise of its duties and authorities. No organ, authority, office or individual can give orders or instructions to the Council.

The Council of Judges and Prosecutors is the centralized body responsible for the organization of the judiciary, with power to decide on admission, appointment, transfer, promotion, disciplinary measures, dismissal, and supervision of judges and public prosecutors.

The Constitution describes the powers of the council as follows: "The Council shall make the proceedings regarding the admission of judges and public prosecutors of civil and administrative courts into the profession, appointment, transfer to other posts, the delegation of temporary powers, promotion, and promotion to the first category, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office; it shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court, or changes in the territorial jurisdiction of a court; it shall also exercise the other functions given to it by the Constitution and laws."

The Council of Judges and Public Prosecutors is the competent body to take decisions on civil, criminal and administrative judiciary.The council's main power is to make decisions and carry out the operations on acceptance into profession, appointments, promotions and disciplinary procedures with regard to judges and public prosecutors. The council also has the power to elect all members of the Court of Cassation and ¾ of the members of the Council of State.

The Minister of Justice is the President of the council and the Deputy Minister of the Ministry of Justice is a regular member. Membership of the Deputy Minister of the Ministry shall continue during duration of his/her post. When the regular Deputy Minister is not present, another deputy minister who represents him/her shall attend the council. The Deputy Minister of the Ministry of Justice shall be appointed from among the first class judges and public prosecutors qualified to be selected to High Courts.

The functions of the Council of Judges and Public Prosecutors are listed below:

- to appoint members of the Court of Cassation, Council of State and Court of Jurisdictional Disputes
- to take final decisions on proposals by the Ministry of Justice concerning the abolition of a court or an office of judge or public prosecutor, or changes in the jurisdiction of a court

- admission of judges and public prosecutors into the profession
- appointments, transfers to other posts, the delegation of temporary powers,
- promotion and allocation of posts,
- decisions concerning those whose continuation in the profession is found to be unsuitable,
- the imposition of disciplinary sanction, and
- removal from office.

The High Council takes decisions with absolute majority

Independence of Council of Judges and Prosecutors is guaranteed by the Constitution and law.

The Council of Judges and Public Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the guarantees of judges. (Constitution Art. 159/1)

The main duties of the Council can be stated as follows:

- Rendering final decisions about the proposal of the Ministry of Justice concerning abolishment of a court or a change in a court's jurisdiction,
- Performing the following proceedings concerning judges and prosecutors starting their careers:
  - appointing or transferring to another locality,
  - equipping them with temporary authorizations,
  - promoting them or allocating them as first class,
  - distributing cadres,
  - making final decisions about those who are not considered appropriate to continue to perform their profession,
  - issuing disciplinary punishments,
  - suspending them from office to inspect whether judges and prosecutors perform their duties in compliance with laws, regulations, bylaws and circulars,
  - examining whether they commit offenses in connection with or during the exercise of their duties, or whether their behaviours and acts are in compliance with the requirements of their capacities and duties, and if necessary, launching examination or investigation proceedings about them.

The Principle of Natural Judge

The principle of the natural judge constitutes a fundamental guarantee of the right to a fair trial. This principle means that no one can be tried other than by an ordinary, pre-established, competent tribunal or judge. As a corollary of this principle, emergency, ad hoc, 'extraordinary', ex post facto and special courts are forbidden. This ban, however, should not be confused with the question of specialist jurisdictions. The principle of the natural judge is based on the dual principle of equality before the law and the courts, which means that laws should not be discriminatory or applied in a discriminatory way by judges.

The Principle of Separation of the

attention

The principle of the natural judge constitutes a fundamental guarantee of the right to a fair trial.

Jurisdictions

In many countries in the continental Europe the judicial system is in the form of a multipartite structure at the levels of first instance courts, district courts and supreme courts. The main separation in such a structure is done as ordinary and administrative judiciary. Unlike the common law system the civil law system requires that the resolution of all the cases should not be monopolized within a single uniform court. Therefore in these countries the resolution of different cases is realized by different-specialized courts with exclusive jurisdictions by applying different procedural principles.

As a result of the existing multipartite structure, Turkish judicial system has 2 different types of jurisdictional fields, and thus, supreme courts are:

- the Court of Cassation as the final decision maker in civilian ordinary judiciary,
- the Council of State as the final decision maker in civilian administrative judiciary.

Moreover, the Court of Jurisdictional Disputes was established to resolve the disputes between these courts and the Constitutional Court for constitutional jurisdiction. Each of them has their own prosecution services and general prosecutors except the Constitutional Court and the Court of Jurisdictional Disputes. (The prosecution services in the Constitutional Court are carried out by the General Prosecutor of the Court of Cassation.) Therefore, this complicated system has led to the emergence of four supreme courts and two general prosecutors.

attention

The judicial system is in the form of a multipartite structure at the levels of first instance courts, district courts and supreme courts.

The Principle of Procedural Economy

In article 141 of the Turkish Constitution, a general principle for the entire judiciary is regulated under the provision *"It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost."*. This principle is called as the principle of the procedural economy, and it is valid in all the branches of the judiciary.

attention

According to the principle of procedural economy, it is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost.

your turn 1

Why is the principle of judicial independence and impartiality important?

The Main Institutions Constituting the Turkish Judiciary Organization

According to Article 142 of the Constitution, *"the organization, duties and jurisdiction of the courts, their functions and trial procedures are regulated by law"*. In line with the aforementioned article of the Constitution and related laws, the court system established in Turkey can be classified under two main categories: Ordinary Judiciary and Administrative Judiciary. Each category includes its own lower and higher courts. In addition, the Court of Jurisdictional Disputes rules on cases that cannot be classified readily as falling within the purview of one court system.

The judicial system in Turkey has a multipartite structure at the levels of first instance courts, district courts and supreme courts.

As a result of this multipartite structure, Turkish judicial system has 2 main types of jurisdictional fields and, thus, supreme courts are:

- The Court of Cassation as the final decision maker in ordinary judiciary,
- The Council of State as the final decision maker in administrative judiciary,

Moreover, the Court of Jurisdictional Disputes was established to resolve the disputes between these courts and the Constitutional Court for constitutional jurisdiction.

Each of jurisdictional fields has their own prosecution services and general prosecutors except the Constitutional Court and the Court of Jurisdictional Disputes. (The prosecution services in the Constitutional Court are carried out by the General Prosecutor of the Court of Cassation.)

In addition to those, the Court of Accounts and the Supreme Election Board are also considered as judicial authorities.

attention

The judicial system in Turkey has a multipartite structure at the levels of first instance courts, district courts and supreme courts.

SUPREME COURTS IN THE TURKISH JUDICIAL SYSTEM

Turkey has "supreme courts", rather than one supreme court, because of its above mentioned multipartite structured judicial system. These supreme courts are the final decision making authorities in the fields of judiciary. Within the Turkish judicial system, there are four higher courts with separate jurisdictions: the Constitutional

Court, the Court of Cassation, the Council of State and the Court of Jurisdictional Disputes. In addition to those, the two supreme authorities with judicial powers, namely the Court of Accounts and the Supreme Election Board, are also considered as supreme courts.

attention

Within the Turkish judicial system, there are four higher courts with separate jurisdictions: the Constitutional Court, the Court of Cassation, the Council of State and the Court of Jurisdictional Disputes. In addition to those, the two supreme authorities with judicial powers, namely the Court of Accounts and the Supreme Election Board, are also considered as supreme courts.

The Constitutional Court and Constitutional Judiciary

The basic function of the Constitutional Court is to examine "the constitutionality"; in both form and substance of laws, presidential decrees and the rules of procedure of the Turkish Grand National Assembly. Constitutional amendments are subject to constitutional review only in respect of form. By the amendment to the Constitution in 2010, important changes have been introduced in the structure of the Constitutional Court, and the right to individual application by citizens to the Constitutional Court has become a constitutional right. Since then everyone may apply to the Constitutional Court on grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights, which are guaranteed by the Constitution, have been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.

Duties of the Constitutional Court

The Constitutional Court is the only court within the constitutional jurisdiction. The Constitutional Court has the power to review the constitutionality of laws in both form and substance and to review constitutional amendments in form only. Thus the main and the traditional duty of the constitutional court is to examine the constitutionality, in respect of both form and substance of laws, presidential decrees and the rules of procedure of the Turkish Grand National Assembly and to examine and verify Constitutional amendments only with regard to their form. Two methods are used for the constitutional review of the norms which are the action for annulment (abstract review of norms) and the contention of unconstitutionality (concrete review of norms). The President of the Republic, parliamentary group of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Parliament have the power to apply for an annulment action to the Constitutional Court. If more than one political party is in power, the party having the greatest number of deputies exercises the power to apply for an annulment action. Contention of unconstitutionality can be initiated by the ordinary and administrative courts ex officio or upon the request of parties involved in a case that is heard by the relevant court. Applications are made by correspondence.

attention

The main and the traditional duty of the constitutional court is to examine the constitutionality, in respect of both form and substance of laws, presidential decrees and the Rules of Procedure of the Turkish Grand National Assembly and to examine and verify Constitutional amendments only with regard to their form.

your turn 2

What are the two methods are used by the Constitutional Court for the constitutional review of the norms?

After 2010 amendments in the Turkish Constitution, the court can also decide on individual applications. Hence the Constitutional Court began carrying out constitutional adjudication by reviewing the individual applications against human rights violations regardless of the fact that these applications arise from decisions of other supreme courts.

The Constitutional Court has jurisdiction to try the President, the Prime Minister or the members of the high courts or the military in its capacity as the Supreme Court; to decide on the dissolution of political parties, to audit political parties, and to review decisions on lifting parliamentary immunity of a member of Parliament and the loss of membership of a member of Parliament.

The Constitutional Court examines cases on the basis of documents in the case file, except where it acts as the Supreme Criminal Court.

The President of the Republic, the Speaker of the TGNA, the deputies of the President of the Republic, the ministers, the presidents and members of the Constitutional Court, the Court of Cassation, the Council of State, their Chief Public Prosecutors, Deputy Public Prosecutors of the Court of Cassation, and the presidents and members of the Council of Judges and Prosecutors, and the Court of Accounts are tried for offences relating to their functions by the Constitutional Court in its capacity as the Grand Tribunal.

The Commander of Turkish Armed Forces (Chief of Staff), the Commanders of the Land Forces, Naval Forces and Air Forces are tried for offences relating to their functions in the Grand Tribunal.

Composition of the Court

The Court consists of 15 members who are selected by the Parliament and the President of the Republic. Turkish Grand National Assembly (TGNA) appoints two members from the presidents and members of the Court of Accounts, and one member from among self-employed lawyers to be nominated by the heads of the Bar Associations. The President of the Republic of Turkey appoints three members from the Court of Cassation, two from the Council of State, three from academicians in the fields of law, economics and political sciences who are not members of the Council, and appoints four members from senior officials, self-employed lawyers, first class judges and public prosecutors or rapporteurs having served at least five years at the Constitutional Court.

The Constitutional Court elects a president and two deputy presidents from its members for a term of four years by secret ballot and by absolute majority of the total number of its members. They may be re-elected at the end of their term of office.

The members of the Constitutional Court do not assume any official and private functions, apart from their main functions.

According to the Law on the Constitutional Court, there shall be enough rapporteur-judges and assistant rapporteurs to assist the works of the Court. Rapporteur-judges are responsible for the preparation and presentation of reports and drafting of judgments. The rapporteur-judges are selected from among the judges and prosecutors with at least five years of judicial experience, academics at the law, economy or political sciences departments of higher education institutions and auditors of the Court of Accounts. Administratively, they are responsible to the President of the Court, not to the members of the Court. The case files are assigned by the President to rapporteur-judges and they present their reports to the President, the Plenary and the Sections. The rapporteur-judges prepare non-binding reports on which the members of the Court deliberate and decide. Once the decision is taken by the members, the rapporteur-judge prepares the judgment in accordance with that decision.

The Plenary of the Constitutional Court is composed of fifteen members including the President of the Court. It shall convene with the participation of the whole members under the chairmanship of the President or a vice-president determined by the President. As a rule, the Plenary shall take decisions by absolute majority. However, annulment of constitutional amendments, dissolution of political parties, or their deprivation from state aid, shall be decided with a two-thirds majority of members attending the meeting. The Plenary:

- carries out abstract and concrete review of the constitutionality of norms,
- tries, for offences relating to their offices, the President of the Republic, the Speaker of the TGNA,
- the deputies of the President of the Republic, the ministers, presidents and members of the High Judicial Organs and the Chief of Staff and the Commanders of Land, Air and Naval Forces,
- decides on the cases related to the dissolution of political parties,

- carries out the financial audit of political parties,
- reviews and decides on the individual applications referred to the Plenary by the Section,
- reviews the decisions of the Parliament with regard to the annulment of the parliamentary immunity or disqualification from membership,
- elects the President and Vice-President of the Court of Jurisdictional Disputes from among the judges of the Constitutional Court.

There are two Sections of the Constitutional Court each consisting of seven members and presided by a vice-president. The Sections shall convene with five justices and take their decisions with a simple majority. The main duty of the Sections is to examine and adjudicate on the merits of individual applications. However, if a Commission deems it necessary for the adoption of a principal judgment, then the application is referred to the Section where the admissibility review may be carried out together with the review on the merits. There are three Commissions under each Section. Each commission consists of two members and shall decide unanimously. When unanimity cannot be ensured, the case shall be referred to the Section. The Commissions are mainly responsible for deciding on the admissibility of individual applications. The draft decisions on admissibility prepared by the rapporteur-judges of the Commissions shall be ruled upon by the Commissions.

The Court of Jurisdictional Disputes and the Judiciary of Jurisdictional Disputes

The Court of Jurisdictional Disputes is regulated in article 158 of the constitution as an independent court that is established to finalise the jurisdictional disputes that may occur between the courts of different jurisdictional areas. It does not have district and first instance courts. Its decisions are binding for the supreme, district and first instance courts except for the Constitutional Court. The Constitutional Court is outside the area of jurisdiction of this court. Unlike other supreme courts, the court does not have a separate budget and; its budget is included in the budget of the Ministry of Justice. Both members and rapporteurs and other officials continue to receive their personal rights from the institutions they are affiliated to.

The Court of Jurisdictional Disputes has the power to deliver final judgments on disputes between ordinary and administrative courts related to their jurisdiction and judgments. Thus the Court of Jurisdictional Disputes is the final authority to settle disputes concerning verdicts and competencies of the Judicial and Administrative Courts in Turkey. But the decisions of the Constitutional Court shall take precedence in jurisdictional disputes between the Constitutional Court and other courts.

The organization of the Court of Jurisdictional Disputes, the qualifications and electoral procedure of its members, and its functioning shall be regulated by law.

The office of president of this Court shall be held by a member delegated by the Constitutional Court from among its own members. The members of the Court of Jurisdictional Disputes are elected by the members of the Court of Cassation and the Council of State.

The Court of Jurisdictional Disputes has two chambers and a Plenary Assembly. There are two chambers of the court as the Civil-Administrative Law Chamber and the Criminal Law Chamber in accordance with the nature of the cases dealt with in the court. The Civil-Administrative Law Chamber reviews and finalizes the disputes between the civil law courts and administrative courts. The Criminal Law Chamber finalizes the disputes between the criminal courts. Presidency of the both chambers is chaired by the President of the court. The Plenary Assembly resolves the contradictions between the decisions of chambers and duty disputes between the chambers, and it addresses resolutions in this regard. It consists of the President, deputy president and members. The President of the court chairs the Plenary Assembly.

There are two different types of disputes between the judicial and administrative courts that of as “duty disputes” and “judgment disputes”. While the concept of “duty dispute” means that two courts from different jurisdictional branches have

made contradictory judgements on which court should hold a case, the concept of "judgement dispute" means that two courts from different jurisdictional branches have made contradictory judgements in merits of the same case. If the case is in the nature of conflict of civil-administrative law, the court finalizes the case. However, if the case is in the nature of the criminal law, the court only decides on the court that should deal with the case.

attention

The Court of Jurisdictional Disputes has the power to deliver final judgments on disputes between ordinary and administrative courts related to their jurisdiction and judgments.

The Court of Cassation and the Ordinary Judiciary

The Court of Cassation, also called Supreme Court of Appeals of Turkey which was founded in 1868 is the last instance for reviewing verdicts given by the courts of ordinary justice meaning that it is the highest court in the ordinary judiciary. It is the last instance court for reviewing decisions and judgments rendered by civil and criminal courts and which are not referred by law to other judicial authorities. It is also the first and last instance court dealing with specific cases prescribed by law.

The main duty of the Court of Cassation is to function as the last instance court for reviewing decisions and judgments given by lower civil and criminal courts. Thus the court has power to review the judgments of lower civil and criminal courts which are district court of appeals.

The members of the Court of Cassation are appointed by the Council of Judges and Prosecutors from among the first class judges and public prosecutors, of the judicial courts, or those considered to be members of this profession, by secret ballot and by an absolute majority of the total number of members.

The first president, first deputy presidents and heads of division are elected by the Plenary Assembly of the Court of Cassation from among its own members, for a term of four years, by secret ballot and by an absolute majority of the total number of members; they may be re-elected at the end of their term of office.

The Court of Cassation operates as chambers, boards and assemblies. In the Court of Cassation, there are the Assembly of Civil Law Chambers consisting of the president and all members of the civil law chambers and the Assembly of Criminal Law Chambers consisting of the president and all members of the criminal law chambers. Each assembly comes together under the chairmanship of the relevant deputy president. The main duty of the assemblies is to finalize the chamber decisions by examining them in cases when the General Prosecutor of the Court of Cassation raises objection against the decision or the judges insist on their prior decisions reversed by the chambers. Assemblies of civil law and criminal law chambers also deal with the cases of those who, according to the law, must be tried by the Court of Cassation as the first instance court. The assemblies may decide to finalise the conflicted judgments on their own fields.

The Court of Cassation reviews the decisions of lower courts under 23 Civil and 20 Criminal Chambers. A president and a sufficient number of members work together in each chamber. Rapporteur judges are given tasks of examining case files and preparing reports to be submitted to the Plenary Assembly or Chambers.

The civil law and criminal law chambers of the court conduct the appellate review of the decisions of the district courts of appeal and deal with the cases of those who, according to the law, must be tried by the Court of Cassation in the capacity of first instance court. In each chamber, there is one president and members.

The Grand Plenary Assembly of the Court of Cassation consists of the Prime President, first deputy presidents, heads of chambers and their members and the General Prosecutor and Deputy General Prosecutor of the Court of Cassation. The Grand Plenary Assembly elects the Prime President, deputy presidents, heads of chambers and the General Prosecutor and the Deputy General Prosecutor and takes decision on the finalization of the conflicted judgments in the case of confliction between judgements of different chambers and assemblies.

An important unit of the Court of Cassation is the Chief Public Prosecutor's Office. The Chief Public Prosecutor and the Deputy Chief Public

Prosecutor at the Court of Cassation are appointed by the President of the Republic for a term of four years from among five candidates nominated for each office by the Plenary Assembly of the Court of Cassation from among its own members by secret ballot. They may be re-elected at the end of their term of office.

The organization, the function, the qualifications and procedures for election of the prime president, deputy presidents, the heads of chambers and members and the Chief Public Prosecutor and the Deputy Chief Public Prosecutor at the Court of Cassation are regulated by law in accordance with the principles of the independence of courts and the security of tenure of judges.

attention

The main duty of the Court of Cassation is to function as the last instance court for reviewing decisions and judgments given by lower civil and criminal courts.

The "district courts of appeals" are the regional courts established to evaluate the appeal applications against the decisions of the ordinary judiciary first instance courts. The legal framework for district courts of justice is the Law No. 5235 relating to the Establishment, Functions, and Competencies of First Instance and Regional Courts of Justice which enabled the establishment of district courts of appeals which began operating in 2016 according to the decision of the Ministry of Justice. These courts have the authority to examine files coming from the First Instance Courts in terms of form and substance. District Courts of Appeal may either uphold or quash the decision of the First Instance Courts. In the latter situation, it may either send the case file to the relevant Court of First Instance or re-try the case itself.

The district courts of appeals are established in some important provinces of Turkey in a way to cover the area of jurisdiction in the neighbouring provinces as well. Each court is established independently and there is not a joint body. Each district court of appeals is structured in itself in parallel with each other.

The district courts of appeals consist of chambers in different numbers. Each court must have minimum 3 civil chambers and 2 criminal chambers within its body in accordance with the workload. Each chamber has a head and members. The number of members is not limited however, it is compulsory that the head of a chamber and at least two members should be present to hold a meeting and make a decision. The presidents of district court of appeals are appointed by the Council of Judges and Prosecutors. The members of the Court of Cassation may be assigned as president or head of chamber in the district court of appeals on their requests. The Committees of Presidents consist of the president and heads of chambers of district court. They are established to carry out administrative and judicial functions within the court. Justice commissions make decisions on issues related with civil servant status of the auxiliary personnel working in the court such as appointment, promotion and discipline. The commissions consist of a regular member determined from among the heads of chambers by the Council of Judges and Prosecutors; the district prosecutor and the president of the relevant district court of appeal. Also, a substitute member is elected from among the heads of chambers or members by the Council of Judges and Prosecutors. Offices of district prosecutor are established within the district courts of appeals. District prosecutor, deputy district prosecutors and prosecutors are assigned in the offices. It carries out the prosecution on behalf of the public in the courts as well as administrative duties such as budget management.

District courts of appeals are established to evaluate the appeal applications against the decisions of the first instance courts of ordinary jurisdiction. District courts of appeals carry out the trial of cases when they consider that the decision of the first instance court is inappropriate rather than to reverse the judgement to trial court. They are in the position of court of higher jurisdiction within their district other than the "appeal" review. Accordingly, these courts will also finalise the jurisdictional disputes between the first instance courts in their responsibility area. District courts of appeals also deal with the cases of compensation filed against the judges in their district due to their duties as the first instance court.

attention

The district courts of appeals are the regional courts established to evaluate the appeal applications against the decisions of the ordinary judiciary first instance courts.

First Instance Courts of Ordinary Jurisdiction are the courts assigned to deal with all types of cases outside the jurisdiction of the administrative courts. Both for civil and criminal cases, first instance courts are basic judicial authorities to settle disputes. First Instance Courts of Ordinary Jurisdiction are split into two categories as criminal law courts and civil law courts. Some of these courts are courts of general jurisdiction and others are specialized courts. The courts of general jurisdiction are established to deal with the cases, which are not included in the jurisdiction of a specialized court. They are separated to levels on the basis of the severity of crimes for criminal law courts and on the basis of the economic value of claims for civil law cases. Specialized courts are established to deal with the cases in their jurisdiction, and they are found at an equal level to one of the courts of general jurisdiction. In the case of that a specialized court is not found in a city or a city is not covered by the jurisdiction of a specialized court, courts of general jurisdiction deal with the cases in the jurisdiction of this specialized court.

The jurisdictions of the first instance courts of ordinary judiciary are decided by the Council of Judges and Prosecutors considering the borders of the city centers and districts to a large extent. However, there are not any court-houses in some small cities and courts close to that cities deal with the cases of those cities with the decree of the Council of Judges and Prosecutors. In terms of internal structuring, among these courts, only the severe criminal courts and some other specialized courts are called as "delegation courts" and consist of one president and two members. One judge serves in all of the other courts. Judicial decisions in the courts are made by judges. Administrative tasks (such as disciplinary and general management) are carried out by the president of the court in delegation courts and by the judge in the courts with only one judge.

First instance civil courts are divided into two categories: general courts (including the civil courts of peace and the civil courts of general jurisdiction) and specialized courts (such as the family courts, the commercial courts, the cadastral courts, the labour courts and the civil courts for intellectual and industrial property, consumer courts, maritime courts and civil courts of enforcement).

First instance criminal courts are divided into three categories: criminal courts of general jurisdiction, severe criminal courts and the criminal judgeships of the peace which supervise criminal investigations. There are also specialized criminal courts such as juvenile criminal courts, criminal courts for intellectual and industrial property rights and enforcement courts acting as criminal courts for crimes stated in the Law of Enforcement and Bankruptcy No 2004.

The criminal courts of peace were replaced by criminal judgeships of peace in 2014 by the Law No. 6545. Both are composed of one judge. The criminal judgeships of peace (criminal judges of peace) were established in June 2014 and replaced the previous category of criminal courts of peace without retaining all their prerogatives. Under the current structure, criminal trials are conducted before the criminal courts of general jurisdiction, but functions related to supervision of the investigation are transferred to the criminal judgeships of peace. According to the Law on Criminal Procedure, these courts have the power to issue search, arrest and detention warrants. They are also entitled to judicially review the decisions of public prosecutors on non-prosecution. Furthermore, under article 10 of Law No. 5235, criminal judges of the peace can be accorded additional powers by law.

Establishment and competences of public prosecution authorities in Turkey are also regulated by law. A public prosecutor's office is set up in each province or sub-province in which a court organization exists.

attention

First Instance Courts of Ordinary Jurisdiction are split into two categories as criminal law courts and civil law courts.

your turn 3

What are the specialized criminal courts?

Council of State and the Administrative Judiciary

The Council of State is the highest tribunal of administrative jurisdiction, with the power to review the decisions and judgments of all administrative courts. The Council of State is a supreme court established as a court of last resort to conduct the appellate review of the decisions given by the courts of administrative judiciary and to make decisions on certain administrative issues as the final decision making authority. Thus the actual duty of the Council of State is to conduct the appellate review of the decisions finalized by the lower administrative courts. However, the Council of State has some other duties attributed by law as well as the cases that it deals with as the first instance court. There are some specific cases prescribed by law where the Council deals with as the first and last instance court i.e. the administrative actions against the decrees of the President and ordinary presidential decrees. Besides being a supreme court, the Council also has advisory functions such as giving opinions on legal matters that are sent by the President of Republic or giving opinions on or on draft legislations, examining the conditions and the contracts under which concessions concerning public services are granted and the draft regulations and carrying out other duties as prescribed by law.

Three-fourths of the members of the Council of State are appointed by the Council of Judges and Prosecutors from among the first class administrative judges and public prosecutors, or those considered to be of this profession; and the remaining quarter by the President of the Republic from among officials meeting the designated requirements.

The president, chief public prosecutor, deputy president, and heads of divisions of the Council of State are elected by the Plenary Assembly of the Council of State from among its own members for a term of four years by secret ballot and by an absolute majority of the total number of members. They may be re-elected at the end of their term of office.

The organization, the functioning, the qualifications and procedures for election of the president, the chief public prosecutor, the deputy presidents and the heads of divisions and the members of the Council of State are regulated by law in accordance with the principles of the administrative jurisdiction, the independence of courts, and the security of tenure of judges.

The Council of State operates as chambers and boards. Also, there is the Office of General Prosecutor established within the Council of State

There are 15 chambers in the Council of State, 14 of them are judicial chambers and 1 of them is the administrative chamber. The First Chamber is assigned as the administrative chamber. The administrative chamber, delivers opinion on administrative tasks assigned to them by law. Four of the judicial chambers deal with the tax cases, and 10 of them deal with other administrative cases. The judicial chambers take decisions by dealing with the cases sent to them on appeal by the lower administrative courts which are the district administrative courts. Moreover, the judicial chambers of the Council of State adjudicate the cases that must be dealt with in the capacity of the first instance court by the Council of State according to the law.

In the Council of State, there are the Board of Administrative Litigation Chambers consisting of the president and members of the administrative chambers; and the Board of Tax Litigation Chambers consisting of the president and members of tax chambers. Main duties of the boards include making the final decision by reviewing the file in cases when the lower administrative courts insist against the decisions taken by the chambers or when the chamber takes a decision in the capacity of first instance court.

The Plenary Assembly of the Council of State is the executive decision making body which consists of the President of the Council of State, the General Prosecutor, deputy presidents, heads of chambers and members and the Secretary General. The Plenary Assembly has the final word on most of the administrative decisions about the Council of State such as electing the President, the General Prosecutor, deputy presidents and heads of

chambers, makeing decision on the jurisdiction of the chambers or the chambers which the members will be assigned to. Whereas the Assembly on the Finalisation of Conflicted Judgments takes decisions on the finalisation of conflicted judgments, which is one of the most important judicial duties in the Council of State. It consists of the President of Council of State, the General Prosecutor, deputy presidents, heads and members of judicial chambers.

attention

The actual duty of the Council of State is to conduct the appellate review of the decisions finalized by the lower administrative courts.

The district administrative courts are regional courts established to evaluate the applications for objection remedy against the decisions of the first instance administrative courts. Just like the district courts of appeals, district administrative courts also make "appeal" review and are established in bigger provinces of Turkey in a way to include the neighbouring provinces within their areas of jurisdiction. Each court is established independently and there is not a joint body. Each district administrative court has parallel structure. There are a president and members in each district administrative court and they are appointed by the Council of Judges and Prosecutors. According to the law, there must be one president and at least two members to make decisions. President of the court carries out the administrative and financial management of the court. They are also responsible for the general operation of the first instance administrative courts and tax courts in their jurisdictional area. Justice commission makes decisions on issues related with civil servant status of the auxiliary personnel working in the administrative and tax courts such as appointment, promotion and discipline. Under the chairmanship of the president of the district administrative court, the commission consists of two regular members and one substitute member appointed by the Council of Judges and Prosecutors. The district administrative courts consist of chambers in different numbers. Each court must have minimum 1 administrative chamber and 1 tax chamber within its body in accordance with the workload. Each chamber has a head and members. The office of prosecutor does not exist within the district administrative courts.

District administrative courts are established to evaluate the appeal applications against some of the decisions of administrative and tax courts at the first instance level. Some of the decisions of the district administrative courts are reviewed by the Council of State. District administrative courts are also assigned to finalize the jurisdictional disputes between the first instance administrative courts in their jurisdictional area. In other words, these courts rule on disputes relating to competence and venue arising between administrative and tax courts within their judicial district. One of the most important authorities of the district administrative courts is to review objections to the stay of execution orders given by the administrative courts of first instance. Finally district administrative courts carry out other functions designated by the law.

your turn 4

What are the duties of district administrative courts?

First Instance Courts of Administrative Jurisdiction are in principle the courts of general jurisdiction in administrative judiciary branch which are assigned to deal with the administrative cases. Administrative cases are the cases in which the defendant is, with some exceptions, a public institution. Anyone that claim his/her interest or right is violated may apply to an administrative court. The trial procedure in these courts is written and a hearing could be held upon the request of parties under certain conditions. The Council of State, the district administrative courts and the administrative courts of first insantance whether an administrative court or a tax court can carry out all examinations about the actions, of their own motion.

First instance administrative courts are split into two categories as administrative courts and tax courts. Tax courts deal with the tax disputes and administrative courts deal with all the other administrative disputes. The territorial limits of the

jurisdiction of these courts are identified by the Council of Judges and Prosecutors based on the borders of the provinces to a large extent. However, these courts are not established in each province and city. In the places where these courts do not exist, the courts of a nearby province deal with the cases with the decree of the Council of Judges and Prosecutors.

Administrative courts are the courts of general jurisdiction in administrative judiciary branch; therefore, they deal with all administrative cases that remain outside the jurisdiction of the Council of State and tax courts. These courts deal with cases which are brought against the administrative organs because of the implementation of the administrative legislation. Administrative cases can be split into three categories: administrative actions with demand for the cancellation of an administrative proceeding, administrative actions claiming for compensation of damages caused by an administrative proceeding or action (full remedy actions), and finally administrative actions aiming the resolution of administrative disputes that occur as a result of the contracts signed to carry out a public service. A president and members from administrative jurisdiction judges serve in these courts. The board to hear the case (for the majority of cases) must consist of the president and at least two members. Whereas some administrative actions such as actions brought against administrative acts whose subject contain a certain amount of money and full remedy actions whose subject is less than a certain amount of money are resolved by a Single Judge of an Administrative Court. The president of the court determines which members will deal with a case and the boards are chaired by the president or a senior member. The territorial limits of their jurisdiction are determined by the Council of Judges and Prosecutors.

Tax courts deal with tax cases arising from tax disputes. Those are the cases that are filed on the basis of tax claims of the State. In other words, tax courts resolve actions related to the general budget; to the taxes, fees, duties and other similar financial obligations that belong to the provinces, municipalities and villages; to the increases and penalties concerning these obligations as well as actions related to tariffs and some actions related to the application of the Act on the Procedure of Public Claims' Collection. The structure of the tax court is almost same as the structure of an administrative court with the only exception the tax actions whose subject is less than a certain amount of money are resolved by a Single Judge of a Tax Court. Also, the territorial limits of their jurisdiction are determined by the Council of Judges and Prosecutors, and they may also be different from the that of an administrative court in the same province.

Some of the final judgments of first instance administrative courts are definite meaning that they can neither be challenged before the district administrative courts nor before the Council of State. But some other final the judgments of first instance administrative courts can be challenged before the district administrative courts for appeal.

attention

First instance administrative courts are split into two categories as administrative courts and tax courts.

Turkish Court of Accounts and the Judiciary of Public Accounts

The Court of Accounts is regulated in Article 160 of the Turkish Constitution. According to this provision, the Court of Accounts shall be charged with auditing, on behalf of the Grand National Assembly of Turkey, revenues, expenditures, and assets of the public administrations financed by central government budget and social security institutions, with taking final decisions on the accounts and acts of the responsible officials, and with exercising the functions prescribed in laws in matters of inquiry, auditing and judgment. Those concerned may file, only for once, a request for reconsideration of a final decision of the Court of Accounts within fifteen days of the date of written notification of the decision. No applications for judicial review of such decisions shall be filed in administrative courts. In case of conflict between the decisions of the Council of State and the Court of Accounts, regarding taxes, similar financial obligations and duties, the decision of Council of State shall prevail. Auditing and final decision on the accounts and acts of local administrations shall be conducted by the Court of Accounts. The establishment, functioning, auditing procedures,

qualifications, appointments, duties and powers, rights and obligations and other personnel matters of the members and guarantees of the President and the members of the Court shall be regulated by law.

The Court of Accounts is responsible for auditing the revenues, expenditures and property of public administrations on behalf of the Turkish Grand National Assembly.

It carries out functions required by law related to inquiry, auditing and judgment.

Parties concerned may file a single request for reconsideration of the Court of Accounts' final decision within fifteen days as of the date of written notification of the decision.

No applications for judicial review of such decisions are filed in administrative courts.

The Supreme Election Board and the Electoral Judiciary

In Turkey all the elections (whether presidential, parliamentary or local) and referendum are executed with the principles of equal, secret, universal direct suffrage, open counting and tabulating of votes principles under administration and supervision of jurisdiction.

In Turkey the elections are primarily regulated by the Constitution of the Republic of Turkey, The Law on Parliamentary Elections No. 2839, the Law on Presidential Elections No. 6271, the Law No. 298 on Basic Provisions on Elections and Voter Registers, and finally The Law No. 7062 on the Organization and the Duties of Supreme Election Council.

Elections in Turkey are organized by four levels of election administration: the Supreme Election Board (SEB), Provincial Electoral Boards (PEBs), District Electoral Boards (DEBs) and Ballot Box Committees (BBCs).

The Supreme Election Board, as the highest legal authority on electoral matters, is responsible for the overall monitoring and management of elections.

In article 79 of the Turkish Constitution with the title "E. General administration and supervision of elections", it is stated that the elections shall be held under the general administration and supervision of the judicial organs. The Supreme Election Board shall execute all the functions to ensure the fair and orderly conduct of elections from the beginning to the end, carry out investigations and take final decisions, during and after the elections, on all irregularities, complaints and objections concerning the electoral matters, and receive the electoral records of the members of the Grand National Assembly of Turkey and presidential election. No appeal shall be made to any authority against the decisions of the Supreme Election Board. The functions and powers of the Supreme Election Board and other electoral boards shall be determined by law. The Supreme Election Board shall be composed of seven regular members and four substitutes. Six of the members shall be elected by the General Assembly of Court of Cassation, and five of the members shall be elected by the General Assembly of Council of State from amongst their own members, by the vote of the absolute majority of the total number of members through secret ballot. These members shall elect a chair-person and a vice-chairperson from amongst themselves, by absolute majority and secret ballot. Amongst the members elected to the SEB by the Court of Cassation and by the Council of State, two members from each group shall be designated by lot as substitute members. The Chairperson and Vice-Chairperson of the SEB shall not take part in this procedure. The general conduct and supervision of a referendum on laws amending the Constitution and of election of the President of the Republic by people shall be subject to the same provisions relating to the election of deputies.

Supreme Election Board is a sui generis independent judicial board which is assigned with administrative and electoral jurisdiction, and appeal is not allowed to any other institutions against its decisions. The SEB is assigned from the start till the end of elections in order to manage the order of elections with honesty, to undertake or provide undertaking all necessary transactions, to examine all electoral complaints and objections and to give final decisions on such complaints and to accept electoral minutes of members of Turkish Grand National Assembly and minutes of presidential elections. SEB executes the administration and supervision of elections, and is composed of seven original and four reserve members.

Furthermore, political parties which have the four highest voting amounts in recent general elections and political parties that have groups in Turkish Grand National Assembly, may assign one original and one reserve representatives in Council with the condition of having consent of political party leaders. These representatives attend all meetings and discussions of the Council, but they are not allowed to vote.

The election administration, with the exception of BBCs and partially PEBs, are formed from the judiciary. The Supreme Election Board was established in 1950 to serve as the highest independent legal authority on the management of elections. Each member of SEB serves for six years and is eligible for re-election.

The SEB ensures the proper management of- and judicial oversight over local, parliamentary and presidential elections in addition to constitutional referendums. The SEB is required to answer questions by the heads of provincial election boards regarding the voting procedure and is the final authority on appeals. The SEB, which derives its authority from the Constitution, not only manages elections but also ensures proper judicial oversight over electoral processes. The SEB's decisions are final, and, therefore, not subject to further interpretation by any judicial authority whatsoever.

The SEB is a permanent body tasked with overall authority and responsibility for the conduct of elections. PEBs are established in each province and consist of three members, plus substitutes, appointed from judges in the province based on seniority. DEBs have seven members selected through a mixed appointment process; unlike SEB and Provincial Election Boards-PEBs, District Election Boards-DEBs which are semi judicial authorities are chaired by the most senior judge in the district and include four members nominated by political parties and two local civil servants, plus substitutes, who are appointed following an established selection process. Generally, each district has one DEB, although additional DEBs may be established in areas with higher populations. PEB and DEB members serve for wo-year terms. BBCs are constituted for each election and consist of seven members.

Political parties can appoint representatives to higher levels of the election administration, including the SBE. These representatives participate in the operations and meetings of the SBE, but do not have the right to vote on decisions.

While judges serve in the electoral administration, they are independent from the courts both in terms of their structure and decisions. Decisions of each level of the election administration can be appealed to the next higher level, with the SEB being the final instance for appeals at all levels. The SEB is established as the final decision-making authority, and according to the law, its decisions cannot be challenged.

As a result of constitutional amendments passed in 2010, the Constitutional Court accepts individual applications from anyone claiming that his/her fundamental rights have been violated and when all other domestic remedies have been exhausted. It remains to be seen whether this possibility includes judicial appeal of SEB decisions.

Directorates of Enforcement and Bankruptcy

The directorates of enforcement and the directorates of bankruptcy are the justice institutions established to ensure the collection of the claims of the persons and to carry out the required proceedings in cases when the companies go bankrupt respectively.

These directorates are established in places where the courts are found and carry out their duties under the supervision of the judges and prosecutors. Both the duty of enforcement and the duty of bankruptcy proceedings may be gathered under a single roof in places with lesser workload and, in this case, the directorate may be called as "enforcement directorate". There is enforcement or bankruptcy director at the top, and deputy directors and other auxiliary personnel are assigned. It is possible to establish more than one directorate in places where the workload is intense.

The main function of the enforcement and bankruptcy offices is to ensure the collection of the claims of the persons. This claim may depend on the judgement of a court or may be based on an economic relation. The enforcement directorates

are responsible to take action on the application of an individual or a company and they complete the required procedures and confiscate the properties of the debtors and collect the claims.

As per the Turkish Commercial Code, if the debtor is a company and cannot pay the debts, a decision on the bankruptcy of the company may be taken by a commercial court. Under these circumstances, it is the duty of bankruptcy directorates (or of enforcement directorate in the case of that they are gathered under a single roof) to carry out the proceedings on bankruptcy and to ensure the collection of the claims of the creditors. All types of proceedings of the directorates of enforcement and bankruptcy are under the supervision of civil courts. The courts finalize the applications against the actions and proceedings of these directorates.

The officials of the enforcement directorates consist of directors, deputy directors, and civil servants are assigned in these judicial institutions. Directors and deputy directors are appointed by the Ministry of Justice through oral and written exams. Other public officials are also appointed by the Ministry of Justice through ordinary methods.

The Ministry of Justice

The Ministry of Justice having an important role within Turkish judicial system is responsible for determining the main policies about the system as well as controlling the budgets of important bodies within this system.

The Ministry of Justice is split into various units in order to fulfil its duties. Accordingly, there are general directorates, heads of departments and presidencies in the Ministry.

The duties of the Ministry of Justice have been set forth in Article 2 of the Law No. 2992 (29.03.1984) on Organization and Duties of the Ministry of Justice. These are:

- to establish and organize courts as foreseen in the laws,
- to plan and establish any and all types and degrees of judicial institutions such as penal execution and correction institutions as well as execution and bankruptcy offices, and to provide supervision and control as to their administrative functions,
- to submit proposals in matters such as abolishing of courts or changing of judicial locality,
- to carry out actions regarding the use of authority granted by laws to the Ministry of Justice concerning initiation of a public proceedings,
- to carry out duties assigned to the Ministry by the Laws of Attorneys and Public Notaries,
- to carry out services regarding keeping judicial records,
- to carry out duties assigned to the Ministry by the Turkish Commercial Law and Trade Registry Regulation,
- to carry out functions regarding foreign countries on judicial services,
- to make necessary research and legal arrangements and express opinions on matters of interest to judicial services,
- to review the compliance of draft laws and decrees having the force of law prepared by the Ministries with the Turkish legal system and techniques of preparing laws, before submitting them to the Ministry,
- to organize execution and correction functions according to the provisions of relevant legislation,
- to carry out execution and bankruptcy functions through execution and bankruptcy offices, and
- to carry out other functions assigned by laws.

Summary

LO 1 To explain the basic concepts and principles regarding judiciary

One of the three basic organs of a state is the judiciary. The judiciary, as a system of courts that interpreting and applying the law in the name of the state, provides a mechanism for the resolution of disputes. The judiciary is an organizational system and principles of court that administer the justice and constitute the judicial branch of government. Judiciary is the branch of government that is endowed with the authority to interpret and apply the law, adjudicate legal disputes and otherwise administer the justice. The Turkish Judiciary refers to the courts which are responsible for the enforcement and the interpretation of Turkish laws.

Under seperation of powers doctrine, the judiciary shares power with executive and legislative branches of the government. The judiciary is granted the power to adjudicate the law-suits that arise under the law.

The judiciary is the hierarchical system of trial and appellate courts. The structure of a court system varies, but three levels generally can be identified: courts of first instance, intermediate appellate courts and supreme courts.

The basic concepts regarding judiciary can be stated as the judge, the court, the trial and the legal action.

A judge is a public officer appointed to decide cases in a law court. Judges are the public officials who preside over civil, criminal and administrative trials in relevant courts. Turkish Constitution has adopted the principle of professional judge. Judges are split into two categories as ordinary jurisdiction judges and administrative jurisdiction judges while starting the profession in line with the segregation in the judicial system. Ordinary jurisdiction judges are selected from among the graduates of law faculties while administrative jurisdiction judges are selected from among the graduates of either law schools or faculties of political science and faculties of social sciences, which include law courses in their programs at a sufficient level. Those who pass the central written exam will be subject to an oral exam by a board consisting of the representatives of the Ministry of Justice and supreme courts; and then, the ones who pass the oral exam can become "candidate judges". "Candidate judges" who receive training for 2 years in the courts and Department of Training of Ministry of Justice will be branched off as judge or public prosecutor (in terms of the candidate judges to serve in the ordinary judiciary) at a certain stage of the training. Those who successfully complete the training are accepted into the profession by the CoJP as judges or public prosecutors and they are appointed to the courts. Judge class is split into four levels as third level, second level, candidate for first level and first level by the period of office and their achievements. The recruitment, trainings, personal rights and other issues for judges and prosecutors are arranged completely in parallel with each other. Although it is not very common, the transition between two professions is also possible. Auxiliary personnel working in the judicial system are mainly assigned in courts, public prosecution offices and other judicial institutions as clerks or mid-level managers. Auxiliary judiciary personnel serve as civil servant and have the same rights with the other civil servants. Lawyers, along with judges and prosecutors, are one of the pillars on which protection of the rule of law and access to justice against human rights violations rests. If the justice system is to be effective, then lawyers must be free to carry out their professional duties independently, without interference from the Executive or from other powerful interest groups, and must be protected, in law and in practice, from attack or harassment as they carry out their professional functions.

A court can be defined as a place where trials and other legal cases happen or the people present in such a place especially the officials and those deciding who is right or guilty. Court is a body of people presided over by a judge or a number judges and acting as a tribunal in civil, criminal and administrative cases. A court is generally established as a government institution, with the authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal, and administrative matters in accordance with the rule of law.

Trial is a judicial examination and determination of facts and legal issues arising between parties to a civil, criminal or in some cases administrative action. Two main types of trials are civil trials and criminal trials. The main parties to a lawsuit are the plaintiff and the defendant.

A legal action can be defined as a process to have a court of law to settle an argument.

The basic principles regarding judiciary can be stated as the principle of independence and impartiality of the Judiciary, the security of tenure of judges and public prosecutors, the principle of natural judge, the principle of separation of jurisdiction and the principle of procedural economy.

The principle of independence of the courts is an universally accepted principle which requires from all governmental and other institutions to respect and observe the independence of the judiciary. In other words, the governing bodies of the judiciary must be independent of the executive and legislative powers.

LO 2 To analyze the main institutions of the Turkish Judiciary Organization

Summary

The judiciary is hierarchical system of trial and appellate courts. The structure of court system varies but three levels can generally be identified: courts of first instance, intermediate appellate courts and supreme courts. The courts of first instance handle the cases at the first step. Intermediate appellate courts (in Turkey district court of appeals or district administrative courts) review some cases that have been decided by courts of first instance (if they are not a final decision). They are also trial courts and they hear new evidence. They decide whether the lower court (court of first instance) correctly applied the law in the relevant case. Finally, supreme courts are the nation's highest appellate courts which review the decisions of the lower courts at the last instance and render a final judgment, further appeals can not be made. So they are called as the court of last resort.

Some courts are ordinary courts. Many of law suits begin in an ordinary court. Such courts can hear almost every type of cases. On the other hand some, courts are special courts: only some special law-suits begin in such a court. Such courts are expressly designated to hear specific types of cases. For example, tax courts handle disputes between tax payers and the tax administration. Juvenile courts are an example for such a special court in penal cases involving juveniles, and family courts are special civil courts to hear cases involving domestic issues.

According to Article 142 of the Turkish Constitution, the organization, duties and jurisdiction of the courts, their functions and trial procedures are regulated by law. In line with the aforementioned article of the Constitution and related laws, the court system established in Turkey can be classified under two main categories: Ordinary Judiciary and Administrative Judiciary. Each category includes its own lower and higher courts.

The judicial system in Turkey has a multipartite structure at the levels of first instance courts, district courts and supreme courts.

Turkey has supreme courts, rather than one supreme court, because of its above mentioned multipartite structured judicial system. These supreme courts are the final decision making authorities in the fields of judiciary. Within the Turkish judicial system, there are four higher courts with separate jurisdictions: the Constitutional Court, the Court of Cassation, the Council of State and the Court of Jurisdictional Disputes. In addition to those, the two supreme authorities with judicial powers, namely the Court of Accounts and the Supreme Election Board, are also considered as supreme courts.

The Constitutional Court, having the main and the traditional duty of examining the constitutionality, in respect of both form and substance of laws, presidential decrees and the Rules of Procedure of the Turkish Grand National Assembly and to examine and verify Constitutional amendments only with regard to their form. The action for annulment (abstract review of norms) and the contention of unconstitutionality (concrete review of norms) are the two methods used for the constitutional review of the norms. After 2010 amendments, the Constitutional Court began carrying out constitutional adjudication by reviewing the individual applications against human rights violations regardless of that these applications arise from decisions of other supreme courts.

The Court of Jurisdictional Disputes is regulated in article 158 of the constitution as an independent that is established to finalise the jurisdictional disputes that may occur between the courts of different jurisdictional areas. This Court has the power to deliver final judgments on disputes between ordinary and administrative courts related to their jurisdiction and judgments.

The Court of Cassation, also called Supreme Court of Appeals of Turkey is the last instance for reviewing verdicts given by the courts of ordinary justice; thus, it is the highest court in the ordinary judiciary. It is the last instance court for reviewing decisions and judgments rendered by civil and criminal courts, and which are not referred by law to other judicial authorities. It is also the first and last instance court dealing with specific cases prescribed by law. The main duty of the Court of Cassation is to function as the last instance court for reviewing decisions and judgments given by lower civil and criminal courts. Thus, the court has the power to review the judgments of lower civil and criminal courts which are district court of appeals.

LO 2 To analyze the main institutions of the Turkish Judiciary Organization

Summary

The district courts of appeals are the regional courts established to evaluate the appeal applications against the decisions of the ordinary judiciary first instance courts. District courts of appeals are established to evaluate the appeal applications against the decisions of the first instance courts of ordinary jurisdiction. District courts of appeals carry out the trial of cases when they consider that the decision of the first instance court is inappropriate rather than to reverse the judgement to trial court.

First Instance Courts of Ordinary Jurisdiction are the courts assigned to deal with all types of cases outside the jurisdiction of the administrative courts. Both for civil and criminal cases, first instance courts are basic judicial authorities to settle disputes. First Instance Courts of Ordinary Jurisdiction are split into two categories as criminal law courts and civil law courts. Some of these courts are courts of general jurisdiction, and others are specialized courts. The courts of general jurisdiction are established to deal with the cases, which are not included in the jurisdiction of a specialized court. Specialized courts are established to deal with the cases in their jurisdiction, and they are found at an equal level to one of the courts of general jurisdiction.

First instance civil courts are divided into two categories: general courts (including the civil courts of peace and the civil courts of general jurisdiction) and specialized courts (such as the family courts, the commercial courts, the cadastral courts, the labour courts and the civil courts for intellectual and industrial porperty, consumer courts, maritime courts and civil courts of enforcement).

First instance criminal courts are divided into three categories: criminal courts of general jurisdiction, severe criminal courts and the criminal judgeships of the peace which supervise criminal investigations. There are also specialized criminal courts such as juvenile criminal courts, criminal courts for intellectual and industrial property rights, and enforcement courts acting as criminal courts for crimes state in the Law of Enforcement and Bankruptcy No 2004.

The Council of State is the highest tribunal of administrative jurisdiction, with the power to review the decisions and judgments of all administrative courts. The Council of State is a supreme court established as a court of last resort to conduct the appellate review of the decisions given by the courts of administrative judiciary and to make decisions on certain administrative issues as the final decision making authority.

The district administrative courts are regional courts established to evaluate the applications for objection remedy against the decisions of the first instance administrative courts. Just like the district courts of appeals, district administrative courts also make “appeal” review. District administrative courts are established to evaluate the appeal applications against some of the decisions of administrative and tax courts at the first instance level. Some of the decisions of the district administrative courts are reviewed by the Council of State. District administrative courts are also assigned to finalize the jurisdictional disputes between the first instance administrative courts in their jurisdictional area. In other words, these courts rule on disputes related to competence and venue arising between administrative and tax courts within their judicial district. One of the most important authorities of the district administrative courts is to review objections to the stay of execution orders given by the administrative courts of first instance. Finally, district administrative courts carry out other functions designated by the law.

First Instance Courts of Administrative Jurisdiction are in principle the courts of general jurisdiction in administrative judiciary branch which are assigned to deal with the administrative cases. Administrative cases are the cases in which the defendant is, with some exceptions, a public institution.

First instance administrative courts are split into two categories as administrative courts and tax courts. Tax courts deal with the tax disputes; administrative courts deal with all the other administrative disputes.

Some of the final judgments of first instance administrative courts are definite, which means they can neither be challenged before the district administrative courts nor before the Council of State. But other final the judgments of the first instance administrative courts can be challenged before the district administrative courts for appeal.

LO 2 To analyze the main institutions of the Turkish Judiciary Organization

The Court of Accounts is regulated in Article 160 of the Turkish Constitution. It is considered as supreme court with judicial powers while it carries out a functions required by law related to judgment by taking final decisions on the accounts and acts of the responsible officials.

The Supreme Election Board, as the highest legal authority on electoral matters, is responsible for the overall monitoring and management of elections. The Supreme Election Board shall execute all the functions to ensure the fair and orderly conduct of elections from the beginning to the end, carry out investigations and take final decisions, during and after the elections, on all irregularities, complaints and objections concerning the electoral matters, and receive the electoral records of the members of the Grand National Assembly of Turkey and presidential election. No appeal shall be made to any authority against the decisions of the Supreme Election Board. Supreme Election Board is a sui generis independent judicial board which is assigned with administrative and electoral jurisdiction and appeal is not allowed to any other institutions against its decisions. The SEB is assigned from the start till the end of elections in order to manage the order of elections with honesty, to undertake or provide undertaking all necessary transactions, to examine all electoral complaints and objections and to give final decisions on such complaints and to accept electoral minutes of members of Turkish Grand National Assembly and minutes of presidential elections.

The directorates of enforcement and the directorates of bankruptcy are the justice institutions established to ensure the collection of the claims of the persons and to carry out the required proceedings in cases when the companies go bankrupt respectively. The main function of the enforcement and bankruptcy offices is to ensure the collection of the claims of the persons. This claim may depend on the judgement of a court or may be based on an economic relation. The enforcement directorates are responsible to take action on the application of an individual or a company and they complete the required procedures and confiscate the properties of the debtors and collect the claims.

It is the duty of bankruptcy directorates to carry out the proceedings on bankruptcy and to ensure the collection of the claims of the creditors. All types of proceedings of the directorates of enforcement and bankruptcy are under the supervision of civil courts. The courts finalize the applications against the actions and proceedings of these directorates. The officials of the enforcement directorates consist of directors, deputy directors and civil servants assigned in these judicial institutions.

The Ministry of Justice, having an important role within Turkish judicial system, is responsible for determining the main policies about the system as well as controlling the budgets of important bodies within this system. The Ministry of Justice is split into various units in order to fulfil its duties. Accordingly, there are general directorates, heads of departments and presidencies in the Ministry.

Test Yourself

1 Which of the following can **not** be considered within the functions of the judiciary?
A. Interpretation of laws
B. Application of laws
C. Making of laws
D. Resolution of disputes
E. Strengthening of fundamental rights and freedom

2 Among which of the following ordinary jurisdiction judges are selected?
A. Graduates of faculties of political sciences
B. Graduates of faculties of social sciences
C. Graduates of faculties of educational sciences
D. Graduates of vocational schools of justice
E. Graduates of law faculties

3 Which of the following is an auxiliary judiciary personnel?
A. Judges
B. Public prosecutors
C. Lawyers
D. Court clerks
E. Public notaries

4 Which of the following principle's definition is "no one can be tried other than by an ordinary, pre-established, competent tribunal or judge"?
A. The Principle of Natural Judge
B. The Principle of Impartiality of Judges
C. The Principle of Independence of Judges
D. The Principle of Procedural Economy
E. The Security of Tenure of Judges and Public Prosecutors

5 Which of the following can **not** be considered as one of the supreme courts in Turkey?
A. The Constitutional Court
B. The Council of Judges and Prosecutors
C. The Court of Cassation
D. The Council of State
E. The Court of Jurisdictional Disputes

6 Which of the following is the supreme court for tax judiciary?
A. The Court of Accounts
B. The Court of Cassation
C. The Court of Jurisdictional Disputes
D. The Constitutional Court
E. The Council of State

7 Which of the following is **not** within the scope of civil courts?
A. Family Courts
B. Commercial Courts
C. Labour Courts
D. Juvenile Courts
E. Maritime Courts

8 Which of the following shows the actual number of members of the Constitutional Court?
A. 10
B. 11
C. 12
D. 15
E. 17

9 Which of the following judicial authorities are **not** regulated in Chapter Three of the Turkish Constitution between articles 138 and 160 under the title of "judicial power"?
A. The Constitutional Court
B. The Court of Cassation
C. The Supreme Board of Election
D. The Council of State
E. The Council of Judges and Prosecutors

10 Which of the following can **not** be considered as one of the duties of the Ministry of Justice?
A. To appoint the members of the Court of Cassation and the Council of State
B. To review the compliance of draft laws and decrees with the Turkish legal system and techniques of preparing laws, before submitting them to the Ministry
C. To carry out execution and bankruptcy functions through execution and bankruptcy offices
D. To carry out services regarding keeping judicial records
E. To establish and organize courts as foreseen in the laws

Answer Key for "Test Yourself"

1. C	If your answer is wrong, please review the "Judiciary as a State Organ" section.
2. E	If your answer is wrong, please review the "The Basic Concepts Regarding Judiciary" section.
3. D	If your answer is wrong, please review the "The Basic Concepts Regarding Judiciary" section.
4. A	If your answer is wrong, please review the "The Basic Principles Regarding Judiciary" section.
5. B	If your answer is wrong, please review the "The Main Institutions of the Turkish Judiciary Organization" section.
6. E	If your answer is wrong, please review the "The Main Institutions of the Turkish Judiciary Organization" section.
7. D	If your answer is wrong, please review the "The Main Institutions of the Turkish Judiciary Organization" section.
8. D	If your answer is wrong, please review the "The Main Institutions of the Turkish Judiciary Organization" section.
9. C	If your answer is wrong, please review the "The Main Institutions of the Turkish Judiciary Organization" section.
10. A	If your answer is wrong, please review the "The Main Institutions of the Turkish Judiciary Organization" section.

Suggested answers for "Your turn"

your turn 1

Why is the principle of judicial independence and impartiality important?

The separation of powers, particularly between the political branches of government and the judiciary, is a core precept of the rule of law. Central to this principle is that the judiciary must be, structurally and in practice, independent. Thus, according to the universally accepted principle of independence of the courts, it is guaranteed by the State and enshrined in the Constitution of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. In accordance with international standards on the independence of the judiciary, the governing bodies of the judiciary must be independent of the executive and legislative powers. Judicial independence refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts. This independence pertains to the judiciary as an institution (independence from other branches of power, referred to as "institutional independence) and to the particular judge (independence from other members of the judiciary, or "individual independence"). "Independence" requires that neither the judiciary nor the judges who compose it be subordinate to the other public powers. On the contrary, "impartiality" refers to the state of mind of a judge or tribunal towards a case and the parties to it. Impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.

Suggested answers for "Your turn"

What are the two methods are used by the Constitutional Court for the constitutional review of the norms?

your turn 2

Two methods are used for the constitutional review of the norms which are the action for annulment (abstract review of norms) and the contention of unconstitutionality (concrete review of norms). The President of the Republic, parliamentary group of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Parliament have the power to apply for an annulment action to the Constitutional Court. If more than one political party is in power, the party having the greatest number of deputies exercises the power to apply for an annulment action. Contention of unconstitutionality can be initiated by the ordinary and administrative courts ex officio or upon the request of parties involved in a case that is heard by the relevant court. Applications are made by correspondence.

What are the specialized criminal courts?

your turn 3

The specialized criminal courts are juvenile criminal courts, severe juvenile criminal courts, criminal courts for intellectual and industrial property rights and criminal enforcement courts.

What are the duties of district administrative courts?

your turn 4

The duties of the district administrative courts are to evaluate the appeal applications against some of the decisions of administrative and tax courts at the first instance level, to finalize the jurisdictional disputes between the first instance administrative courts in their jurisdictional area, to review objections to the stay of execution orders given by the administrative courts of first instance, and to carry out other functions designated by the law.

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Chapter 6 Fiscal Law

After completing this chapter, you will be able to;

Learning Outcomes

1 Analyze the concepts and different fields of fiscal law

2 Explain the main concepts of tax law

Chapter Outline

Introduction
Fiscal Law

Key Terms

Fiscal Law, Public Expenditure Law
Public Revenue Law
Law Relating to Public Borrowing and Debt
Tax Law, Legality of Taxation Principle
Basic Concepts of Taxation
Taxpayer
Taxable Event
Tax Object
Tax Base
Tax Rate
Tax Exemptions
Tax System
Multitax System
Turkish Tax System
Taxes on Income
Personal Income Tax
Corporations Tax
Taxes on Property
Real Estate Tax
Motor Vehicle Tax
Gift and Inheritance Tax
Taxes on Expenditure
Value Added Tax
Special Comsumption Tax
Stamp Tax
Banking and Insurance Transactions Tax
Special Communication Tax
Fees

INTRODUCTION

Today every nation, every organized political community, every country in the world is considered as an economic unit which is called as the national economy.

In the national economy the production of various kinds of goods and services are realized in different sectors.

National economy consists of two main sectors: the public sector and the private sector.

Public sector in the national economy includes mainly the economical activities of the government and the other public authorities.

Public sector, therefore, is also called as the public economics. Public economics studies the role of the governments in the national economies. The government provides plenty of goods and services such as defence, security, justice, health, education, infrastructures, etc. These goods andservices are called as the public goods and services. As the market is unable to produce such goods and services, the public goods and services are produced either by the public sector itself or also by the private sector but under the monitoring and supervision of the government.

The provision of public goods and services requires certain financial activities from the government. The government must collect and spend revenues and real sources to realize the production of public goods and services.

Public finance is a field of social sciences which studies the role of the government in the national economy, in other words, it studies how the governments raise and spend money for the provision of the public goods and services together with the effects of these activities on the economy and on the society. Public finance tries to find an answer for the question: How can the government raise the necessary sources to meet its ever-rising expenditure? The two fields of study of the public finance can be stated as the income and the expenditure of the government.

As the government taxes and expenditure affect the economy and society deeply, no arbitrary exercise of power in the area of public finance is acceptable. Therefore, in a modern state, the principle of rule of law or the principle "government by law" requires both the spending of the government, and the methods used to pay for that spending especially taxation and debt borrowing must be subject to law. All the activities of the government in the field of public finance whether in regards collection of public revenues or making of the public expenditure must be in strict adherence to due process of law. The rules that must be obeyed by the government and the other public authorities in all their activities in the field of public finance are called as fiscal law. Fiscal law is considered as a branch of public law while it governs the relationship between the individuals and the government regarding public finance and regulates the operations of the government in the field of public finance.

Fiscal law consists of two branches: public revenue law and public expenditure law. Public expenditure law can be defined as the rules and procedures relating to making and the management of the public expenditure. As the primary source of income for a modern state is the tax revenue which is the income gained by the government through taxation instead of "public revenue law" tax law is used. Tax law, is a body of rules under which the government or another public authority has a claim on taxpayers requiring them to transfer to the government or the relevant authority part of their income or property.

In the following section, the branches of fiscal law in Turkey shall be studied in general.

FISCAL LAW

As it is stated in the Article 2 of Turkish Constitution with the title "Characteristics of the Republic", The Republic of Turkey is a state governed by the rule of law. According to this provision, not only the citizens but also the governing bodies are bound by the authority of law, the powers of the government are duely limited and the government with its all officials and agents as a whole is held accountable under the law while all the governmental activities should be lawfully operated. Also, the activities of the government in the field of public finance, whether in regards collection of public revenues or making of the public expenditure, must be in strict adherence to due process of law. The rules that must be obeyed by the government and the other public authorities in all their activities in the

field of public finance is called as fiscal law and it is considered as a branch of public law while it governs the relationship between the individuals and the government regarding public finance and regulates the operations of the government in the field of public finance. Fiscal law can be divided into two branches as the public expenditure law and the public revenue law.

important

In a state governed by the rule of law the activities of the public authorities in the field of public finance whether in regards collection of public revenues or making of the public expenditure must be in strict adherence to due process of law.

Public Expenditure Law

Public expenditure can be defined as the spending made by the government of a country on collective needs and wants.

All the administrative units must make public expenditures within the budget appropriations allocated to them, in other words, their expenditures should not exceed the amounts released. Also, such expenditure should conform with the provisions of the legislation on public expenditure.

The legislation in Turkey regarding public expenditure consists of the Public Financial Management and Control Law No 5018, the Law No 6085 On Turkish Court of Accounts and also the related fiscal year Budget Law. The Public Financial Management and Control (PFMC) Law has created a new legal framework for modern public expenditure management and accountability in Turkey since 2003. Also, the new legislation on Turkish Court of Accounts the TCA Law No 6085 introduced a greater performance orientation in budget management.

The Public Financial Management and Control Law No 5018 enacted in December 2003 has replaced The Public Accounting Law No. 1050 and providing a new legal framework for modern public expenditure management and accountability and has established a public financial management and control system in Turkey compatible with international standards and EU norms. The Public Financial Management and Control Law (PFMC), defines new principals, rules and structures for the Turkish public financial management systems including budget formulation and execution, financial and internal control systems, and internal and external audit structures. The PFMC Law 5018 defines general government as the total of central government, social security institutions and local authorities. Central government includes general budget agencies, special budget agencies (such as universities) and regulatory and supervisory authorities. According to the provisions of PFMC, central government also covers extra budgetary funds and revolving finds. Today with the PFMC Law, the budget approved by the Parliament covers the general budget, special budget, and regulatory and supervisory institutions. The PFMC Law has introduced a modern internal audit framework. The PFMC Law requires each public administration to establish an internal audit unit. The law clearly articulates the accountability of ministers and other high-level civil servants. It extends the scope of the budget; provides budgetary unity, increase effectiveness, fiscal transparency, and accountability during the process of preparation and implementations of budgets; ensures transparency in financial management; and restores the balance between authorizations and responsibilities in the spending process by establishing an efficient accountability mechanism. The law no 5018 articulates a modern performance-oriented public sector management. It provides the first comprehensive framework for public finance management using a modern Government Finance Statistics concept for the coverage of revenue and expenditure. It clarifies to the public the nature of ministerial and official accountability, and it strengthens public expenditure and financial management processes in line with EU practice. The PFMC law requires ministries and other spending units to undertake a strategic planning exercise and performance budgeting in order to clarify the, policy goals as well as objectives and to prepare budget requests consistent with performance goals. Since 2006 the budget is being prepared according to the functional, economic and institutional classifications defined under the PFMC law and since then the Government Finance Statistics,

analytical budget classification and the accrual based accounting systems have been expanded to all general government institutions, including local governments. The implementation of the budget has also been carried out in line with the PFMC structure. Therefore, The Public Financial Management and Control Law No 5018 can be considered as a new approach in public expenditure law in Turkey.

With the PFMC Law, a modern financial management control framework for the public sector in Turkey is being applied. It has introduced major policy changes in internal financial controls and internal audit arrangements. The spending agencies will have increased authority and concomitant accountability for executing the budget. Each spending agency will have an authorizing officer and a financial services expert who belongs to the spending unit's administration. The Strategy Development Directorates, established by PFMC Law, have responsibilities for financial services and internal control in each spending agency. The law has delegated certain authorities and responsibilities to the spending agencies. The spending agency now has the authority to authorize payments. Previously budget officers, who worked in spending agencies, were employees of Ministry of Treasury and Finance; now they will be part of the financial service units within each spending agency. According to the PFMC Law stating the financial control framework of the public expenditure including the payment, processing controls are made in two different levels namely that of the internal control system and internal audit. First, in the spending units, the accounting officer verifies and makes the payment, and maintains the accounts, then the authorizing officer approves the payments (therefore he is held accountable for the payment), and then in the Strategy Development Directorate established within each budget spending unit, the financial services expert makes ex-ante controls over budget expenditures, and finally, the internal auditor makes the internal audits. The most important positive feature of the internal control system is the separation of duties and responsibilities between those who incur expenditures and those who make payments. Under the framework specified by the PFMC Law, the system of controls in regards payments by verifying the documentation supporting the payment and the authority to make the expenditure and in general compliance with rules and regulations are exercised by the Strategy Development Directorate before payment. The accounting office would restrict itself to verifying the completeness of documentation and to ensuring that no material errors exist.

The PFMC Law has also introduced a modern internal audit framework. With devolution of authority and responsibility to spending agencies, the need has increased for a modern internal audit organization that can assure the head of the spending agency on the soundness of the internal control system. The PFMC Law requires each public administration to establish an internal audit unit within its administration. The law envisions a decentralized internal audit model in which internal auditors report to the head of the administration. To provide a centralized oversight mechanism over the dispersed internal audit function, the law requires a central Internal Audit Coordination Board (IACB) to be attached to the Ministry of Finance. This board would set internal audit standards, organize training for internal auditors, and provide quality assurance for internal audit work carried out by the line ministry internal audit units.

The law no 5018 clearly articulates the accountability of ministers and other high-level civil servants. Not only the accountants but also the higher-level officials including the ministers and heads of public administrations, which a means broader group of government officials, have accountability and are responsible to TCA for financial misdemeanors.

The Turkish Court of Accounts Law No 6085 creates a sound basis. for the development of government audit. The TCA Law No 6085 expands the audit mandate of the TCA to all public sectors and provides a legal basis for expanding the scope of the TCA to include the performance and financial audits along with the compliance audit. According to Law No 6085 as well as being subject to the internal control and internal audit regime defined in the PFMC Law, Turkish Court of Accounts is authorized to exercise an external audit on the accounts of the spending administrative units. TCA submits an opinion to the parliament on the annual accountability reports prepared by public administrations, an

annual general conformity statement on the final accounts, and a report on evaluation of financial statistics in terms of accuracy, reliability, and conformity with set standards. In addition to these mandatory reports, TCA submits ad hoc reports on performance audits and other special audits. TCA has also judicial authority while by taking final decisions by judicial procedure on whether the accounts and transactions of those responsible specified in laws are in compliance with the legislation, and by the legal remedies related to this authority it realizes the trial of accounts, and therefore becomes the high court for public accounts. In the exercise of its judicial function, the TCA decides whether or not the accounts and transactions of the competent departments are in accordance with the legal arrangements. At the end of the audit process, the auditors prepare an enquiry into any losses to the public purse. If the auditors are still dissatisfied with the counter-arguments of the competent officials, they prepare a judicial report, which will contain the auditees' arguments and the auditors' opinion. The chambers of TCA reach a final decision on any charges of public loss in the judicial report, though there are still legal remedies such as appeal, revision of trial and correction of decision.

Public Procurement Law (PPL) No 4734 and its secondary legislation prepared by the Public Procurement Authority are also an important legal source of public expenditure law. The purpose of PPL is to establish the principles and procedures to be applied in any procurement held by public authorities and institutions governed by public law or under public control or using public funds. The procurement of goods, services or works the costs of which are paid from any resources at the disposal of the contracting authorities that are within the scope of PPL must be in accordance with the provisions of this law. Also, the Law No 4735 on Public Procurement Contracts aiming the establishment of the principles and procedures that pertain to making and implementing public procurement contracts under Public Procurement Law shall apply to contracts concluded as a result of tender processes carried out by public entities and institutions subject to the Law on Public Procurement in accordance with the provisions of the said Law.

Public Revenue Law

Governments need to perform different functions in the field of political, social and economic activities to maximise social and economic welfare. In order to perfom such duties and functions, the government requires large amount of resources. These resources are called as the public revenues. Public revenue is defined as the total income of the government and the other public authorities from all sources. It is an important tool of the fiscal policy of the government and is the opposite factor of government spending. Revenues earned by the government are received from various sources. Today public revenue in the modern state can be divided into two major sources: taxes and public borrowing.

Taxes are the first and foremost sources of public revenue. In the second place of the public revenue comes the public borrowing.

Whether the public revenue is raised from taxes or borrowing it should comply with the provisions of the public revenue law. Public revenue law refers to the legal rules and procedures regulating the collection of public revenue. Public revenue law can be divided into two subbranches: The law relating to public borrowing and debt & tax law.

Law For/About Public Borrowing and Debt

With the Presidential Decree No:1 on the Organization of the Presidency of the Republic published on 10th July 2018 of the Offical Gazette No 30474, the Ministry of Finance and the Undersecreteriat of Treasury of the Prime Ministry are unified under one institution which is the Ministry of Treasury and Finance. Thus today the institution which is authorized for public borrowing and debt is the Ministry of Treasury and Finance. In article 217 on the duties of the Ministry of Treasury and Finance it is clearly stated that to carry out treasury operations; to find the cash that is required for the expenditures of the State; to carry out the domestic borrowing operations of the State; to issue government bonds, treasury bills and other domestic borrowing instruments; to sell is the authority and duty of the Ministry of Treasury and Finance. By the method of competitive bidding, the method of regular sale and other methods; to determine the quantities of such government bonds, treasury bills

and other domestic borrowing instruments to be sold and their values and interest rates; to carry out the preparation, the contract, the issue, the payment, the early payment and the registration procedures of all types of domestic and foreign borrowing in connection with the management of State debts; to carry out the procedures related to interest and lending that are assigned by the State; revision needed. I couldn't understand the content. to establish and operate a State Debts Accounting Office for this purpose; to keep an account of debt management; to create a database for Turkey's foreign debts; to keep a foreign debts file for this purpose; to carry out the procedures related to the provision of treasury guarantee under various laws and other legislation; to keep the necessary records; to determine the terms and conditions of guarantee and are authorities and duties of the Ministry of Treasury and Finance. The unit of the Undersecretariat with whom all those duties are fulfilled by is the General Directorate of Public Finance. Another unit of the Undersecretariat, the General Directorate of Foreign Economic Relations, is also responsible for some duties related to public debt and borrowing. The Ministry is also authorized to issue permits for importation related to projects financed with foreign loans; to receive loans from foreign countries, institutions, organizations and financial markets in the capacity of debtor or guarantor in the name of the Republic of Turkey; to carry out the contract and guarantee procedures related to such loans; to take any and all actions to alleviate the foreign debt burden, making use of financial instruments available in the financial markets for this purpose; to furnish guarantees, within the framework indicated in relevant laws, and perform the related procedures, for basic infrastructural projects requiring advanced technology to be carried out with the participation of the domestic and foreign private sector

The related legislation for public debt operations and management in Turkey is the Law No 4749 small letters could be better. This law sets the procedures and principles related with domestic and external borrowing, the financial claims and State External and Domestic Debt arising from such borrowing and guarantees, arrangement of financial relations between the Ministry of Treasury and Finance and the institutions and establishments included in the general, annexed and autonomous budget, establishments subject to provisions of private law with more than 50% of their capital belonging to the state, funds, state banks, investment and development banks, metropolitan municipalities, municipalities and establishments affiliated to municipalities, and other local government agencies, the establishments whose payment obligations have been guaranteed by the Ministry of Treasury and Finance under the projects foreseen to be realized under such financing models as build-operate-transfer, build-operate, transfer of operational right and similar financing models and non-governmental organizations to be limited with grants.

Some terms related to public borrowing and debt is specificly defined in Law No 4749.

The term state debt refers to all kinds of financial obligations which have been assumed by the Ministry or to which the Ministry has become a party on behalf of the Republic of Turkey.

Financing facilities obtained by the Ministry from a Foreign Financing Source to be repaid according to a certain redemption plan and the financial obligations assumed by the Ministry within the context of Treasury Guarantee is called as the External State Debt. Whereas Domestic Borrowing Notes issued by the Ministry within the country, Ministry's borrowings from domestic market in order to meet its temporary cash requirement, and all kinds of financial obligations assumed by the Ministry, regardless of whether the same are based on a note means Domestic State Debt.

According to Law No 4749, in the name of the Republic of Turkey, the Minister of Treasury and Finance is authorized to obtain Domestic and Foreign State Debt, to provide Treasury Reimbursement Guarantee, Treasury Counter – Guarantee and to make amendments in conditions of such guarantees, to receive grants, to make available the foreign financing facility used through Transfer of Foreign Debt, Onlending of Foreign Debt and Allocation of Foreign Debt and to create new financial liabilities, to manage these debts and liabilities and to manage the Treasury Claims stemming from these. The Minister may transfer this authority and his authorities in undertaking the duties attributed to him by the Law to the relevant units of the Ministry when necessary to be valid for the relevant budget year. Transfer of authority

does not abrogate the liability of the Minister. The President of the Republic is authorized to grant Treasury Investment Guarantee and Treasury Country Guarantee, to make amendments in the conditions of these guarantees and to provide debts and grants upon the proposal of the Minister. The Ministry can not be held responsible for the borrowings by organizations mentioned in Article 2 of Law No 4749 where the Ministry is not a party to the relevant agreements in any way. The Minister is authorized to determine the conditions of foreign financing facility and to transform the repayments arising from this facility to credits or disbursements. Transactions related to this shall be undertaken by the Ministry.

Within the fiscal year, in line with the principles of the Article 1 of Law No 4749 and fiscal sustainability, net debt utilization can be made up to the difference between the allocations mentioned in the budget law and estimated revenues. This limit can only be increased by up to 5% within the year by taking into account the development and requirements of debt management. When even this amount is not sufficient, there can be an additional 5% increase only through the decision of the President of the Republic upon the proposal of the Minister and opinion of the Undersecretariat. In case of a balanced budget, borrowing may also be increased by up to a maximum of 5% of the principal repayment. Borrowing limit can not be changed. Except those repaid in cash upon maturity, special category State domestic borrowing notes that are onlent upon several different laws, cannot be taken into account in the calculation of this limit. The limit on the special category State domestic borrowing notes that will be onlent within the fiscal year is determined by the budget law every year. The limit of Guaranteed Facility to be provided within the fiscal year shall be determined by budget laws every year.

your turn [1]

Why should the activities of the government in the field of public finance whether in regards collection of public revenues or making of the public expenditure be in strict adherence to due process of law?

Tax Law

As compulsory, unrequited payments to government taxes are the enforced proportional contributions from persons and property levied by the law-making body of the State by virtue of its sovereignty for the support of the government and all public needs. In modern economies taxes are the most important source of governmental revenue. Taxes differ from other sources of revenue in that they are compulsory levies and are unrequited i.e., they are generally not paid in exchange for some specific things, such as a particular public service, the sale of public property, or the issuance of public debt. While taxes are presumably collected for the welfare of taxpayers as a whole, the individual taxpayer's liability is independent of any specific benefit received.

Taxation is generally defined as the power of the state to demand enforced contributions for public purposes. It is an inherent power of the sovereign, exercised through the legislature, to impose burdens upon subjects and objects within its jurisdiction for the purpose of raising revenues to carry out the legitimate objects of government. It is also defined as the act of levying a tax, i.e. the process or means by which the sovereign, through its law-making body, raises income to defray the necessary expenses of government. It is a method of apportioning the cost of government among those who, in some measure, are privileged to enjoy its benefits and must therefore bear its burdens. The primary purpose of taxation (the revenue or fiscal purpose of taxation) on the part of the government is to provide funds or property with which to promote the general welfare and the protection of its citizens and to enable it to finance its multifarious activities. Taxation may also be employed for purposes of regulation or control (the non-revenue or regulatory purpose of taxation). Taxation is often employed as a devise for regulation by means of which certain effects or conditions envisioned by the government may be achieved.

Tax law is defined as the body of rules which the government or any other public authority has a claim on tax payers, requiring them to transfer to the goverment or to the relevant public authority part of their income or property.

Tax law is concerned only with legal aspects of taxation, not with the its financial, economic or other aspects. Although the tax law of a nation is unique to itself, there are many similarities and common elements in the tax laws of various contries.

Tax law falls in the domain of public law i.e., the rules that determine and limit the activities and reciprocal interests of the political community and the members composing it as distinguished from relationships between individuals (the sphere of private law).

important

Tax law falls in the domain of public law and it is concerned with legal aspects of taxation rather than its financial, political or economic aspects.

Tax law can be divided as general tax law and special tax law (national taxation system), also as material tax law and formal tax law, international tax law, tax procedural law, criminal tax law, etc.

The power to impose taxes is generally recognized as a traditional right of the government. This power is neither an unlimited nor an arbitrary power. The right of the government or other public authorities has certain limits. These limits are set by the power that is qualified to do so under constitutional law. In a democratic system, this power is the legislature, not the executive or the judiciary. The constitutions of some countries may allow the executive to impose quasi-legislative measures especially in time of emergency. Under certain circumstances the executive may be given a limited power to alter provisions of tax laws of course again within the limits set by the legislature.

Power to tax is subject to certain constitutional limitations. Since Magna Carta Libertatum of 1215, taxation has always been a prerogative of the legislature. The general and the basic principal of tax law, "the legality of taxation" (no taxation without representation or consent) has been expicitly asserted in constitutional texts of many countries. Also in article 73 of Turkish Constitution 1982 in the third, the principle of legality of taxation is clearly stated with the following provision: "Taxes, fees, duties, and other such financial obligations shall be imposed, amended, or revoked by law". So levying or imposition of the tax (taxation) must depend on a legislative act. The power of taxation is peculiarly and exclusively legislative and cannot be exercised by the executive or judicial branches of the government. Hence, only the legislature (in Turkey Turkish Grand National Assembly) can impose taxes. The parliament (with some certain exceptions stated in the constitution) cannot delegate its power of taxation. The Parliament may to a certain extent delegate its power to tax by law to the executive branch. According to the last paragraph of article 73 of Turkish Constitution, the President is the President of the republic may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial obligations, within the minimum and maximum limits prescribed by law. On the other hand, as the collection of the tax levied is essentially administrative in character, it is referred to as the tax administration. Tax administration is authorized for administration of the tax laws. That means the tax administration of a country (in Turkey the Presidency of Revenue Administration and Tax Office Directorates) is the responsible governmental authority for the assessment, computation, collection and enforcement of the taxes. The taxpayer has a guarantee against unfairness or error in the application of taxes in the right to appeal to competent, impartial authorities when he disagrees with the determination of the assessing officer. The tax payer can either demand the settlement of the tax dispute initially from the tax administration by applying for some administrative processes (such as correction of tax errors or compromise, or he may take the dispute with the tax authorities directly to the court. Thus the tax judiciary is invoked, and the disputes between the taxpayer and the tax administration are settled by impartial and independent tax courts in the name of the nation by interpretation and application of the tax laws.

important

According to the principle of "the legality of taxation" levying or imposition of any tax or other fiscal duty must depend on a legislative act.

your turn 2

Why is the delagation of taxation power from legislative to executive is to a certain extent possible?

Tax System and Basic Concepts of Taxation

Tax System

Tax system is defined as the legal system for assessing and collecting taxes. It is a system created to administer, collect, integrate, improve, change and manage methodically the local tax law and national tax legislation. It should be a fair, transparent, accurate and effective system vital for the government to administer, collect, change and manage taxes within the country. Tax systems can either be a single tax system or a multi tax system. We can talk about a single tax system where only one tax constitutes the sources of public revenue or a single tax is levied on one subject. As the single tax system from the revenue point of view does not provide sufficient tax yield for the goverment, today tax systems are generally in the form of a multitax system which is a tax system where several and various types of taxes are being levied.

Basic Concepts of Taxation

The constitutional principle of legality of taxation requires that any tax with all of its essential elements must have a firm basis in law. That clearly means no tax can be levied except under authority of a law. As fundamental rights and personal freedom cannot be restricted except by law and as any act of the administration, including any administrative act of tax assessment and collection requires a firm basis in law. Also the essential elements of a tax must be provided in an enabling law. Such elements like taxpayer, taxable event, object of taxation, tax base, tax rates, and tax exemptions, which must be explicitly included in a tax law, are called as the basic concepts of taxation.

important

As a requirement of the principle of "the legality of taxation", all the essential elements of a tax such as the taxpayer, taxable event, tax object, tax base, tax rates, and tax exemptions, which are alo called as "the basic concepts of taxation", must be explicitly included in a tax law.

The taxpayer is the real person or the legal entity liable for the debt in accordance with tax laws.

The person responsible for the tax is the person who is responsible towards the taxation office, as regards the payment of the tax.

Legal capacity shall not be required for being a taxpayer or responsible for the payment of the tax.

Taxable event is any event or transaction that results in a tax consequence for the party who executes the event. Taxable events generally result in the tax liability of the relevant person. Taxable event in corporations tax is the obtainment of corporate profits/earnings, whereas the taxable event in the motorvehicle tax is the registration of the relevant motor vehicles in the traffic or the civilian air-vehicle register.

Tax object is defined as the things with an economic value indicating the ability to pay of the to pay such as income, property and expenditure. In this context, the income of an individual, tangible-intangible or movable-immovable properties, consumptions and transactions on which the gorverment has imposed the taxes can be the object of taxation.

Tax base is defined as the measure upon which the assessment or determination of tax liability is based. The tax is charged on tax base. When we talk about an ad valorem tax, tax base is generally the amount on which a taxpayer pays taxes, as for example their taxable income in the case of an income tax, or the taxable value of their property in case of a property tax. On the other hand, when specific taxes are concerned, then the tax base used to calculate a tax liability is each unit of a good or service rather than its value.

Tax rate is defined as the proportion of income, spending or asset value that is taxed. It is generally expressed as a percentage of the value of income or

property to be paid as a tax. The statutory tax rate meaning the tax rate specified bye law can either be a fixed rate or it can vary with the amount of tax base. When the rate of tax increases as the tax base increases, we talk about progressive taxation and progressive tax rates. But we talk about a flat taxation when the same percentage of taxation (constant tax rates or sometimes a single tax rate) is applied to all taxpayers regardless of their tax base.

Tax exemption or exemption from taxation is defined as the situation of not being subject or liable to taxation. Tax exemptions come in many forms, but one thing they all have in common is that they either reduce or entirely eliminate your obligation to pay tax.

Turkish Taxation System

In Turkish taxation system, rights, burdens, ways of implementing mandates and carrying out duties along with principals of accrual are regulated by the Tax Procedures (TP) Code No. 213. This Law comprises procedural and formal provisions of all tax laws.

Taxes, duties and charges, and the ones that belong to provincial private administrations and municipalities are within the scope of the TP Code No. 213. However, taxes, duties and charges collected by customs administrations are not subject to the TP Code.

Turkish taxation sysytem is a multi tax system for it consists of different taxes on income, property or expenditure.

As it consists of different taxes on income, property and expenditure, Turkish taxation sysytem is considered as a multi tax system.

Taxes on Income in the Turkish Taxation System

Taxes on income are the taxes imposed on individuals or entities that vary with their respective income or profits.

Turkish taxation system consists of two main taxes on income: personal income tax and corporations tax (corporate income tax). An individual is subject to the personal income tax on his income and earnings, in contrast to a corporation which is subject to corporate income tax on its income and earnings.

The rules of taxation for individual income and earnings are provided in the Personal Income Tax (PIT) Law No. 193 dated 1960. Likewise, the rules concerning the taxation of corporations are contained in the new Corporations Tax (CT) Law No. 5520 dated 2006.

Despite the fact that each is governed by a different legislation, many rules and provisions of the PIT Law are also applied to corporations, especially, in terms of income elements and determination of net income.

Personal Income Tax

Personal income tax is a direct tax collected by the central government. It is considered as personal, and ordinary tax. As personal income tax has progressive tax rates, it is considered in accordance with ability to pay principle.

Tax Object

Income of individuals are subject to personal income tax. The term "individuals" means real-natural persons. In the application of income tax, partnerships are not deemed to be separate entities and each partner is taxed individually on his/her share of profit.

An individual's income may consist of one or more income elements listed below:

1. Business profits: The profit arising from commercial or industrial activities.
2. Agricultural profits: The income derived from agricultural activities.
3. Salaries and wages: The income derived from dependent personal services
4. Income from independent professional services: The income derived from any activity performed by a person who is self-employed, and based on professional and scientific expertise rather than capital.
5. Income from immovable property and rights: The income derived especially from the rental of real property, which includes land buildings, and permanent leasehold rights as well as letting of some goods such as ships, boats, aircraft and other types of

transportation vehicles, which are also regarded as immovable property in the application of the PIT Law, and earnings derived from the letting of copyrights by people other than the author himself or his legal heirs

6. Income from capital investment: The interest or dividend income and other profits derived from capital in cash or capital in kind.
7. Other income and earnings without considering the source of income: capital gains and non-recurring income

Taxable Event

The event that creates tax liability in personal income tax is to receive income. For business profits and agricultural profits, income is prescribed in PIT Law on accrual basis and for the other five items of income on a cash basis.

Tax Payer-Tax Liability

Real persons who are the recipients of income are liable for income tax. Nationality does not, in principle, make any difference for income tax liability. Hence foreigners as well as Turkish national shall be subjected to income tax when they receive income.

In general, residency criterion is applied in determining tax liability for individuals. This criterion requires that an individual whose domicile is in Turkey is liable to pay tax for his worldwide income (unlimited liability). Any person who resides in Turkey more than six months in one calendar year is assumed as a resident of Turkey. However, foreigners who stay in Turkey for six months or more by the reason of a specific job or business or particular purposes, which are specified in the PIT Law, are not treated as resident. Therefore, unlimited tax liability is not applicable for them.

In addition to residency criterion, within a limited scope, nationality criterion also applies regardless of their residency status. Turkish citizens who live abroad and work for government or a governmental institution or a company, and whose headquarter is in Turkey, are considered as unlimited liable taxpayers. Accordingly, they are subject to PIT on their worldwide income. Non-residents are only liable to pay tax on their income derived from the incomes in Turkey (limited liability). For tax purposes, it is especially important to determine in what circumstances income is deemed to be derived in Turkey. The provisions of Article 7 of the PIT Law regulate this issue.

Tax Base

As a rule, the PIT Law charges the net amount of income on its aggregate, which is determined on the actual basis. In order to determine net amount of income on the actual basis, some expenses and expenditures stated in PIT Law may be deducted from the relevant gross income.

Tax Rate

In line with the rule of taxing annual income as an aggregate, the PIT Law adheres to progressive taxation. Today the progressive tax is set as 15% for the first bracket and %35 for the top bracket.

Tax Exemptions

There are several tax exemptions provided in the PIT Law such as the tax exemption for artisans (small traders and craftsmen) and a partial exemption for rents obtained from house lettings.

Corporations Tax-Corporate Income Tax

The second tax in the Turkish Taxation System levying income is the corporations tax. It is also a direct tax collected by the central government. It is a general, ordinary tax. But, unlike personal income tax, it is considered as a non personal tax as a single tax rate of 20% is applied to all corporations - regardless of their corporate income. Therefore, corporations tax is not in conformity with ability to pay principle.

Tax Object

Tax object of the two taxes on income in Turkish Taxation System is identical. The only difference is with respect to their tax payer. The corporation tax is levied on the income (profits) of corporations. According to article 1 of CT Law, the profit of a corporation consists of all the income items (business profits, agricultural profits, salaries and wages, income from independent professional services, income from immovable property and rights, income from capital investment and other income and earnings) within the scope of PIT Law. The only difference of corporations tax from income tax is that CT Law considers and levies the seven items of income as the business profits of the corporations.

Taxable Event

Earning of the corporate profits is the taxable event in the corporations tax. In other words, there is also a similarity between personal income tax and corporations tax with respect to tax the event creating the tax liability. The corporate profits are treated just like the business profits in personal income tax, and the earning of the corporate income on an accrual basis generates the tax debt of the corporations.

Tax Payer-Tax Liability

Tax payers of the corporations tax are the corporate bodies. Corporate bodies consists of some legal persons together with some economic entities without legal personality. According to article 1 of CT Law, the profits of capital companies (joint stock companies, partnerships with limited liability and limited partnerships in which the capital is divided in to shares), cooperatives, state economic enterprises, the business entities owned by societies and foundations, and corporate joint ventures are subject to corporations tax.

The CT Law as with PIT Law distinguishes two sorts of tax liability, namely full liability and limited liability. A corporate body, with either its statutory domicile or place of management in Turkey, is considered as carrying full corporations tax liability. On the contrary, non resident corporations with neither their legal center nor central management in Turkey are prescribed as corporate tax payers with limited liability.

Tax Base

The tax base of the corporations tax is the net profits of the corporate bodies earned in one year. The net profits of corporations is according to the balance sheet method in the same way as business profits in personal income tax 'Just like' OR 'In addition to' van be better the business expenses stated in PIT Law, certain expenses specific to corporations can also be deducted from the gross corporate earnings.

Tax Rate

Unlike personal income tax, the corporations tax is paid at one standard rate of %20.

Tax Exemptions

There are several tax exemptions provided in the CT Law such the tax exemption for the profits earned from participation in other corporations and the tax exemption for the profits obtained abroad by companies from construction projects and technical services.

Although personal income tax and corporations tax are identical with respect to tax object, they differ from each other with respect to their tax payers and tax rates.

Taxes on Property in the Turkish Taxation System

Taxes on property are the taxes on the use, ownership or transfer of property. These ad valorem taxes are usually levied on the value of real estate. Property taxes include the taxes on immovable property or net wealth, the taxes on the change of ownership of property through inheritance or gift and taxes on financial and capital transactions.

There are three kinds of tax on property in the Turkish Taxation System. These are real estate tax, motor vehicle tax and inheritance and gift tax.

Real Estate Tax

Real estate tax is a special tax on property collected by the municipalities.

Tax Object

The buildings and lands in Turkey and within the municipality frontiers are subject to real estate tax.

Taxable Event

Real estate tax liability begins following the budget year in the case of acquiring real estate, change in situation of real estate property or end of exemption.

Tax Payer

The taxpayer is the owner of the building or land, the owner of any usufruct over the building or land, or if neither of these exists, any person that uses the building or land is considered as its owner.

Tax Base

Tax base for the real estate tax is the tax value of the building or land according to the Real Estate Tax (RET) Law No. 1319.

Tax Rate

Real estate taxes are calculated annually by related municipality based on the tax values of

land or buildings at rates varying from 0,1% to 0,3%. These rates are increased by 100% within the frontiers of metropolitan municipality.

Tax Exemptions

In articles 4, 5 and 6 of the Real Estate Tax (RET) Law No. 1319, some permanent or temporary exemptions are stated such as the real estate tax exemption for propety owned by the state or other local authorities.

Motor Vehicle Tax

Motor vehicle tax is also a special tax on property but collected by the State.

Tax Object

Land motor vehicles registered to traffic bureaus or offices, also helicopters and airplanes registered to the Directorate General of Civil Aviation are subject to the motor vehicle tax. Motor vehicles are classified into three categories in terms of motor vehicle tax:

List 1: cars, motorcycles and terrain vehicles etc.

List 2: minibuses, panel vans, motorized caravans, busses, trucks etc.

List 3: aeroplanes and helicopters

Taxable Event

Motor vehicle tax liability begins with acquisition and entry in the relevant register of a motor vehicle in his own name.

Tax Payer

Taxpayers are real and legal persons who have motor vehicles that are registered to their own names in the traffic register and the civilian air-vehicle register maintained by the Ministry of Transportation, Maritime Affairs and Communications.

Tax Base and Tax Amount

The fixed amount of motor vehicle tax for land transportation vehicles is determined according to their age, type, number of seats, cylinder capacity, maximum gross weight (after 01.01.2018 also purchase the value of the cars, minibuses and panel vans and terrain vehicles). The amount for planes and helicopters is determined according to their maximum takeoff weight.

Tax Exemptions

According to article 4 of Motor Vehicle Tax (MVT) Law No. 197, certain exemptions such as the exemption for the motor vehicles of diplomatic missions granted under the principle of reciprocity are applied relating to motor vehicle tax.

Inheritance and Gift Tax

Inheritance and gift tax is a general tax on property, collected by the State. It is the second progressive tax in the Turkish taxation system.

Tax Object

All the items comprising the property acquired as a gift or through inheritance are subject to inheritance and gift tax.

Taxable Event

The inheritance and gift tax liability begins with the transfer and acquisition of an item as a gift or through inheritance

Tax Payer

Turkish citizens are subject to inheritance and gift tax on worldwide assets received. Resident foreigners are subject to inheritance and gift tax on worldwide assets received from Turkish citizens and on assets located in Turkey received from resident foreigners or nonresidents. Nonresident foreigners are subject to inheritance and gift tax on assets located only in Turkey.

Tax Base

Acquired item's appraised value is the tax base for the inheritance and gift tax. Tax paid in a foreign country on inherited property is deducted from the taxable value of the asset.

Tax Rate

The value of the assets received is subject to progressive tax rates ranging from 10% to 30% and 1% to 10% respectively.

Tax Exemptions

Various tax exemptions are foreseen in articles 3 and 4 of the Inheritance and Gift Tax (IGT) Law No. 7338 such as the tax exempt of the public administrations, political parties or the exemption for the inherited household items, personal belongings of the decedent or the items conserved as family souvenirs like swords, paintings, decoration and madals, etc.

important

In comparison with the motor vehicle tax and the gift and inheritence tax, which are collected by the central government, the real estate tax is a municipality tax collected by local authorities.

Taxes on Expenditure in the Turkish Taxation System

Taxes on expenditure are the taxes levied on the total consumption expenditure of an individual.

Turkish taxation system comprises several indirect taxes, such as value added tax, special consumption tax, stamp tax, banking and insurance transactions tax, special communication tax, fees, etc.

Value Added Tax

Value added tax is one of the most important taxes in the Turkish Taxation System. VAT can be considered as an indirect tax levied on consumption spending on goods and services. VAT is a universal-general tax on consumption while it levies each stage of the production and the distribution process. But unlike other multi stage indirect taxes (for example the multi stage sales tax), which are also applied to the sales of goods and services at all stages of the production and marketing chain, VAT does not cause an unproportionate and heavy tax burden in the form of pyramiding of tax.

Tax Object

Turkish taxation system levies value added tax on the supply and the importation of almost every goods and services at each stage of the production and the distribution process.

Taxable Event

Liability for VAT arises; (a) when a person or entity performs commercial, industrial, agricultural or independent professional activities within Turkey and (b) when goods or services are imported to Turkey.

Tax Payer

People or entities who supply goods or services within the scope ot their commercial, industrial, agricultural or independent professional activities within Turkey or people or entities who import goods and services as VAT taxpayers are liable to VAT in their taxable transactions, irrespective of their legal status or nature and their position with regard to other taxes. However, liability for the tax levies on the person who supplies or imports goods or services, the real VAT burden is on the final consumer.

Tax Base

Tax base for VAT is generally the total purchase value of the supplied or importated goods and services not including the VAT itself. There is a a tax-credit method for the computation of the VAT. Hence, VAT liability is based on the difference between the VAT liability of a person on his sales (output VAT) and the amount of VAT that he has already paid on his purchases (input VAT). If the output VAT is less than the input VAT, then the input VAT, which cannot be deducted, is refunded to those who perform such transactions, on the basis of principles to be determined by the Ministry of Finance.

Tax Rate

The Turkish VAT system employs multiple rates such as 1%, 8%, 18% (the standard rate of VAT on taxable transactions) for different goods and services and the President of the Republic is authorized to change the statutory VAT rate (10%) within certain limits (from 0% to 40%).

Tax Exemptions

Various exemptions for VAT are foreseen in articles 15, 16 and 17 of the Value Added Tax (VAT) Law No. 3065. In this context, the exportation of goods and services is one of those transactions which are exempt from VAT. There is also a diplomatic exemption for VAT.

Special Consumption Tax

Special consumption tax is another important indirect tax in the Turkish Taxation System. Unlike VAT, special consumtion tax is levied only for once at one stage of consumption process of the goods within the scope of four lists annexed to the Special Consumption Tax (SCT) Law No. 4760.

Tax Object

The goods subject to SCT are indicated as tariff codes generating from Turkish Customs Tariff Nomenclature (TCTN). TCTN is incompliance with the Combined Nomenclature, which is the

international classification system for goods. There are mainly four product groups that are subject to SCT at different tax amounts or rates.

- List (I) is related to petroleum products, natural gas, lubricating oil, solvents and derivatives of solvents,
- List (II) is related to land, air and sea vehicles (cars and other vehicles, motorcycles, planes, helicopters, yachts etc.),
- List (III) is related to alcoholic beverages and cola soda pops, cigarettes and other tobacco products,
- List (IV) is related to other consumption goods (caviar, furs, mobile phones, white goods and other electrical household machines etc.).

Taxable Event

Taxable event for the goods laid down in List (I) does not occur at the time of importation but at the domestic delivery of the goods. Delivery means the transfer to recipient or to those acting on behalf of him, the right of disposition of property by the owner or by those acting on behalf of him. Importation means the entry of goods subject to excise duty into the customs territory of the Republic of Turkey. On the other hand, at the stage of importation, guarantee is required for corresponding duty that becomes payable in Turkey.

As for the goods stated in List (II), taxable event either occurs with their first acquisition or at time of their delivery, importation or public auction. First acquisition is the taxable event for vehicles subject to entry and registration such as cars, buses, trucks, motorcycles, airplanes, helicopters, ships, yachts, etc. In terms of special consumption tax, first acquisition means, in respect of the vehicles which have not already been recorded and registered in Turkey, the importation, acquisition by auction, acquisition from the merchants of motor vehicles or being started to be used or capitalized by merchants of motor vehicles or registered in the name of them. For vehicles which are not subject to entry and registration, taxable event occurs at the time of their delivery, importation or public auction. Delivery means the transfer to recipient or to those acting on behalf of him, the right of disposition of property by the owner or by those acting on behalf of him. Importation means the entry of goods subject to excise duty into the customs territory of the Republic of Turkey.

For the Goods in List (III), taxable event occurs at the time of their delivery by their manufacturers, importation or sale at public auction before tax is applied. Delivery means the transfer to recipient or to those acting on behalf of him, the right of disposition of property by the owner or by those acting on behalf of him. Importation means the entry of goods subject to excise duty into the customs territory of the Republic of Turkey.

And finally for the Goods in List (IV), taxable event occurs at the time of their delivery by their manufacturers, importation or sale at public auction before tax is applied.

Tax Payer

Taxpayers of SCT vary by list and transaction as follows:

- For List (I), manufacturers including refineries or importers of the petroleum products,
- For List (II), traders of motor vehicles, importers for their use (not for selling) or sellers of untaxed vehicles through auction,
- For List III, manufacturers and importers of the goods or sellers of untaxed goods through auction,
- For List IV, manufacturers and importers of the goods or sellers of untaxed goods through auction.

Tax Base

Tax base for SCT differs according to the lists. For example, the tax base for cigarettes and other tobacco products is retail selling price of these goods to final customers including VAT. Tax base for importation of cigarettes and tobacco products shall also be the retail selling price of these goods. However, the tax base for the goods of List (IV) is VAT tax base excluding SCT.

Tax Rate

The Turkish VAT system employs multiple rates such as 1%, 8%, 18% (the standard rate of VAT on taxable transactions) for different goods and services and the President of the Republic is authorized to change the statutory VAT rate (10%) within certain limits (from 0% to 40%).

Tax Exemptions

Various exemptions for SCT are foreseen as per the relevant lists in SCT Law No. 4760. Exportation for the goods within lists (I), (II), (III) and (IV) and and diplomatic exemptions granted for the goods within lists (I), (II), (III) under the principle of reciprocity can be stated in this context.

Stamp Tax

In the Turkish Taxation System, stamp tax is a duty imposed on the expenditures relating to legal transactions.

Tax Object

Stamp tax applies to a wide range of documents listed in Annex I of Stamp Tax Law No. 488. Stamp tax levied documents, which are functional to document and prove one's claims, are including but not limited to, contracts, agreements, notes payable, letters of credit and letters of guarantee, financial statements and payrolls.

Taxable Event

Stamp tax arises with the signing of the taxable documents.

Tax Payer

The parties who sign a document on which stamp duty is imposed are liable to pay stamp tax. The Law No. 488 provides that each relevant party shall be responsible for payment of the total amount of stamp tax on the documents.

Tax Base & Tax Rate-Amount

Stamp tax is levied according to the type of documents at different tax rates or lumpsum amount listed in Annex I of the Stamp Tax Law.

Tax Exemption

Documents exempt from stamp tax are listed in Annex II of the Law No. 488.

Banking and Insurance Transactions Tax

Another indirect tax levying the expenditures related with to legal transactions in Turkish Tax System is the banking and insurance transactions tax.

Tax Object

All the transactions and services stated in the Law No. 6802 and performed by banks, bankers and insurance companies are subject to banking and insurance transactions tax (BITT) regardless of the nature of the transaction. The transactions of banks and insurance companies are exempt from VAT, but are subject to BITT, which is due on the gains of such companies from their transactions.

Taxpayer

Taxpayers of banking and insurance transactions tax are banks, bankers and insurance companies.

Taxable Event

There will be the banking and insurance transactions tax upon the money, which they collect under the name of interest, commission and expenditure because of the services they performed on behalf of banks, bankers and insurance companies.

Tax Base & Rate

The tax base for BITT is the total amount of Money collected by the banks and insurance companies from their customers. The general BITT rate is 5% and some specific transactions are taxed at 1%. In addition, foreign exchange transactions are subject to 0 (zero) BITT according to the Council of Ministers Decision since 2008.

Special Communication Tax

Special communication tax is also a special indirect tax imposed on some communication expenditiures and regulated in article 39 of Expenditure Taxes Law No. 6802 with the amendment in 2004.

Tax Object

Certain telecommunication services are subject to special communication tax.

Taxable Event

Special communication tax is imposed on the performance of certain communication services such as mobile electronic communication services, the services regarding the transmission of radio and television broadcasts on satellite platforms and cable medium, the internet providing services by wired, wireless and mobile and other electronic communication services.

Tax Payer

Tax payers of the special communication tax are the operators who provide the electronic communication services.

Tax Base

The tax base for special communication tax is the same as the VAT base. Unlike special comsumpiton tax, this tax is not included in the VAT base.

Tax Rate

Special communication tax rates are as follows:

25% mobile electronic communication services (including the sales for pre-paid lines),

15% for the services regarding the transmission of radio and television broadcasts on satellite platforms and cable medium,

5% for the internet providing services by wired, wireless and mobile,

15% for the electronic communication services not listed above.

Fees

Fees regulated under the Law No. 492 are also considered as a special duty related to legal transactions in Turkish Tax System.

The fees which are collected by the central government are in different types such as Judgment Fees, Notary Fees, Tax Judgment Fees, Title Deed Fees, Consulate Fees, Ship and Harbor Fees, Permit of License and Certificate Fees, Traffic Fees, Passport, Visa and Ministry of Foreign Affairs Certification Fees.

The above mentioned fees are taken at different rates or in fixed amounts from the ones who benefit from the services which are liable to the relavant fees.

Unlike many other taxes on expenditure such as value added tax and special consumption tax, stamp tax, banking and insurance transactions tax and fees are indirect taxes imposed on the expenditures relating to legal transactions.

LO 1 You will be able to analyze the concepts and different fields of fiscal law

Summary

The national economy is an economic unit which is present in every nation, every organized political community, and every country in the world. The production of various kinds of goods and services is realized in the national economy by two main sectors, namely: the public sector and the private sector. Public sector or public economics studies the economical activities of the government and the other public authorities in the national economies. The goods and services provided by the government are called as the public goods and services. In the national economy, public goods and services are produced either by the public sector itself or also by the private sector but under the monitoring and supervision of the government. To realize the production of public goods and services, the government must collect and spend revenues. Public finance as a field of social sciences studies the role of the government in the national economy. The two fields of study of the public finance are the income and the expenditure of the government. In a modern state, the principle "government by law" requires both the spending of the government and the methods used to pay for that spending, especially taxation and debt borrowing must be subject to law. The rules regulating the activities of the government and the other public authorities in the field of public finance is called as fiscal law. As it governs the relationship between the individuals and the government regarding public finance and regulates the operations of the government in the field of public finance, fiscal law is considered as a branch of public law. Fiscal law can be divided into two branches as the public expenditure law and the public revenue law.

The term public expenditure can be defined as the spending made by the government of a country on collective needs and wants, and the public expenditure law can be defined as the rules and procedures related to making and the management of the public expenditure. Public expenditure of all the administrative units should conform with the provisions of the legislation on public expenditure. The legislation in Turkey related to public expenditure is composed of various laws such as the Public Financial Management and Control Law No. 5018, the Law No. 6085 On Turkish Court of Accounts, the related fiscal year Budget Law, the Public Procurement Law (PPL) No. 4734 together with the Law No. 4735 on Public Procurement Contracts.

To perform the social and economic duties and functions undertaken by the provisions of the constitutions, the governments requires large amount of resources which are called as public revenues. Public revenue is an important tool of the fiscal policy of the government and is the opposite factor of government spending. Revenues earned by the government are received from various sources. Today public revenue in the modern states can be divided into two major sources: taxes and public debts. Whether the public revenue is raised from taxes or debt borrowing, it should comply with the provisions of the public revenue law. Public revenue law refers to the legal rules and procedures regulating the collection of public revenue. Public revenue law can be divided into two subbranches: the law related to public borrowing and debt & tax law.

The term public debt refers to all kinds of financial obligations which have been assumed by the Ministry of Treasury and Finance or or to which the Ministry has become a party on behalf of the Republic of Turkey. The Law Relating to Public Borrowing and Debt consists of the legislation for public debt operations and management in Turkey, which is the Law No. 4749 On Regulating The Public Finance And Debt Management. This law sets the procedures and principles related with domestic and external borrowing, the financial claims and State External and Domestic Debt arising from such borrowing and guarantees, arrangement of financial relations between the Treasury and the various local and international financial institutions. According to Law No 4749 In the name of the Republic of Turkey, the Minister of Treasury and Finance is authorized to obtain Domestic and Foreign State Debt, to provide Treasury Reimbursement Guarantee, Treasury Counter – Guarantee and to make amendments in conditions of such guarantees, to receive grants, to make available the foreign financing facility used through Transfer of Foreign Debt, Onlending of Foreign Debt and Allocation of Foreign Debt and to create new financial liabilities, to manage these debts and liabilities, and to manage the Treasury Claims stemming from these. Within the fiscal year, in line with the principles of the Article 1 of Law No 4749 and fiscal sustainability, certain limits are provided for the public borrowing which can not be changed.

As the primary source of income for a modern state is the tax revenue which is the income gained by the government through taxation instead of "public revenue law", tax law is used. Tax law is a body of rules under which the government or another public authority has a claim on taxpayers requiring them to transfer to the government or the relevant authority part of their income or property.

LO 2 You will be able to explain the main concepts of tax law

Summary

Taxes are the most important source of governmental revenue defined as compulsory, unrequited payments to government. Taxes are collected for the financial support of the government and all public needs. In modern economies taxes differ from other sources of revenue in that they are compulsory levies and are unrequited i.e., they are generally not paid in exchange for some specific thing. Taxes are presumably collected for the welfare of taxpayers as a whole, the individual taxpayer's liability is independent of any specific benefit received.

Taxation is an inherent power of the sovereign, exercised through the legislature, to impose burdens upon subjects and objects within its jurisdiction for the purpose of raising revenues to carry out the legitimate objects of government. It is an act of levying a tax, i.e. the process or means by which the sovereign, through its law-making body, raises income to defray the necessary expenses of the government. The primary purpose of taxation (the revenue or fiscal purpose of taxation) on the part of the government is to provide funds or property with which to promote the general welfare and the protection of its citizens and to enable it to finance its multifarious activities. Taxation may also be employed for purposes of regulation.

Tax law is defined as the body of rules which the government or any other public authority has a claim on tax payers, requiring them to transfer to the goverment or to the relevant public authority part of their income or property. Tax law is concerned only with legal aspects of taxation and falls in the domain of public law. It can be divided as general tax law and special tax law (national taxation system), also as material tax law and formal tax law, international tax law, tax procedural law, criminal tax law, etc.

The power to impose taxes is generally recognized as a traditional right of the government. This power is neither an unlimited nor an arbitrary power. The right of the government or other public authorities has certain limits. These limits are set by the power that is qualified to do so under constitutional law. In a democratic system, taxation power belongs to the legislature, not to the executive or the judiciary. Power to tax is subject to certain constitutional limitations. Taxation has always been and is a prerogative of the legislature. The general and the basic principal of tax law, "the legality of taxation", requires that levying or imposition of the tax must depend on a legislative act. Only the legislature can impose taxes. The parliament in principle cannot delegate its power of taxation. The collection of the taxes levied is essentially administrative in character. The tax administration is the authorized and the responsible governmental authority for the assessment, computation, collection and enforcement of the taxes in the country. The taxpayer can appeal to competent, impartial authorities when he disagrees with the determination of the assessing officer. He can either demand the settlement of the relevant tax dispute initially from the tax administration by applying for some administrative processes or may take the dispute with the tax authorities directly to the tax courts wihcih are impartial and independent courts having the authority to interprete and apply the tax laws in the name of the nation.

The constitutional principle of legality of taxation requires that any tax with all of its essential elements must have a firm basis in law. The essential elements which must be explicitly included in a tax law are called as the basic concepts of taxation. These consist of taxpayer, taxable event, object of taxation, tax base, tax rates, and tax exemptions. The taxpayer is the real person or the legal entity liable for the debt in accordance with tax laws. Taxable event is any event or transaction that results in a tax consequence for the party who executes the event. Tax object is defined as the things with an economic value indicating the ability to pay of the tax payer such as income, property and expenditure. Tax base is defined as the measure upon which the assessment or determination of tax liability is based. Tax rate is defined the proportion of income, spending or asset value that is taxed in an ad valorem tax. Tax exemption is defined as the situation of not being subject or liable to taxation.

Tax system is a fair, transparent, accurate and effective legal system for assessing and collecting taxes, created to administer, collect, integrate, improve, change and manage methodically the local tax law and national tax legislation. Tax systems can either be a single tax system or a multi tax system. A multitax system is a tax system where several and various types of taxes are being levied.

Turkish taxation sysytem is a multi tax system for it consists of different taxes on income, property or expenditure. There are two kinds of taxes on income in the Turkish Taxation System which are: the personal income tax and the corporations tax. The taxes on property in the Turkish Taxation System are composed of the real estate tax, the motor vehicle tax and finally the gift and inheritance tax. There are several taxes on expenditure in the Turkish Taxation System such as the value added tax, the special consumption tax, stamp tax, banking and insurance transactions tax, special communication tax and fees.

1 Which of the following can **not** be considered within public goods and services?

A. Entertainment services
B. Defence services
C. Health services
D. Educational services
E. Justice services

2 Which of the following is the definition of "public finance"?

A. A sector in the national economy which includes mainly the economical activities of the government and the other public authorities
B. A field of social sciences which studies how the government raises and spends money for the provision of the public goods and services together with the effects of these activities on the economy and on the society
C. The part of law which governs relationships between individuals and the government
D. An important tool of the fiscal policy of the government and the opposite factor of government spending
E. The rules and procedures related to the making and the management of the public expenditure

3 Which of the following is a branch of fiscal law?

A. Law of obligations
B. Public international law
C. Public revenue law
D. Criminal law
E. Civil procedure law

4 Which of the following does **not** compose one of the sources of the legislation regarding public expenditure in Turkey?

A. Public Financial Management and Control Law No. 5018
B. The Law on Turkish Court of Accounts No. 6085
C. The Law on Public Procurement Contracts No. 4735
D. The Tax Procedures Law No. 213
E. The related fiscal year Budget Law

5 Which of the following is the **first** and **foremost sources** of public revenue?

A. Fines
B. Duties
C. Public debt and borrowing
D. Gift and grants
E. Taxes

6 Which of the following is the institution authorized for public borrowing and debt in the Republic of Turkey?

A. The Council of State
B. The Presidency of Revenue Administration
C. The Court of Accounts
D. The Ministry of Treasury and Finance
E. The Banking Regulation and Supervision Agency

7 Which of the following principle requires that taxation must be a prerogative of the legislature?

A. The Efficiency of Taxation
B. The Neutrality of Taxation
C. The Legality of Taxation
D. The Flexibility of Taxation
E. The Ability to Pay

8 Which of the following defines the term "tax object"?

A. Any event or transaction that results in a tax consequence for the party who executes the event
B. The real person or the legal entity who is liable for the debt in accordance with tax laws
C. The things with an economic value indicating the ability to pay of the tax payer such as income, property and expenditure
D. The measure upon which the assessment or determination of tax liability is based
E. The situation of not being subject or liable to taxation

Test Yourself

9 Which of the following can be considered as a tax on property?

A. Corporations tax
B. Real Estate tax
C. Value added tax
D. Stamp Tax
E. Special communication tax

10 Which of the following is the tax payer of the value added tax?

A. The owner of the building or Desertion
B. The parties who sign a document on which stamp duty is imposed
C. The real persons who are the recipients of income
D. The real and legal persons who have motor vehicles that are registered to their own names in the traffic register and the civilian air-vehicle register maintained by the Ministry of Transportation, Maritime Affairs and Communications.
E. The people or entities who supply goods or services within the scope ot their commercial, industrial, agricultural or independent professional activities within Turkey or people or entities who import goods and services

1. A	If your answer is wrong, please review the "Introduction" section.
2. B	If your answer is wrong, please review the "Introduction" section.
3. C	If your answer is wrong, please review the "Fiscal Law" section.
4. D	If your answer is wrong, please review the "Public Expenditure Law" section.
5. E	If your answer is wrong, please review the "Public Revenue Law" section.
6. D	If your answer is wrong, please review the "Law Relating to Public Borrowing and Debt" section.
7. C	If your answer is wrong, please review the "Tax Law" section.
8. C	If your answer is wrong, please review the "Basic Concepts of Taxation" section.
9. B	If your answer is wrong, please review the "Taxes on Property in the Turkish Taxation System" section.
10. E	If your answer is wrong, please review the "Taxes on Expenditure in the Turkish Taxation System-Value Added Tax" section.

Why should the activities of the government in the field of public finance whether in regards collection of public revenues or making of the public expenditure be in strict adherence to due process of law?

your turn 1

In a state governed by the rule of law, not only the citizens but also the governing bodies are bound by the authority of law, any arbitrary use of the powers of the government are strictly prohibited. All the governmental activities also including the activities of the government in the field of public finance whether in regards collection of public revenues or making of the public expenditure should be lawfully operated and must be in strict adherence to due process of law.

Suggested answers for "Your turn"

Why is the delagation of taxation power from legislative to executive is to a certain extent possible?

your turn 2

In a democratic system, the power to impose taxes is a traditional right of the legislature, not the executive or the judiciary. The constitutions of some countries may allow the executive to impose quasi legislative measures especially in time of emergency Under certain circumstances, the executive may also be given a limited power to alter provisions of tax laws of course again within the limits set by the legislature. The general and the basic principal of tax law, "the legality of taxation" (no taxation without representation or consent) demands that taxation must be a prerogative of the legislature. Accoding to this principle, taxes, fees, duties, and other such financial obligations should be imposed, amended, or revoked by law. Any levying or imposition of the tax must depend on a legislative act. The power of taxation is peculiarly and exclusively legislative and cannot be exercised by the executive or judicial branches of the government. Only the Turkish Grand National Assembly can impose taxes. As a rule, the parliament can not delegate his power of taxation to executive. But as an exception, the Parliament may to a certain extent delegate his power to tax by law to the executive branch. According to the last paragraph of article 73 of Turkish Constitution, the President of the Republic may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial obligations, within the minimum and maximum limits prescribed by law.

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Chapter 7

Labour and Social Security Law

After completing this chapter, you will be able to;

Learning Outcomes

1. Understand the fundamental concepts of the Turkish Labour Law
2. Obtain notion about the rights and obligations arising out of an employment relationship
3. Gain insight into the Turkish social security system

Chapter Outline

Introduction
General Introduction to Labour Law
Individual Labour Law
Social Security Law

Key Terms

Individual Employment Contract
Labour Law, Social Insurance
Labour Law
Social Insurance
Social Security Law

INTRODUCTION

The rise of industrialization starting from the second half of the eighteenth century resulted in fundamental changes in the economic and social structure of the Western world. The principle of *laissez faire* of the 1789 French Revolution gave rise to the idea of freedom of contract which became strictly applied in contractual relationships. State's intervention to any form of contracts, and in the meantime to employment contracts was not allowed and the belief that free will of individuals was the essence of contracts led to the prohibition of unionism.

By the nineteenth century, the unfair consequences of *laissez faire* policies became widely acknowledged leading to an alteration in the perception of contracts law where employment relationships were concerned. At this point, the necessity of the involvement of the state and inference with employment relationships with a view to ensure workers a level of protection became recognized and the adoption of legislations to this end demonstrated significant increase. It is during these periods of the world history that labour and social security law emerged as separate branches of law where the principle of freedom of contract became intertwined with the principle of social justice.

GENERAL INTRODUCTION TO LABOUR LAW

Labour law deals with the legal relationship between employees and employers. Not all groups of workers constitute the subjects of labour law. The subjects of labour law are only the groups of workers who work subordinately under an employment contract, namely employees. This means that independent workers and self-employed, as well as public servants, who are not parties to an employment contract, are not the subjects of labour law.

The significance of labour law lies with the intensive interference by the state with the employment relationship. The economic inequality and the natural hierarchy between the employee and the employer and hence, the uneven bargaining powers of the two parties require the provision of special protection to employees. This characteristic of labour law distinguishes it from regular private law relationships and makes it an independent branch of law.

Labour law as a separate branch of law consists of two main parts: Individual Labour Law and Collective Labour Law. Individual labour law deals with the one-on-one relationship between an employee and an employer arising out of an employment contract. In this respect, the subject matter of this part of labour law involves conclusion and termination of the employment contract, as well as parties' obligations arising thereof and working conditions of the employees. Collective labour law, on the other hand, constitutes the collective part of the labour relationships where trade unions are involved and collective bargaining, collective (labour) agreements and the right to strike and lock-outs are regulated.

important

Under the Turkish law, collective agreements concluded by public servants have different legal characteristics than the regular collective agreements. In order to avoid confusion in terminology and to be consistent with the usage in the Turkish language, "collective labour agreement" is used for collective agreements signed within private employment relationships; whereas "collective agreement" is used for collective agreements signed by public servants.)

Legal Sources of Labour Law

Legal sources of labour law consist of international sources and national sources.

International Sources

A significant group of sources of labour law consist of international sources. Labour law has a human rights aspect to it that makes it a common subject of international documents, particularly those that govern economic and social rights such as the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1976 adopted by the United Nations.

Among the international sources of labour law, the most common and significant documents

consist of the conventions and recommendations of the International Labour Organisation (ILO) which is a special agency of the United Nations with the objective of realizing social justice and improving working conditions of the workers around the world.

National Sources

National sources consist of official sources and private sources. The former refers to the sources of legislation that are adopted by the competent legislative authorities; whereas the latter consists of sources unique to labour law.

Official Sources

Official sources are the legal sources of labour law that are adopted by the competent authorities with legislative power. The official sources consist of the Constitution, statues, by-laws and other legislative instruments of minor significance in the field of labour law such as regulations.

Constitution: Social state, as adopted in article 2 of the Turkish Constitution of 1982, is a principle that seeks to ensure the protection of social rights, including work-related rights. As a complementary of the principle of a social state, the Turkish Constitution explicitly ensures the protection of labour rights in articles 48-55. These provisions of the Constitution regulate the right and freedom to work, the right to fair conditions of work, the right to rest, freedom of association, the right to collective bargaining and collective action, and the right to a fair remuneration.

Statutes: There are a number of statutes that are applicable to employment relationships. Among these, statutes and provisions that explicitly regulate individual employment contracts are articles 393-469 of the Code of Obligations No. 6098, Labour Act No. 4857, Maritime Labour Act No. 854, and Press and Media Labour Act No. 5953. Statutes which govern collective labour relations are Act No. 6356 on Trade Unions and Collective Labour Agreements and Act No. 4688 on Trade Unions and Collective Agreements of Public Servants. Finally, the statute which governs occupational safety and health is the Occupational Health and Safety Act No. 6331.

By-Laws: There are numerous by-laws that are applicable to employment relationships. These by-laws govern a variety of issues, including but not limited to annual paid leaves, working time, overtime work, subcontractors, remuneration, and union membership.

Private Sources

The private sources refer to the binding sources that are unique to labour law. Accordingly, collective labour agreements, individual employment contracts, internal regulations, establishment practices and employer's right of direction constitute the scope of the private sources.

Collective Labour Agreements: Collective labour agreements are agreements concluded between trade unions and employers' associations or employers not affiliated with an employers' association, with a view to regulate issues regarding the conclusion, content and ending of individual employment contracts. Normative provisions of collective labour agreements have an imperative force over the provisions of individual employment contracts and therefore, are above the individual employment contracts in the hierarchy of norms.

Individual Employment Contracts: Individual employment contract is the legal basis of an employment relationship between an employer and an employee. Individual employment contracts are below collective agreements in the hierarchy of norms.

Internal Regulations: General and common rules laid down unilaterally by the employer on working conditions and the functioning of the establishment are called international regulations. Internal regulations have the force of an individual employment contract and therefore, are in the same level in the hierarchy of norms.

Establishment Practices: An establishment practice is a general, repetitious and *de facto* provision of an interest to the employees unilaterally by the employer creating an objective expectation on the part of the employees to repeat. Establishment practices have the force of an individual employment contract and therefore, are in the same level in the hierarchy of norms as the individual employment contracts and internal regulations in the hierarchy of norms.

Employer's Right of Direction: In employment relationships, employers have the right to give their employees instructions and employees are under the obligation to comply with these instructions. The instructions given by the employer cannot be against the legislative sources, collective labour agreements, and individual employment contracts. Therefore, employer's right of direction is below individual employment contracts (and hence, internal regulations and establishment practices) in the hierarchy of norms.

Fundamental Concepts of Labour

Employee: Article 2/I defines an employee as a real person who works under an employment contract. Article 8 of the Turkish Labour Act No. 4857 defines employment contract as "a contract where one party (the employee) undertakes to subordinately perform work and the other to pay remuneration." Accordingly, an employee is the party to an employment contract who undertakes to perform work and who is subordinate to the employer by being bound by the employer's orders and instructions.

Apprentices and trainees shall be distinguished from employees. The former is a student learning the relevant art or profession and apprenticeship is a part of their education. Trainees, on the other hand, are qualified with the relevant theoretical information and seek to improve their practical skills. Neither group qualifies as an employee and are not considered within employee count of the establishment. They are not subject to the Labour Act, but benefit from the provisions of the Act on Occupational Health and Safety, as well as the social insurance for occupational hazards and diseases.

Employer: Employer is defined in article 2/I of the Turkish Labour Act No. 4857 as "real or legal persons or institutions and organizations without legal personalities that employ employees." The employer is the addressee of the performance of work by the employee and the person with the authority to give orders and instructions at the highest level. These two characteristics of the employer may either be assembled in one person or may be divided between different persons. In the latter case, the employer who is the addressee of the employee's obligation to perform work is called the "abstract employer"; whereas the employer who is vested with the authority to give orders and instructions at the highest level is called the "substantial employer". This separation is of particular relevance regarding employers who are legal persons. The legal personality itself, while the addressee of the employees' obligations to perform work, i.e. the abstract employer, cannot physically give orders and instructions. Instead, its highest competent body is the authoritative body delegated with the authority to give orders and instructions. Therefore, the highest competent body of a legal person employer is the substantial employer. It should be noted that the abstract-substantial employer distinction is not limited to the case of legal persons. It may arise in any case where the two functions of the employer are divided between different persons, in particular where the abstract employer lacks legal capacity to act.

Employer's Representative: Employer's representative is defined in article 2/IV as "persons who act on behalf of the employer and take part in the management of the work, establishment and the enterprise." This definition indicates that an employer's representative entails two elements. The first one is the authority to directly represent the employer. All legal transactions concluded by the employer's representative bear legal consequences within the legal ambit of the employer. Secondly, the employer's representative shall take part in the management of the work, establishment and the enterprise. The level of this management is irrelevant in determining the status of an employer's representative. It can be a high level position as in the case of general directors, directors, or a lower level position such as the chiefs, head of departments, foremen, etc.

Apart from the very high level positions, such as CEOs who generally work under a proxy agreement, employer's representative's relationship with the employer is based on an employment contract. Therefore, the employer's representative is an employee *vis-à-vis* the employer; whereas an employer's representative *vis-à-vis* other employees. Article 2/V of the Labour Act endorses this

situation by indicating that the title of employer's representative does not prejudice his/her rights and responsibilities deriving from being an employee.

The significance of employer's representative arises in the area of liabilities. Article 2/IV of the Labour Act stipulates that the employer is liable against all acts and responsibilities of the employer's representative conducted under that title towards the employees. Therefore, all damages of the employees arising out of a misconduct of an employer's representative shall be directed to the employer, rather than to the employer's representative. This is a natural consequence of the direct representation relationship between the employer and the employer's representative. However, this does not liberate the employer's representative from all liabilities. Article 2/V of the Labour Act states that all responsibilities and obligations of the employers governed in the law shall also be applicable to employer's representative. This means that employer's representatives are subject to administrative fines and criminal penalties in case they fail to fulfil their responsibilities and obligations arising out of the labour law legislations.

Subcontractor: It is a common practice where an employer (principal employer) delegates certain tasks within an establishment organization to another employer (subcontractor) who puts his/her own employees to work in the establishment of the principal employer. These tasks which are delegated to a subcontractor consist of work that require an expertise in a specific technology, such as the IT tasks or conducting cranes, or are of auxiliary character such as the management of the cafeteria, cleaning and transportation.

The subcontractor and the relationship between the principal employer and the subcontractor are regulated in article 2/VI-IX of the Turkish Labour Act. According to article 2/VI of the Labour Act, there are five criteria that shall be met in order to deem a relationship principal employer-subcontractor relationship.

- Both the principal employer and the subcontractor shall be employers. In order to form a principal employer – subcontractor relationship, the principal employer shall employ his/her own employees in the same establishment where the subcontractor employs employees. This means that in cases where the work is performed in the absence of the employees principal emplayerls, such as in case of tenders or turnkey projects, a principal employer - subcontractor relationship cannot not be established. It should be noted that the legal relationship between the principal employer and the subcontractor can be based on a number of different types of contracts, except an employment contract. In other words, there is not any employer-employee relationship between the principal employer and the subcontractor.
- The subcontractor shall be delegated with a task that is related to the production of goods and services rendered in the principal employer's establishment.
- The work performed by the employees of the subcontractor shall be executed in the establishment of the principal employer.
- Only a part of the principal employer's work shall be delegated to the subcontractor. The tasks that could be delegated to the subcontractor consist of either a part of the main activity of the principal employer or the auxiliary tasks. The former can only be delegated to a subcontractor for enterprise based and operational reasons, as well as for reasons of technological expertise. Auxiliary tasks can be delegated to a subcontractor without limitation.
- The employees of the subcontractor delegated to the principal employer's work shall work exclusively in the principal employer's establishment. A principal employer – subcontractor relationship cannot be established if the subcontractor's employees working in the principal employer's establishment are put to work in other establishments by the subcontractor. Of course, this does not mean that the subcontractor cannot take up work in other establishments or employ employees in his/her own establishment. It only means that the subcontractor cannot put to work the *same* employees working in the principal employer's establishment in other establishments.

A principal employer – subcontractor relationship is established in the cumulative presence of all these five criteria. The legal consequence of this relationship is the joint liability of the principal employer and subcontractor towards the employees of the subcontractor working in the establishment of the principal employer. Article 2/VI of the Labour Act states that the principal employer is jointly liable with the subcontractor towards the latter's employees regarding the responsibilities arising out of the Labour Act, the employment contracts and the collective labour agreement to which the subcontractor is a party. Accordingly, although the employees of the subcontractor are not in any form of contractual relationship with the principal employer, they may address their claims for unpaid remuneration, work related damages, severance allowance, payment in lieu of notice, etc. towards either the principal employer, the subcontractor or both.

Article 2/VII of the Turkish Labour Act specifically regulates cases of simulation in forming principal employer – subcontractor relationship. In case a principal employer and a subcontractor engage in such a relationship with a view to reduce the principal employer's economic burden, to avoid the legal responsibilities of the employer arising out of an employment contract and/or the law, or for any other similar reason, the principal employer – subcontractor relationship will be void and the employees of the subcontractor will be deemed employees of the principal employer from the beginning.

The same provision also provides two cases of presumption of simulation. Accordingly, the employees of the principal employer cannot be employed by a subcontractor by limiting their rights arising out of the employment contract with the principal employer. Secondly, a principal employer cannot hire a subcontractor who was his/her former employee. In the presence of these two cases, the burden of proof shifts from the employee alleging simulation to the employer who refuses the existence of an act of simulation. In other words, if a principal employer – subcontractor relationship is built in one of these two manners, it is up to the employer to prove that this relationship is not a simulation.

Establishment: The establishment is defined in article 2/I-III of the Turkish Labour Act as the unit where employees and material and immaterial elements are organized with the objective of producing goods and services by the employer. The establishment is a unity of work organization which includes adherent parts, adjunct facilities and vehicles.

The adherent parts refer to places that are organized under the same management and are by nature subsidiary to the production of goods and services rendered in the establishment. The adjunct facilities are listed in an exemplary manner in article 2/II as recreational places, nurseries, cafeteria, dormitories, shower rooms, medical examination and care, physical and vocational training facilities and courtyards. Vehicles consist of any mobile or immobile means such as cars, buses, cranes, bulldozers, construction equipment, etc.

Transfer of Establishment or its Part: It is a common practice where an establishment or a section of it is transferred to another employer. In such an event, the legal cônsequences concerning the employment contracts of the employees who work for the transferor is regulated in article 6 of the Turkish Labour Act. This provision ensures the protection of the transferor's employees by stipulating that all employment contracts that are valid on the day of transfer shall be transferred to the new employer together with all rights and obligations arising thereof. With the transfer of the establishment or one of its parts, the validity of the existing employment contracts will be upheld and the transferee will *ipso facto* be the party to the employment contracts as the employer. In this respect, all seniority based rights of employees will be calculated according to the date of conclusion of the employment contract with the transferor employer, rather than the day of the transfer of the establishment or its part.

The law extends this protection of employees by creating joint liability for the transferor and the transferee. Article 6/III of the Labour Act sets forth joint liability of the two employers regarding the obligations of the employer that have arisen before the day of the transfer and are due on the day of the transfer. However, the liability of the transferor is limited to two years following the day of the transfer.

A third and final protection granted to employees in cases of transfer of establishment or its part is protection against dismissals. The transfer of the

establishment or its part *per se* cannot be a ground for employer's termination of the employment contract. By the same token, the transfer *per se* does not constitute a just cause for termination without notice for the employee either. On the other hand, the right of the transferor or transferee employer to terminate on economic and technological grounds or due to changes in the work organization as well as the parties' rights to terminate without notice in case of a just cause are reserved.

your turn [1]

What is the difference between an establishment and an enterprise?

INDIVIDUAL LABOUR LAW

As previously examined, there are four statutes that directly govern individual employment relationships, namely the Labour Act No. 4857, Maritime Labour Act No. 854, Press and Media Labour Act No. 5953 and Code of Obligations No. 6098. Despite various inter-act references, these legislations are applicable to different employment relationships depending on the type of activity carried out in the establishment.

The Scope of Application of the Turkish Labour Act No. 4857: The scope of the Turkish Labour Act is regulated in article 4 in a negative manner, where the article provides the types of work to which the Labour Act is not applicable. In this respect, the Turkish Labour Act is not applicable to the employment relationships concerning the following activities or persons:

- Maritime and air transport activities. However, loading and unloading activities to and from ships at the coasts or ports and piers, as well as activities related to the producers of water products that do not constitute an agricultural activity and do not fall within the scope of application of the Maritime Labour Act are subject to the Labour Act. Furthermore, the employees working in the ground services of aviation are also subject to the Labour Act.
- Establishments or enterprises of less than 50 (inclusive) employees where agricultural and forestry work is carried out. Exceptions to this include agricultural crafts, activities carried out in workshops and factories where tools, machines and their parts are manufactured for agricultural purposes, construction work carried out in enterprises on agriculture, and in activities related to parks and gardens that are open to public use or are adjunct facilities of an establishment. The employees working in establishments that carry out such activities that fall within the ambit of these exceptions are subject to the Labour Act.
- Any construction work related to agriculture that fall within the ambit of family economy.
- Handcraft activities that are performed within the household and by the members of a family and their relatives up to third degree (inclusive) kinship.
- Domestic work
- Apprentices
- Sportsmen
- Persons under rehabilitation
- Establishments of three employees which fall within the definition of article 2 of the Act No. 507 on Tradesmen and Craftsmen.

The Scope of Application of the Maritime Labour Act No. 854: The Maritime Labour Act is applicable to seamen working under an employment contract in ships of a hundred or more gross tons carrying the Turkish flag on seas, lakes and rivers, as well as to their employers.

The Scope of Application of the Press and Media Labour Act No. 5953: The Press and Media Labour Act is applicable to journalists who work under an employment contract and perform intellectual or artistic activities at newspapers, periodicals or news and photography agencies that are published in Turkey, as well as to their employers.

The Scope of Application of the Code of Obligations No. 6098: All employees and their employers who do not fall within the scope of the Labour Act, Maritime Labour Act or the Press and Media Labour Act are subject to the provisions of the Code of Obligations on employment contract (articles 393 *et al.*). However, as a *lex generalis* vis-

à-vis the Labour Act, Maritime Labour Act and Press and Media Labour Act, the provisions of the Code of Obligations is applicable to employment relationships subject to these acts to the extent that the respective acts have failed to regulate an issue that is covered under the Code of Obligations.

Individual Employment Contracts

Article 8 of the Turkish Labour Act No. 4857 defines an employment contract as "a contract where one party (employee) undertakes to subordinately perform work and the other to pay (employer) remuneration." From this definition derives three elements, namely performance of work, remuneration and subordination, the existence of which are essential in the formation of an employment contract.

The first element of an employment contract is the obligation of the employee to perform work. This work can be any form of activity that is of economic quality and could be either manual or intellectual.

The second element that is essential in the formation of an employment contract is remuneration. Remuneration is the consideration of the work performed by the employee. It should be noted that an agreement on the existence or the amount of remuneration is not found essential to deem a relationship an employment relationship. According to the established judgments of the Court of Cassation, all work as a rule is performed in exchange of a payment and if it is a type of work that is done in exchange of a pay in the ordinary course of life, that work shall be considered as arising out of an employment contract.

The third and final element of an employment contract is subordination. Subordination refers to the employee's dependency on the orders and instructions of the employer. It is a personal subordination where the employee provides his/her labour, which constitutes an essential part of his/her personality, to the employer and the employer has a sphere of authority over the employee's labour. The employer exercises this authority through his/her right of direction. This element of the employment contract distinguishes it from other contracts of service provision.

Conclusion of an Employment Contract

As a private law contract, conclusion of an employment contract can be concluded between parties with legal capacities to act. A minor with discernment may be a party to an employment contract upon the consent of his/her legal representative.

According to article 8 of the Turkish Labour Act, employment contracts are not subject to a special form unless otherwise set forth in the law. The employment contracts that form an exception to this rule and shall be concluded in writing are as follows:

- Fixed term employment contracts with a duration of one year or longer
- On call employment contracts
- Employment contracts for distance work
- Employment contracts for temporary work
- Gang contracts
- Employment contracts concluded with the legal representatives of a child or young worker
- All employment contracts subject to the Maritime Labour Act
- All employment contracts subject to Press and Media Labour Act

In relation to employment contracts that are not concluded in writing, article 8/III of the Labour Act lays a duty on the employer to provide the employee with a written document within two months following the conclusion of the employment contract. This written document shall include the general and special working conditions, daily or weekly working times, basic remuneration and, if applicable, its supplements, remuneration payment periods, duration of the contract in case of a fixed term contract, and applicable provisions in case of termination.

Limitations on the Freedom of Contract

Although as private law contracts, employment contracts are based on the principle of freedom of contract, the law lays down various restrictions on the freedom of contract of the parties with a view to protect special groups of workers who are

relatively in a more disadvantaged position. In this respect, the law on one hand imposes prohibitions of conclusion of an employment contract for various groups and on the other hand, creates obligations on the part of the employer to conclude employment contracts with other various groups.

Prohibition to Conclude an Employment Contract

A limitation is imposed on the freedom to conclude an employment contract with regard to various groups by prohibiting the formation of an employment relationship with such groups either in full or concerning various activities. Such groups and relevant activities are as follows:

Limitations in terms of age: According to article 71 of the Turkish Labour Act, children under the age of 15 shall not be put to employment. However, children who are 14 years old or above and have completed their mandatory elementary education can be employed in light work that does not hinder their physical, mental and moral development and for those continuing their education, their schooling. Furthermore, children under the age of 18 shall not be employed in underground and underwater work, as well as in the night work of industrial activities.

Limitations in terms of gender: According to article 72 of the Turkish Labour Act, women shall not be employed in underground and underwater work. Furthermore, employment of women in night shifts is subject to special regulations that shall be set forth in a by-law to be prepared by the Ministry of Labour and Social Security pursuant to article 73/II of the Labour Act. It should be noted that the work of pregnant and nursing women are subject to special conditions.

Limitations in terms of nationality: Employment of non-nationals in Turkey, as a rule, is subject to an obtainment of work permits, unless otherwise set forth by law. Furthermore, the condition to be a national of Republic of Turkey is laid down for various occupations.

Obligation to Conclude an Employment Contract

With a view to protect various groups of workers who are relatively in a more disadvantaged position in finding employment, the law imposes various obligations on the employer conclude employment contracts with specific groups of workers. These workers with whom the employer is legally bound to conclude an employment contract are as follows:

Persons with Disabilities, Ex-Convicts and Persons Injured while Fighting Terrorism: Pursuant to article 30 of the Labour Act, private sector employers with fifty or more employees are under the obligation to employ three percent of their total number of employees from persons with disabilities. With regard to public sector employers with fifty or more workers, this quota for employing persons with disabilities is four percent. However, the public sector employers may also employ two percent of their total number of workers from ex-convicts or from persons who were injured but not disabled while fighting against terrorism instead. Workers falling under this category shall be employed via the Turkish Employment Institution (İŞKUR). Employers who do not comply with the obligation to employ persons under this category will encounter an administrative fine.

Employees Dismissed as Part of a Collective Redundancy: Pursuant to article 29/VI of the Labour Act, if an employer wishes to rehire a worker within six months following a collective redundancy to a position of the same nature, the employer is under the obligation to preferably call the employees suitable for the position who have been dismissed as part of the collective redundancy. Incompliance with this provision will result in the imposition of an administrative fine on the employer.

Reinstatement of Workers Whose Disability has been Treated: According to article 30/V of the Labour Act, if a worker whose employment contract had to be terminated due to his/her disability applies to the employer upon his/her recovery, the employer is legally obliged to reemploy such worker in his/her previous position or in a similar position immediately if there is a vacancy and if not, to the first vacant position in preference to other applicants. In case the employer does not comply with the obligation to rehire such worker, the worker is entitled to compensation in the amount corresponding to his/her six months' salary.

Reinstatement of Workers Returning from Military Service or Other Legal Duty: Pursuant to article 31/IV of the Labour Act, if a worker who ended his/her employment contract with a view to perform his/her military service or other legal duty applies to the employer upon his/her completion of the duty, the employer is legally obliged to reemploy such worker in his/her previous position or in a similar position immediately if there is a vacancy and if not, to the first vacant position in preference to other applicants. The reinstatement of such worker shall be made under the present working conditions. Incompliance with this obligation of the employer is sanctioned with compensation in favour of the worker in the amount corresponding to his/her three months' salary.

Invalidity of the Employment Contract

As a private law contract, validity of an employment contract is dependent on the existence of validity conditions such as legal capacity and the subject matter of the contract being in conformity with the imperative legal rules, morality, public order, and personality rights and not impossible to be realized. Just as any other legal transaction, employment contracts that are concluded without satisfying all of the general and special conditions for validity are void and therefore, cannot be effective and cannot cause legal consequences. Furthermore, they cannot obtain validity afterwards. They have to be concluded again in a valid manner.

Nonetheless, application of the general rule on invalidity to a void employment contract is likely to result in unfair results. If a person performs work pursuant to a void employment contract, deeming that contract ineffective from the beginning will leave the worker without any consideration for the work he/she performed, since the work already performed by the worker cannot be taken back. Therefore, in order to overcome such an unjust consequence, article 394/III of the Code of Obligations provides a protection for workers whose employment contracts were found to be void after the obligations arising out of the contract had been performed for some period of time. Accordingly, this provision reads that an employment contract which has been found void *post factum* shall be effective and cause all its legal consequences like a valid employment contract until the employment relationship is terminated.

Types of Employment Contracts

Parties to an employment contract have the liberty to conclude a contract in accordance with their necessities, provided that they form such employment contracts within the borders of law. This freedom of contract is secured in article 9 of the Labour Act. Without prejudice to the parties' right to freely conclude an employment contract of their choice, the labour law legislations have specifically regulated various types of employment contracts due to their common usage or special nature. These types of employment contracts which are specifically regulated in the law will be provided hereunder.

Employment Contracts for Continuous and Discontinuous Work

Work that continues for a period of maximum 30 workdays is called discontinuous work; whereas work that exceeds 30 workdays is continuous work. According to article 10 of the Labour Act, articles 3, 8, 12, 13, 14, 15, 17, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 53, 54, 55, 56, 57, 58, 59, 75, 80, and transitional article 6 shall not be applied to discontinuous work. The provisions of the Turkish Code of Obligations shall be applied to such work regarding issues regulated in these articles of the Labour Act.

Employment Contracts of Definite and Indefinite Duration

Employment contracts of definite and indefinite duration are governed in articles 11 and 12 of the Turkish Labour Act. Unless otherwise agreed upon by the parties, an employment contract is deemed to have been concluded for an indefinite duration. However, mutual agreement of the parties on a fixed term is not sufficient to deem an employment contract of definite duration.

Parties intending to conclude a fixed term employment contract shall have an objective reason to make such a contract. This objective reasons can be due to the nature of the work, be directed towards the completion of a job, the emergence of a fact such as a temporary leave of absence of an employee due to birth, illness, etc. or a similar objective reason.

According to article 11/II of the Labour Act, fixed term contracts cannot be concluded consecutively in the absence of an objective reason. In other words, in case of expiration of a fixed term contract, conclusion of a second one is also dependent on the existence of an objective reason or the continuation of the original objective reason. Otherwise, the employment contract will be deemed an employment contract of indefinite duration from the beginning of the employment relationship. This means that, conclusion of chain contracts of definite duration without an objective reason for renewal will deem the contract between parties contract of indefinite duration.

It should be noted that with regard to employment relationships subject to the Code of Obligations, an objective reason is not required to conclude a fixed term agreement for the first time. Article 430/II of the Turkish Code of Obligations adopts the position that an objective reason shall be sought in cases of chain contracts, i.e. where consecutive fixed term contracts are concluded.

According to article 12 of the Turkish Labour Act, an employee subject to a fixed term employment contract shall not be treated differently vis-à-vis a comparable employee working under an employment contract of indefinite duration unless there are valid reasons for the different treatment. The monetary and divisible benefits shall be provided to the worker in accordance with the period of his/her work; whereas benefits that are dependent on the employee's seniority and are provided to comparable employees with a contract of indefinite duration shall be equally applicable to the employees working under fixed term contracts, unless there are valid reasons for treatment otherwise.

Part-Time and Full-Time Employment Contracts

Part-time work is one of the most chosen forms of flexible employment where the employee is granted the opportunity to construct balance between his/her private life and work life.

Part-time and full-time employment contracts are regulated in article 13 of the Turkish Labour Act. Part-time employment contracts are defined in this article as contracts where the employee's weekly working hours is determined significantly less than the work of a comparable full-time employee. The vague meaning of "significantly less" in the provisions is clarified in the rationale of the same article and with the By-law on the Working Hours Regarding the Labour Act. Accordingly, work that lasts up to 2/3 of the working hours of a comparable full-time employee is part-time work. This means that for example, in an establishment where a comparable full-time employee works 45 hours per week, work that is less than 30 hours per week is considered part-time work.

The principle of equal treatment is also valid between part-time and full-time employees and article 13/II of the Labour Act explicitly prohibits different treatment of part-time employees from comparable employees working under full-time contracts without valid reason. Furthermore, divisible monetary benefits shall be granted to part-time employees in proportion to their working time unless there are valid reasons to act otherwise.

Furthermore, with the 2016 amendment to the Labour Act, the right of a parent to request part-time work is introduced in the Turkish law. Article 13/V of the Labour Act provides the chance of one of the working parents of a child to request from his/her employer conversion of his/her full-time employment contract into a part-time contract until the beginning of the mandatory elementary school age of the child, starting from the end of the maternity leave as regulated in article 74 of the Labour Act.

On Call Employment Contracts

On call employment relationship is a special type of part-time employment regulated in article 14 of the Labour Act. It is a flexible form of employment where the employer calls the employee to work when the services of that employee is needed. With a view to overcome any possible abuses of the employer's powers and to hinder any arbitrary acts of the employer, the Labour Act ensures the employee working under an on call employment contract various guarantees.

Firstly, article 14 of the Labour Act requires the on call employment contracts to be concluded in writing. Therefore, if the parties want to make an on call employment contract, they have to make a written contract.

Secondly, article 14/II of the Labour Act states that the weekly working hours of the employee working under an on call employment contract will be deemed 20 hours unless otherwise agreed by the parties in terms of week, month, year or another measure of time. Furthermore, the same provision also provides the employee with a guarantee in terms of pay, where the employee is entitled to remuneration regardless of whether he/she had worked for the period determined as working hours. In other words, if the employer is not in need of the employee's services and does not call the employee to work, the employee will still be entitled to his/her pay for the amount of hours decided by the parties or 20 hours per week if parties have remained silent concerning the working time of the employee.

Thirdly, the employer shall make his/her call at least four days prior to the day he/she needs the employee to work, unless otherwise agreed by the parties. In addition, unless otherwise agreed by the parties, the employer shall allow the employee to work at least for four consecutive hours.

If the on call employment contract is concluded in accordance with the above conditions and if the employer complies with his/her obligation to call the employee to work four days in advance or in accordance with the time agreed upon by the parties, the employee is under the obligation provide his/her work to the employer. The employee shall keep him/herself available to the calls of the employer and be present for work during the time requested by the employer.

Distance Work

Employment relationships that are built on distance work are another form of flexible employment. In this type of employment relationship, the employee performs his/her work outside the employer's establishment but within his/her work organization either from home or via communication technologies. According to article 14/IV of the Labour Act, employment contracts that establish distance work shall be concluded in writing.

Distance work performed from home, which is regulated in detail in articles 461 through 469 of the Turkish Code of Obligations, is a type of employment relationship where the employee performs his/her obligation to work from his/her home. On the other hand, distance work via communication technologies, namely teleworking, is performed through the usage of information and communication technologies such as telephone, internet, and e-mail.

> Teleworking is a type of distance work where the employee performs his/her obligation to work via the means of communication technologies.

Although the employee in distance work performs work outside the employer's establishment, his/her work is still part of the work organization of the employer. Therefore, the employee is still in a subordinate position vis-à-vis the employer and is bound by the orders and instructions of the employer. In this respect, the employer is also under the obligation to treat employees performing distance work equally in comparison to comparable employees working under conventional employment contracts.

Employment Contracts with Trial Period

With the conclusion of an employment contract, the parties engage in a continuous contractual relationship and in this relationship, the labour of the employee, and hence his/her personality, is directly relevant in performance of obligations. Therefore, with a view to observe employee's adaption to the work and the working environment, parties to an employment contract are free to insert a trial clause to the contract. On one hand, a trial period allows the employer to see if the employee is fit for the position, whether his/her performance meets the requirements of the position and whether the employee can adapt to the working environment and his/her colleagues, supervisors or subordinates. On the other hand, it also provides the employee with the opportunity to see if the position, the employer and the working environment is fit for him/her and whether or not he/she will be willing to continue working in the job.

The significance of a trial period is that parties are free to terminate the contract within this period without providing the party with a reason and

without abiding by the notice periods and having to pay the other party any form of compensation arising out of termination. Of course, the right of the employee to be paid for the work rendered is reserved. Termination of the employment contract within the trial period does not prejudice the employee's right to remuneration for the period he/she had performed work and the enjoyment of other workers' rights.

The period spent in trial period shall be included in the calculation of the employee's seniority and is not deemed a separate contract in cases where the employee continues to work under the same employer upon the expiration of the trial period. In other words, there is one employment contract that establishes the employment relationship and the trial clause is part of this employment contract which may or may not continue following the expiration of the trial period.

As one can see, trial period is mostly to the disadvantage of the employee due to the fact that the employee does not have any form of protection against dismissals. In order to reduce the disadvantages that may be encountered by the employee, the legislation imposes limitation on the trial period in terms of duration to avoid insecurity of the employees against arbitrary dismissals by the employer. In this respect, article 15 of the Turkish Labour Act sets forth that the trial period determined in the individual employment contract cannot exceed two months. However, it can be extended to four months with collective labour agreements.

Gang Contracts

Gang contracts are employment contracts where a gang leader concludes an employment contract with the employer, representing the entirety of a gang of employees. This type of contract is regulated in article 16 of the Turkish Labour Act which requires the contract to be concluded in writing in which the names remunerations of each employee of the gang shall be clarified.

The individual employment contracts between the employer and a member of the gang is deemed to be formed when that member of the gang starts working. The payment of remuneration by the employer or his/her representative to such employees shall be made separately and personally to each employee. Collective payment to the gang leader or a member of the gang does not relieve the employer from his/her obligation to pay remuneration. Furthermore, deduction from the remunerations of the members of the gang shall not be made in favour of the gang leader as an award for employee provision or for any similar reason.

Temporary Work

Article 7 of the Turkish Labour Act regulates two types of temporary work, namely unprofessional temporary work and professional temporary work.

Unprofessional Temporary Work

Unprofessional temporary work refers to the type of employment relationship where an employee is transferred to another establishment in the same holding or corporate group to satisfy a temporary need and thus, for a temporary period of time. In this respect, an unprofessional temporary work relationship with an employee can be established only for a temporary period of time and only regarding employers that are organized in the same holding or corporate group.

One of the conditions of validity of unprofessional temporary work is that the written consent of the employee shall be taken during the employee's transfer. Therefore, a written consent taken from the employee in advance is deemed void and accordingly, cannot be depended upon in forming temporary work relationship. Furthermore, due to the nature of the relationship, the temporary work relationship shall not exceed six months and can be renewed maximum twice.

Temporary work relationship does not create an employment relationship between the transferee employer and the employee. The employer of the employment relationship remains to be the transferor (original) employer and thus, the obligation to pay remuneration will remain with the transferor employer. However, article 7/XV provides the employee with a protection by setting forth joint liability of the transferor employer and the transferee employer concerning unpaid remuneration, obligation to protect the employee and social security premiums with respect to the time the employee has worked in the establishment of the transferee employer.

Professional Temporary Work

Professional temporary work is a form of temporary work that is formed through private employment agencies which also aims at satisfying a temporary need. As a result of the essential position of the private employment agencies in this type of work, it is also called "temporary agency work".

Another name of professional temporary work is "temporary agency work".

With a view to avoid possible abuses of the workers' rights and to hinder application of temporary agency work as a means to overcome continuous employment, article 7 of the Labour Act sets forth strict restrictions concerning the types and durations of the work that can be formed within the framework of temporary agency work. This way, the provision seeks to ensure that temporary agency work is formed strictly for the satisfaction of temporary needs. In this respect, temporary agency work can be concluded for the following types and periods of work:

- During maternity leave as regulated in article 74 of the Labour Act, for the work of the parent who converted his/her employment contract into a part-time employment contract until the child's elementary school age as per article 13/V of the Labour Act, during military service and other cases where the employment relationship is suspended. In such cases, a temporary worker may be requested from a private employment agency with a view to replace the employer who does not perform his/her obligation to work in full or in part for one of the reasons listed above. The duration of such temporary work is limited to the continuation of the situation that precludes the employee from performing his/her obligation to work in full or in part.
- For seasonal agricultural work. A professional temporary work relationship can be concluded regarding seasonal agricultural work for an unlimited period of time.
- For domestic work. A professional temporary work relationship can be concluded regarding domestic work for an unlimited period of time.
- For work that does not constitute an ordinary activity of an enterprise and which is performed intermittently. Temporary work for such work can be established maximum for four months and can be renewed maximum twice without exceeding eight months in total.
- For work of immediate nature that is related to occupational safety or for *force majeure* that significantly affect the production process. Temporary work for such work can be established maximum for four months and can be renewed maximum twice without exceeding eight months in total.
- Due to an unforeseeable increase in the average capacity of production. Temporary work for such work can be established maximum for four months and can be renewed maximum twice without exceeding eight months in total. However, the number of temporary workers in these cases shall not exceed one fourth of the total number of employees working in the establishment. Nevertheless, up to five temporary workers can be employed in establishments with ten or less employees.
- During seasonal increase in business that does not constitute seasonal work. Temporary work for such work can be established maximum for four months and cannot be renewed.

In addition to such limitations as to the types and duration of the work, the law also prohibits the formation of temporary work in the following situations:

- A temporary employer cannot hire a temporary employee for the same work within six months following the finalization of a professional temporary work agreement.
- Temporary work relationship cannot be formed for a period of eight months in establishments that had undergone collective redundancies.
- Temporary work cannot be concluded in public institutions and organizations.

- Temporary work cannot be concluded in the area of underground mining.
- Temporary work cannot be concluded during strikes and lockouts save for activities listed in article 65 of the Act No. 6356 on Trade Unions and Collective Labour Agreements.

Temporary agency work agreement shall be concluded in writing and, as in the case of unprofessional temporary work, the employer in this relationship remains to be the transferor employer, namely the private employment agency. Therefore, the obligation to pay remuneration arising out of the employment contract shall be borne by the private employment agency.

Marketing Contracts

Marketing contracts are regulated in article 445 through 460 of the Code of Obligations. They are contracts where the marketing staff undertakes to represent an employer, who is an enterprise owner, on the account of the employer and regarding transactions concluded outside the enterprise, or in case of a written contract, to perform other duties set forth in the contract and where the employer undertakes to pay a remuneration as a consideration.

Parties' Obligations Arising out of an Employment Contract

The parties' obligations arising out of an employment contract shall be assesses separately as employee's obligations and employer's obligations.

Employee's Obligations

Obligation to Perform Work: The main obligation of the employee arising out of an employment contract is the obligation to perform the work undertaken in the employment contract. The employee shall perform work with care and diligence. Otherwise it will constitute breach of contract in terms of the obligation to perform work. Furthermore, complying with the employer's orders and instructions concerning the work also constitutes an aspect of the employee's obligation to perform work. Unless otherwise agreed, the employee is under the obligation to perform the work him/herself.

Obligation to Comply with the Employer's Orders and Instructions: As previously observed, one of the sources of labour law is the employer's right of direction. Accordingly, the employer has the authority to make general regulations and give orders and instructions concerning the performance of work, as well as the behaviour of the employee in the establishment. The obligation of the employee to comply with the employer's orders and instruction concerning the performance of work is part of the employee's obligation to perform work. On the other hand, the obligation of the employee to comply with the employer's orders and instructions with regard to the order of the establishment and the employee's behaviour in the establishment constitute the employee's obligation to comply with the employer's orders and instructions. The examples to such orders and instructions are those concerning the place and time of work, the time of the breaks, etc.

Obligation of Loyalty: Obligation of the employee to be loyal to the employer is a reflection of the personal relationship established between the employee and employer as a result of an employment relationship. The obligation of loyalty requires the employee to take into consideration the interests of the employer and to refrain from any acts that may harm the employer. This obligation also demands from the employee the obligation to refrain from competing with the employer during the employment relationship.

Obligation of Non-Competition: Obligation of non-competition is an obligation arising out of a non-competition agreement signed between the employer and the employee which prohibits the employee from competing against the employer after the employment relationship has ended. Therefore, in order to talk about an obligation of non-competition after the employment relationship, the parties shall have explicitly agreed upon such an obligation. The non-competition agreement can either be a clause in the employment contract or concluded as a separate contract.

The obligation of non-competition shall be distinguished from the obligation of loyalty. The obligation of the employee to refrain from competing with the employer *during* the employment relationship is an obligation directly arising out of the obligation of loyalty and is present in all employment relationships regardless of whether it is explicitly governed in the employment contract. Obligation of non-competition, on the other hand, refers to an obligation that arises *after* the ending of the employment relationship.

Obligation of non-competition is regulated in articles 444 through 447 of the Code of Obligations. According to article 444 of the Code of Obligations, a non-competition clause restricts the employee from starting a competing business on his/her behalf, working at a competing enterprise or engaging in any interest oriented relationship with a competing enterprise. Due to the fact that a non-competition agreement restricts the employee's freedom of contract, the provisions of the Code of Obligations have laid down strict conditions of validity for such a contract. Accordingly, the following conditions shall be met in order for a non-competition agreement to have validity:

- The employee shall have full legal capacity.
- The non-competition agreement shall be concluded in writing.
- The work performed by the employee shall provide the employee with information about the employer's customers, production confidentialities or the work performed by the employer.
- The usage of such information shall have the potential to cause significant damage on the employer.
- Conclusion of the non-competition agreement shall not endanger the economic future of the employee. In this respect, the non-competition clause shall be limited in terms of territory, time and subject. Accordingly, pursuant to article 445 of the Code of Obligations, the duration of the non-competition agreement shall not exceed two years.

The employee who breaches the non-competition agreement will be liable to pay damages to the employer.

Employer's Obligations

Obligation to Pay Wage: The primary obligation of the employer arising out of an employment contract is the obligation to pay the employee wages. Payment of wage is the reciprocal obligation to the employee's obligation to perform work.

Wage in general terms is defined in article 32 of the Labour Act as "the amount of money in cash that is paid either by the employer or by a third party as a consideration for the work performed by a person". In terms of types of remuneration a distinction is made between basic remuneration and broad remuneration. The former refers to the agreed amount in cash that does not include any supplementary benefits; whereas the latter indicates the total amount of benefits provided to the employee whether in cash or in kind such as premiums, bonuses or social benefits. The significance of this distinction lies with the fact that while various payments such as weekly rest pays, national and general holiday pays and annual leaves are made in terms of the basic remuneration, other payments such as payment in lieu of notice or severance allowance are made on the basis of broad remuneration. The wage of the employee may be agreed to be paid in terms of time, quantity of work, a certain percentage or tips.

The significance of wage is not limited to being the primary obligation of the employer arising out of employment contract. Wage is also a source of income for the worker and his/her family. Therefore, the workers and their families are dependent on the wage to access basic needs and to at least maintain their lives at a certain economic level. Due to this dependency of the worker on his/her wage, the legislation grants various rights and protections to workers with the objective of securing their wages.

Firstly, as a source of income that seeks to ensure workers and their families at least a level of subsistence, the law sets forth a minimum wage. Parties to an employment contract cannot agree on a wage that is beneath this amount.

Secondly, the law provides the employee with various rights in cases of unpaid or partially paid

wages. Apart from the employee's right to claim the unpaid wage or the remaining amount in case of partial payment, as well as the interest accrued, the employee has the right to stop working. According to article 34 of the Labour Act, employees have the right stop working in case their wages are not paid (or partially paid) within 20 days following the due date of the wage, provided that the failure of payment is not due to a *force majeure.* The statute of limitations for claiming unpaid wages is five years.

The third group of guarantees with regard to wages restrict the seizure, transfer and pledging of the wages. Pursuant to article 35 of the Labour Act and article 410 of the Code of Obligations, only one fourth of the wage can be seized, transferred and pledged. The right-holders' rights to alimony are reserved with regard to the restriction on seizure.

The rights and protections granted to the employee are not limited to the list provided above. Other guarantees set forth in the Labour Act and relevant legislations are also applicable.

Obligation to Protect Employees: The second obligation of the employer arising out of an employment contract is the obligation to protect employees against possible material or immaterial damages and threats to their physical and psychological wellbeing. In this respect, the employer is under the obligation to take necessary measures and precautions in relation to occupational health and safety and comply with the legal obligations thereof. Furthermore, the employer shall protect and respect the employees' personalities and ensure that they do not encounter any form of harassment or mobbing and protect their personal data which were shared with the employer. Due to the nature of this obligation, the scope of protection is rather extensive and cannot be compiled in a list of actions. The main criterion in determining the scope of the employer's obligation to protect employees is article 2 of the Turkish Civil Code, namely the principle of objective *bona fides.* The failure of the employer to comply with this obligation will result in the breach of the employment contract by the employer.

Obligation of Equal Treatment: Another obligation of the employer arising out of an employment contract is the obligation to treat employees equally. The cornerstone of this obligation lies with the fundamental principle of equality which is also protected under article 10 of the Turkish Constitution.

With regard to employment relationships, the legal basis of the obligation of equal treatment is found in article 5 of the Labour Act. This article prohibits discrimination in employment relationships on the grounds of language, race, colour, gender, disability, political opinion, philosophical belief, religion, sect or similar grounds. The article also provides specific provisions on gender discrimination stating that an employee shall not be subject to different treatment in the making of the employment contract, during the employment relationship and during the ending of the contract on the grounds of gender or pregnancy, unless biological reasons or reasons arising out of the nature of the work require otherwise. Furthermore, lower remuneration for work of equal value due to gender shall not be agreed and application of special rules for protecting employees of specific genders shall not be a reason for applying lower wage.

Furthermore, the article reiterates the employer's obligation of equal treatment with regard to employees working under part-time contracts and full-time contracts as well as employees working under fixed term contracts and those working under contracts of indefinite duration.

According to article 5/VI of the Labour Act, in case of incompliance by the employer with these obligations during the employment relationship or at the time of ending the employment relationship will award the employee a compensation in the amount corresponding maximum to his/her four months' wage, as well as other rights he/she was deprived of. It should be noted that discrimination on the grounds of trade union membership or non-membership is not subject to the provisions of article 5 of the Labour Act and is separately regulated in article 25 of the Act No. 6356. According to this article, any intervention to the workers' freedom of association by the employer at the time of the making, during or while ending the employment contract will entitle the worker a compensation in the amount corresponding minimum to the worker's one year's wage.

Other Obligations of the Employer: The employer is required to perform other obligations arising out of the employment relationship as set

forth in law, in the employment contract and in the collective labour agreement. Among the former lies obligations such as the obligation to provide tools and equipment necessary for the performance of work, obligation to reimburse the expenses rendered by the employee, and obligation to make payment to a worker who makes an invention.

Ending of the Employment Relationship

An employment relationship can end either by termination of a party or by means other than termination.

Ending of the Employment Relationship by Means Other than Termination

Mutual Agreement: Parties to an employment contract are free to end the employment relationship mutually via an agreement. In this case, the employment relationship ends as a result of a bilateral contract, rather than a unilateral transaction as in the case of termination by a party.

Death: The death of the employee will *ipso facto* end the employment relationship. On the other hand, the death of the employer, as a rule, will not cause the ending of the employment relationship. The employment contract will remain in force with the heirs of the employer. However, if the employment contract is based on the personality of the employer, then the death of the employer will result in the ending of the employment relationship.

Expiration of Definite Duration: In principle, employment contracts of definite duration (fixed term employment contracts) end with the expiration of the period determined as the duration of the contract. Employment relationships based on fixed term contracts end *ipso facto* upon the expiration of the duration. If the parties continue to perform their obligations arising out of the employment contract despite the duration of the contract has expired, the contract turns into a contract of indefinite duration. The right to terminate the employment contract in relation to fixed term contracts is limited to termination with a just cause.

Termination of the Employment Contract

The most encountered means of ending an employment relationship is via termination of the employment contract either by the employee (resignation) or the employer (dismissal). There are two types of termination of the employment contract: termination with notice and termination with a just cause (termination without notice).

Termination with Notice

In an employment relationship both the employer and the employee have the right to terminate the employment contract without the consent of the other party. However, due to the employee's dependency on the wage obtained from the employment, the right of the employer to terminate the employment relationship is limited in certain cases by law. Furthermore, with a view to ensure the employee with a level of income security, the employee is granted certain rights in cases of termination of the employment contract.

> Termination is a formative right that entitles the right-holder the right to unilaterally end the contractual relationship.

It should be noted that termination of the employment contracts with notice is possible only in relation to employment contracts of indefinite duration. This is due to the fact that fixed term contracts, by their nature, are foreign to the concept of termination and in the normal course of the relationships, can end only upon expiration of the duration. Otherwise, the party who has not complied with the duration will be liable for the other party's damages. The only exception to this rule is termination with a just cause, which will be further explained under this chapter.

The procedure for enjoying the right of termination with notice is regulated in article 17 of the Labour Act. Accordingly, the party intending to terminate the employment contract shall give the other party notice in accordance with the periods set forth in this article. The notice period succeeds the notice for termination and during this period, parties' obligations arising out of the employment contract remain valid to the full extent. Therefore,

the employee is obliged to perform work and the employer has to pay remuneration in exchange for the work performed. In case of termination with notice, the employment relationship is deemed to be terminated upon the expiration of the notice period and not at the time of notification of termination to the other party.

The notice periods that shall be abided by in case of termination with notice by either party are determined in article 17 in terms of the duration of the employment contract. In this respect, for the employment relationships that have lasted less than six months, the notice period is two weeks. For those between six months and one-and-a-half years it is four weeks; those that last one-and-a-half years to three years the notice period is six weeks and for employment relationship of more than three years, the notice period is eight weeks. These periods stipulated in article 17 are imperative legal rules of relative effect and therefore, provide the minimum. In other words, parties to the employment contract may agree on longer periods, but cannot lower those set forth in the article.

Imperative legal rules of relative effect within the context of labour law are imperative rules that can be agreed otherwise by the parties only in favour of the employee.

Incompliance with these periods will result in the liability of the infringing party to pay the other party payment in lieu of notice in the amount corresponding to the employee's wage for the notice periods. The obligation to pay payment in lieu of notice lies with the party who does not comply with the notice periods. Therefore, this obligation is not limited to the employer, and in case of incompliance by the employee with the notice periods, the employee also has to compensate the employer.

Permission to seek new employment: As repeatedly mentioned, employment provides individuals and their families with a source of income that serves their subsistence and well-being. Therefore, an employee whose employment contract has been terminated either by the employer or by him/herself will likely be in search of a new job. However, since the employee is expected to continue working during the notice period, it is unlikely for him/her to simultaneously seek employment.

Recognizing this disadvantage of the employee, article 27 of the Labour Act creates an obligation on the part of the employer to grant the employee permission to seek employment during the working hours without any deductions from the employee's wage for the periods spent in employment hunt. The duration of this permission shall not be less than two hours per day and the employee has the right to use these hours as a lump sum, provided that he/she informs the employer thereof and uses them immediately before the ending of the employment relationship.

In case of failure of the employer to grant the employee permission to seek new employment, he/she has to pay the employee firstly, the pay in exchange for his/her work and secondly, 100% of the pay for the hours that the employee was entitled to, albeit not permitted to seek employment. Therefore, if the employer does not grant permission to the employee to seek new employment, he/she shall pay the employee twice the pay for hours that the employee shall have been granted permission.

Termination with payment in advance: It is a common case where the employee whose employment contract has been terminated with notice demonstrates significant decrease in productivity and motivation during the notice period. In order to provide the employer the means to avoid such a consequence, and at the same time avoid the employee from being in a disadvantaged position, article 17/V of the Labour Act grants the employer the right to immediately terminate the employment contract by paying the employee payment in lieu of notice in advance. Consequently, in cases where the employer no longer wants or requires the services of the employee whose employment contract has been terminated with notice by the employer, the employer is entitled to immediately end the employment relationship by paying the wage of the employer corresponding to the notice period (payment in lieu of notice) in advance.

Abuse of the right to terminate: As previously defined, the right to terminate is a unilateral right that entitles the individual to end a legal transaction. This formative right is not an absolute right, in particular within the employment relationships for the employer. In terms of restriction on the right of the employer to terminate, employees who are covered within the framework of job security will

be further assessed. On the other hand, unless the employee is entitled to job security, there is no legal remedy that causes invalidity of the employer's termination and thus, reinstatement of the employee to his/her job.

Employees who are not covered by the provisions of job security are entitled to a sphere of protection when their employment contracts are terminated by the employer in bad faith. Pursuant to article 17/VI of the Labour Act, in case the employment contract is terminated by the employer in bad faith, namely without due regard to objective *bona fides* rule, the employee shall be entitled to a bad faith compensation in the amount corresponding to three times the pay of notice period. In other words, termination by the employer in bad faith of the employment contract of an employee who is not covered under job security does not prejudice the validity of the termination; however, entitles the employee a compensation of bad faith. It should be noted that entitlement to compensation for bad faith is limited to employees who are not covered within the provisions of job protection. Employees in the latter group are ensured additional protections that will be further analysed.

Employees who are protected under the provisions of job security are not entitled to the protection set forth in article 17/VI and therefore, cannot claim compensation for bad faith.)

In case of termination by the employer without having regard to the notice period, the employee will be further entitled to a payment in lieu of notice. In this case, the employer will be obligated to pay three times the pay for the notice period for termination in bad faith and an additional payment in lieu of notice. Therefore, the amount payable in this case add up to four times the amount of payment in lieu of notice.

Job Security

Job security is a form of employment protection that seeks to protect employees from arbitrary terminations by their employers and secure their employment, and hence their source of income. It forms a limitation on the freedom of contract of the employer by forcing him/her to remain in the employment relationship unless there are valid reasons for termination and a special procedure is followed. Job security under the Turkish Law is governed in articles 18-21 of the Labour Act.

Due to the fact that job security constitutes an interference with the freedom of contract of the employer, not all groups of employees are protected under this system. Article 18 of the Turkish Labour Act establishes the coverage of job security. Accordingly, employees are granted job security in the presence of the following conditions:

- The employee shall be subject to either the Labour Act or the Media and Press Labour Act.
- The employee shall be working under an employment contract of indefinite duration.
- There shall be thirty or more employees working in the establishment. However, in determining these thirty employees, employees working in all establishments of the employer in the same sector shall be taken into account. This condition, however, is not required for terminations on the grounds of membership or non-membership to trade unions or participating or not participating in union activities.
- The employee shall have seniority of six months working under the employer. In other words, the employee shall have been working for the employer for at least six months. The six months is calculated by adding the period spent in the same or different establishments of the same employer. It should be noted that the condition of six months seniority is not sought for employees working in underground work or for employees whose employment contracts have been terminated on the grounds of membership or non-membership to trade unions or participating or not participating in union activities.
- The employee shall not be an employer's representative or an assistant employer's representative who manages the enterprise in its entirety or an employer's representative who manages the workplace in its entirety and who assume the authority to recruit or dismiss workers.

Further Reading

The condition of having thirty or more employees at the employer's workplace has been challenged before the Turkish Constitutional Court with the claim that it was not constitutional and violated article 49 on the right to work, article 13 for the unconstitutional limitation to the right to work and articles 2 and 5 for being against the principle of social state, as well as the ILO Termination of Employment Convention No. 158. The Constitutional Court dismissed the claim for annulment and found that the thirty employee rule was constitutional on the account that balance shall be established between employees and employers and that the heavy costs on the employer may lead to an increase in unregistered employment. The Court further claimed that there was not any violation of the ILO Convention No. 158 which allowed the exclusion of "categories of employed persons in respect of which special problems of a substantial nature arise in the light of (…) the size or nature of the undertaking that employs them" from the scope of application of the Convention in article 2(5). Therefore, the Court based its rationale on the fact that there was not a disproportionate balance between the economic interests of the small-size enterprises and the interests of employees in being protected under job security provisions. AYM, 19.10.2005 T., 2003/66 E., 2005/72 K., R.G, 24.11.2007, p. 26710.)

Valid termination: Termination of the employment contracts of employees who are protected under job security is subject to strict criteria in terms of reasons for termination and in terms of the procedure to be followed.

In terms of valid reasons, only reasons that are connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment or service can be the grounds for termination. Reasons connected with the capacity or conduct of the employee can be due to the unproductivity and low performance or the behaviour of the employee; whereas reasons based on operational requirements can be a result of economic, organizational or technological changes in the undertaking, establishment or service.

According to article 18/II of the Labour Act, however, the following do not constitute valid reasons and cannot be the grounds for valid termination:

"(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours.

(b) being (a) trade union's representative in the establishment.

(c) the filing of a complaint or the participation in proceedings against an employer before administrative or judicial authorities with a view to claim one's rights or to realize one's obligations arising out of the law or the contract.

(d) race, colour, gender, marital status, family responsibilities, pregnancy, birth, religion, political opinion, and other similar grounds.

(e) absence from work during the period where the woman employee shall not be put to work as set forth in article 74.

(f) temporary absence from work because of illness or accident during the waiting period set forth in article 25/I(b)."

According to article 19 of the Labour Act, termination of the employment contract of an employee protected under the job security provisions shall be rendered by following a special procedure. In cases where there are valid reasons for termination, the employer shall notify the employee in writing and provide the reasons for termination in a clear and definite manner. In case of termination due to the capacity and conduct of the employee, the employee shall be warned beforehand and upon repetition or continuation of the reason, granted with the opportunity to provide their defence against the accusations against them.

In any case, the employer is required to comply with the principle of *ultimo ratio* which requires that termination shall be applied as a last resort. According to this principle, the employer shall seek other means and solutions against the reason for termination before terminating the employee's contract. This principle requires the employer to refrain from immediately terminating the employment contract in the presence of a valid reason and try to find other possibilities that will keep the employment relationship standing.

It should be noted that termination of the employment contracts of employees protected under job security provisions shall be realized by complying with the notice periods set forth in article 17 of the Labour Act, unless there is a just cause for termination without notice.

Invalid termination: In case the employer terminates the employment contract of an employee who is covered within the job security provisions in the absence of a valid reason or without complying with the necessary procedure for termination, the employee has the right to file a case for reinstatement before the labour courts, or upon agreement by both parties, take it to an arbitrator within one month following the notification of termination.

According to article 20/II of the Labour Act, the burden of proving that the termination is based on a valid reason lies with the employer. If the employee claims that the termination is based on a reason other than the one asserted by the employer, the employee shall provide proof supporting his/her claim.

In cases where the court finds that the employer's termination is not valid, the employee shall apply to the employer for reinstatement within ten workdays following the notification of the final decision of the court or the arbitrator. Otherwise, the employer's termination will be deemed valid and the employer will be liable only for the legal consequences of a valid termination.

Upon the application of the employee, article 21 of the Labour Act grants the employer with two options. The employer may either reinstate the employee within one month following the application of the employee to be reinstated or refrain from reinstating the employee by paying the job security compensation. The job security compensation is the amount of the employee's four to eight months' wage, the exact amount of which is to be determined by the court or the arbitrator who had deemed the termination invalid. In case the employer chooses the latter option, the employment contract will be deemed to be terminated on the date of refusal of the employer to reinstate the employee and the employer will be liable for other rights of the employee arising out of the employer's termination such as severance allowance and if notice was not given before, payment in lieu of notice. In case the employer's termination is deemed invalid on the grounds of membership or non-membership to trade unions or participating or not participating in union activities, the employee will not be entitled to the job security compensation in addition to the compensation corresponding to his/her one year's wage as governed in article 25 of the Act No. 6356.

It should be noted that in either case, the employer is obligated to pay a compensation for the employee's inactive period between the date of termination and the date of the final decision. However, this compensation shall not exceed the employee's four months' wage. If the employer choses to reinstate the employee, the payments made by the employer during termination such as severance allowance or payment in lieu of notice shall be deducted from this compensation.

Changes in the Conditions of Work

As a result of the fact that an employment contract is a private law contract, changes made in the terms of the contract is subject to the mutual agreement of the parties. However, employees are not always granted the power and opportunity to bargain their interests and have a say in the possible changes in terms of conditions. With a view to protect them from unilateral changes to the employment contract by the employer, article 22 of the Labour Act specifically regulates unilateral changes to the employment contract and the employee's rights arising thereof.

Accordingly, the employer can make essential changes to the working conditions arising out of the employment contract, the internal regulations as annexes to the employment contract or other sources only upon notifying the employee about the changes in writing. Unless the notification is

duly made and the changes are accepted by the employee within six workdays in writing, the employee will not be bound by the changes.

> Essential changes are changes that are to the disadvantage of the employee that are beyond the right of direction and their context shall be determined according to the specifics of each employment relationship. However, changes in the remuneration, in the nature of work and working hours are considered as essential changes.

If the employee accepts the changes, the employment relationship will continue under the new terms of conditions. On the other hand, if the employment relationship is not accepted by the employee, the employer will not be able to impose the new conditions on the employee. In this case, the employer has to explain in writing that the changes to the employment contract are based on a valid reason or that he/she has another valid reason for termination. This way, the employer can terminate the contract by complying with the notice periods. If the employee is protected under the job security provisions, the employee may file for reinstatement in case of absence of valid reasons or if the termination is not duly made. Employees who are not within the coverage of job security shall benefit from their rights arising out of the employer's termination such as severance allowance, annual leave pay and if applicable, payment in lieu of notice.

Termination with a Just Cause

The right to termination with a just cause allows the party for whom staying in the employment relationship is no longer bearable under the rules of objective *bona fides,* the opportunity to terminate the employment contract immediately. The right to termination without notice is granted to both parties of the employment contract and constitutes an exception to the rule that fixed term contracts cannot be terminated. In other words, in the presence of a just cause, the party to a fixed term employment contract can terminate the contract without notice.

The just causes that may be based on in terminating an employment contract without notice are provided in article 24 of the Labour Act for employees and article 25 for employers.

Just Causes for Employees: Article 24 of the Labour Act regulates just causes for termination by employees under three headings. Accordingly, an employee has the right to terminate the employment contract without notice in case of the following reasons:

1. Reasons of health:
   a. In case the performance of the work arising out of the employment contract becomes a threat to the health or life of the employee due to the nature of the work
   b. In case the employer or another employee with whom the employer is constantly in a close and direct contact has a contagious disease or an illness that does not suit the employee's work
2. Cases that are against the rules of morality and good faith and similar reasons:
   a. If the employer misleads the employee during the making of the contract regarding the essential points of this contract
   b. If the employer makes negative comments about the honour and decency of the employee or his/her family member or engages in an act thereof or sexually harasses employee
   c. If the employer bullies, threatens the employee or a member of his/her family or encourages, provokes or leads them to engage in an unlawful act or commits a crime against the employee or his/her family member that is punishable with imprisonment or makes serious allegations or accusations against the honour and dignity of the employee
   d. If the employee becomes a victim of sexual harassment by another employee or a third party and the employer fails to take necessary precautions despite having been informed about the situation by the employee

e. If the employee's remuneration is not calculated or paid in accordance with the laws or terms of contract

f. In cases where the remuneration is agreed in terms of quantity and the employer provides the employee with work less than his/her capability, if the difference in the remuneration is not paid in terms of time and thus, the deficit in the employee's remuneration is not reimbursed or if the working conditions are not applied

3. *Force majeure:* In case of emergence of reasons of *force majeure* that require the operations in the establishment to halt for a period exceeding one week.

Just Causes for Employers: Article 25 of the Labour Act regulates just causes for termination by employers. Accordingly, an employer has the right to terminate the employment contract without notice in case of the following reasons:

1. Reasons of health:

a. If the employee becomes ill or disabled as a result of his/her delict or improper way of life or alcoholism and his/her absence for this reason lasts longer than three consecutive workdays or five workdays in a month

b. If the disease of the employee is determined by the Health Board as untreatable and that it is inconvenient for the employee to work in the establishment

In case of absence of the employee due to reasons such as an illness, accident, birth or pregnancy that do not fall within the framework of the item (a) above, the right of the employer to terminate without notice will originate six weeks following the notice periods set forth in article 17 of the Labour Act. In case of birth and pregnancy, this period shall begin following the expiration of the periods governed in article 74. However, the employee will not be entitled to any remuneration for the periods in which the employment contract is suspended.

2. Cases that are against the rules of morality and good faith and similar reasons:

a. If the employee misleads the employer during the making of the contract regarding the essential points of the contract or his/her qualifications

b. If the employee makes negative comments about the honour and decency of the employer or his/her family member or engages in an act thereof or makes serious allegations or accusations against the honour and dignity of the employer

c. If the employee sexually harasses another employee

d. If the employee bullies the employer, his/her family member or another employee, comes to work under the influence of alcohol or drugs or consumes such products in the establishment

e. If the employee engages in acts against good faith such as breaching the employer's confidence, engaging in thievery, revealing the trade secrets of the employer

f. If the employee commits a crime at the establishment that is punishable with imprisonment for more than seven days and cannot be postponed

g. In case of the absence of the employee for two consecutive workdays or twice in a month following a holiday or three days in a month without the employer's consent and without a just cause

h. If the employee insists on not performing his/her duties despite having been warned

i. If the employee endangers the occupational safety intentionally or due to his/her omission, causes damage to the machines, equipment or other property or instruments belonging to the establishment or which are under his/her control that cannot be compensated with the thirty days' wage of the employee

3. *Force majeure:* In case of emergence of reasons of *force majeure* that preclude the employee from working in the establishment for a period exceeding one week.

4. In case of arrest or detention of the employee that results in the absence of the employee that exceeds the notice period as governed in article 17 of the Labour Act.

The above reasons constitute just causes for termination without notice against the party who engages in such acts. As stated in the relevant provisions, the just causes listed in articles 24 and 25 regarding acts against morality and good faith are not *numerus clausus.* Other reasons that may be considered within these provisions may also constitute just causes for termination without notice. A common ground for termination that is not directly regulated under these articles, for instance, is the case of mobbing.

Mobbing is any form of psychological harassment that is directed towards discouraging the employee to continue in the employment relationship.

In case of termination by either party due to a cause that is against the rules of morality and good faith, article 26 of the Labour Act provides a duration in which the right to terminate shall be exercised. Accordingly, the right to terminate without notice on the respective grounds shall be exercised within six workdays following the date of finding out about the just cause or in any event, within one year following the date of the act. However, if the employee obtains a material interest from his/her act that constitutes just cause, the one year period shall not be applied.

Unjust Termination: Unjust termination refers to the case where the termination by the employee or the employer without notice is not relied on a just cause or the just cause relied on cannot be proved or the period stated in article 26 is not complied with.

In case of unjust termination by the employer, a distinction shall be made between employees working under an employment contract of definite duration and those working under an employment contract of indefinite duration.

The legal remedies that the employee working under a fixed term contract may enjoy in case unjust termination by the employer are not governed in the Labour Act, but rather in the Code of Obligations. According to article 438 of the Code of Obligations, in case of unjust termination of a fixed term contract by the employer, the employee will be entitled to compensation in amount that he/she would have earned had the employment relationship continued. However, the amount that the employee has saved or earned from another work or intentionally refrained from earning shall be deducted from this compensation.

Among the employees who work under an employment contract of indefinite duration, those who are protected under job security will enjoy the protection ensured in these provisions in case of unjust termination by the employer. In other words, unjust termination of employment contracts of employees subject to job security will be treated as invalid termination and articles 18, 20 and 21 of the Labour Act will be applicable for employees falling under this category.

With regard to employees working under an employment contract of indefinite duration who are not protected under job security provisions, unjust termination by the employer will not prejudice the validity of the termination. However, the employee whose employment contract has been terminated unjustly will be entitled to payment in lieu of notice and if conditions are met, to severance allowance.

Furthermore, pursuant to article 438/III of the Code of Obligations, the judge may award the employee whose employment contract has been unjustly terminated a compensation that shall not exceed his/her six months' wage. However, the granting of this compensation is within the full discretion power of the judge.

In case of unjust termination of the employment contract of indefinite duration by the employee, employees within the scope of application of the Labour Act shall pay the employer payment in lieu of notice. On the other hand, if the employee is within the scope of application of the Code of Obligations or if the employee who is subject to the Labour Act works under a fixed term employment contract, the employee shall pay a compensation to the employer in the amount corresponding to one fourth of his/her monthly wage, as well as compensate the employer's damages. If the damages of the employer are less than one fourth of the employee's monthly wage, the judge may decrease the amount of compensation.

Legal Consequences of the Ending of the Employment Contract

In case the employment relationship ends, the obligations of the parties arising out the employment contract will also come to an end. If the parties have made a non-competition agreement, the obligation of the employee to non-compete arising out of this agreement will continue until the expiration of the period set forth in the agreement. On the other hand, with the ending of the employment contract, new rights and obligations unique to the ending of the contract will emerge.

Accordingly, all unpaid rights of the employee that had originated but were not due will become due on the day the employment contract ends and therefore, become payable. Furthermore, the annual leaves with pay which the employee was entitled to but had not used over the course of the employment relationship will become payable in the form of annual leave pays upon the ending of the contract. Further obligations of the employer upon the ending of the contract involve providing the employee with a certificate of employment indicating the nature of the work performed by the employee and paying the employee severance allowance if conditions are met. Due to its importance and frequency of payment, severance allowance demands special reference.

Severance Allowance: The legislation that is in force regarding severance allowance is article 14 of the former Labour Act of 1475. Employees who have worked for the same employer for a certain period of time are entitled to a severance allowance in the amount corresponding to their thirty days' wage for every year they have worked for that employer. The calculation of the severance allowance shall be rendered in terms of the final gross salary. In order for the employee whose employment contract has ended to be entitled to severance allowance, the following conditions shall be met:

- The employee shall have at least one year seniority working under the same employer
- The employment contract shall have ended due to specific reasons:
  - Termination by the employer. As a rule, termination by the employer will grant the employee the right to severance allowance if other conditions are met. However, termination by the employer with a just cause for employee's acts against morality and good faith is an exception to this rule and does not entitle employee severance allowance.
  - Termination by the employee. Although termination by the employee, in principle, does not grant him/her the right to severance allowance, there are exceptions to this rule. Accordingly, in the following cases, termination by the employee will award him/her the right to claim severance allowance if other conditions are met:
    - ✓ Termination by the employee with a just cause
    - ✓ Termination by the employee for the purpose of performing compulsory military service
    - ✓ Termination by the employee with the objective of receiving old-age pensions or invalidity pension
    - ✓ Termination by the woman employee within one year following the date of her marriage
    - ✓ Termination by trade union officers with a view to perform their union duties
    - ✓ Death of the employee. In case the employment relationship ends due to the death of the employee, severance allowance of the deceased employee shall be paid to his/her heirs.

Organization of Work

Organization of work consists of two aspects: working time and the rest periods of employees.

Working Time

Article 3 of the By-law on Working Times Regarding the Labour Act, defines working time as "the period spent by the employee in work. Periods governed in article 66/I of the Labour Act are also considered as working times." In this respect, periods set forth in article 66/I of the Labour Act are calculated as part of the daily working hours of

the employee despite the fact that the employee is not performing active work during these periods.

According to article 63 of the Labour Act, the normal weekly hours of work of employees shall be maximum 45 hours. Hours spent in work that exceed the normal weekly hours of work are called overtime work. According to article 41 of the Labour Act, overtime work can be requested from the employee for reasons such as the general interest of the country, the nature of the work or with the objective of increasing production. However, the total number of hours spent in overtime work shall not exceed 270 hours in a year.

In cases of overtime work, employees will be entitled to overtime wages. The calculation of the overtime wage depends on the normal weekly hours of the employee and the duration of the overtime work. Accordingly, if the normal weekly hours of the employee is 45 hours, the employee will be entitled to an overtime wage that is calculated by multiplying the normal hourly wage with 1.5 for every hour he/she performs overtime work. On the other hand, employees whose normal working hours is less than 45 hours per week, overtime wage up to 45 hours per week shall be calculated by multiplying the hourly wage by 1.25; whereas overtime work that exceeds 45 hours shall be calculated by multiplying the hourly wage by 1.5. However, if the employee so desires, instead of the overtime wage, he/she may choose to compensate his/her overtime work in the form of rest periods. In this case, the employee will be entitled to one hour and thirty minutes for every hour he/she spent in overtime work that exceeds 45 hours per week and one hour and fifteen minutes for every hour he/she spent in overtime work beneath 45 hours per week.

As per article 41/VII of the Labour Act, the employee's consent is required in order to request overtime work from him/her. However, in case of overtime work for compulsory reasons as set forth in article 42 of the Labour Act or in emergency situations as governed in article 43 of the Labour Act, the consent of the employee is not required.

Rest Periods

The right to rest is a right of workers that is recognized in the relevant conventions of the ILO, as well as in article 50/III and IV of the Turkish Constitution. The objective of this right is to provide workers with a time for recovery and recreation in order to sustain their physical and mental wellbeing. Therefore, the intention behind all rest periods regulated in the law is to ensure that workers in fact use this time to rest and do not spend it in work. It is for this reasons that in principle, employees are entitled to their wages during the rest periods.

Daily breaks: Since it is not possible to expect employees to continuously perform work during their time at the establishment, they are provided with breaks during the day in order to satisfy their basic needs such as eating, drinking, and resting. The time spent in daily breaks is not taken into account within the working of time of the employees. The minimum duration of daily breaks are governed in article 68 of the Labour Act in accordance with the daily working time of the employee.

Weekly rest: Pursuant to article 46 of the Labour Act, employees shall be granted a weekly rest of at least uninterrupted 24 hours per week. The employee is entitled to the pay for the day spent in the weekly rest. In other words, employers are obliged to pay employees their wages for the days that the employer is not working but resting. In this respect, employees are entitled to weekly rest pays in the absence of a reciprocal obligation of performing work.

National and general holidays: According to article 47 of the Labour Act, employees who do not work on national and general holidays will be entitled to their pay for those days without the reciprocal obligation to perform work. However, if they are put to work on national and general holidays, the employer is under the obligation to pay such employees an additional pay for their work. This means that in case employees are put to work on national and general holidays, they entitled to two days' wage for every day they work that is a holiday.

Annual leave with pay: Annual leave with pay is the substantial right of the constitutional right to rest which aims at keeping employees healthy and at the same time serves occupational health and safety. It is for reason that the employee cannot waive his/her right to an annual leave.

According to article 53 of the Labour Act, employees who have worked at least one year under the employer are entitled to an annual leave with pay. The same article also provides the minimum durations of annual leaves, determined according to the seniority of the employee. Accordingly, for work of one to five years (inclusive), minimum 14 days; for work of five to fifteen years, minimum 20 days; and for work of fifteen years (inclusive) and more, minimum 26 days of annual leave shall be awarded to the employee.

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Periods spent in trial are also taken into account in determining the one year condition.

Undoubtedly, the one year condition, as well as the above durations, are imperative legal rules with relative effect and therefore, parties to an employment contract are free to agree on terms that are more in favour of the employee.

Since the purpose of the annual leave is to ensure a rest period to employees, employees cannot waive their rights to annual leave in exchange for money. Only in the case of ending of the employment relationship can the employee request his/her unused annual leaves in the form of cash. Pursuant to article 59 of the Labour Act, the wages for the unused annual leaves to be determined according to the final wage of the employee shall be paid to the employee upon the ending of the employment contract.

your turn 2

What are the criteria established in the judgments of the Court of Cassation in determining subordination as an element of an employment contract?

SOCIAL SECURITY LAW

The right to social security is a fundamental aspect of the principle of a social state that undertakes to ensure social justice. Although there is not a universally adopted definition of social security, the general objective of social security is rather clear. Accordingly, social security seeks to ensure individuals who have encountered social risks with the necessary means to overcome the effects of such risks. These social risks may be those that affect individuals' income such as unemployment, birth, death, or marriage or other incidents that affect their capacity to work such as occupational hazards and accidents, illnesses, old-age, and disability. In this respect, the main objective of social security is to ensure individuals a decent life.

Depending on the coverage of the social security schemes of a state, social security may involve numerous services such as an income guarantee to persons who are not capable to work, a temporary income to those who have lost their jobs, healthcare services, rehabilitation and family allowances.

Legal Sources of Social Security Law

Constitution: The right to social security is a fundamental human right that is protected in numerous international human rights instruments. Similarly, the 1982 Constitution of Republic of Turkey has adopted the principle of social state in article 2 and explicitly recognizes social security rights in articles 60, 61 and 62 among the economic and social rights and duties. Therefore, social security rights are human rights that are protected under the constitution.

Statutes: There are numerous statutes that are relevant to social security law. Among these, the most essential statute is the Act No. 5510 on Social Insurance and Universal Health Insurance. This Act was adopted in 2006 and came into force in full on 1st of October 2008 upon a need for a social security reform. The significance of the Act No. 5510 is that it has compiled all legislations on social insurance schemes into one act and merged all institutions that implemented social security legislations under one institution, namely the Social Security Institution (SSI). This way the previous regulation which made distinctions among employees working under an employment contract, independent workers and public servants in terms of legislations and institutions were compiled under one roof of legislation and institution.

Other legislative sources: As a rather detailed area of law, there are countless regulations and by-laws that regulate social security law.

Scope of Application of Social Insurance Schemes

The scope of application of the social insurance schemes consists of personal scope of application and territorial scope application.

Personal Scope of Application

The personal scope of application of the Act No. 5510 is determined in articles 4-6. Article 4 provides the list of insured persons, article 5 lists persons who are subject to various social security schemes, whereas article 6 lists persons who are not deemed insured within the social security system.

Insured Persons: According to article 4/I there are three groups that are categorized as "insured persons" and are within the coverage of both the short-term and the long-term social insurance schemes:

- Persons working for one or more employers under an employment contract (Article 4/I(a))
- Village and district headmen and independent workers (Article 4/I(b))
- Public servants (Article 4/I(c))

The provisions concerning the persons regulated in article 4/I(a), 4/I(b) and 4/I(c) shall also be applicable to persons listed in article 4/II, 4/III and 4/IV of the same Act respectively.

Partially Insured Persons: Persons who are partially insured under article 5 of the Act No. 5510 consist of persons who, although are not engaged in an activity that awards them the status of a fully insured person, ensures insurance with regard to various insurance schemes due to the high possibility that they may encounter social risks. These groups and the applicable social insurance schemes are as follows:

- Convicts and detainees who are not party to an employment contract and who work in the facilities, workshops and similar units of prisons and detention homes shall benefit from insurance for occupational hazards and diseases, as well as from maternity insurance. These persons will be insured pursuant to article 4/I(a) of the Act No. 5510. (Article 5/I(a))
- Candidate apprentices, apprentices and students of vocational training in enterprises who are subject to the Act No. 3308 on Vocational Training, shall benefit from insurance for occupational hazards and diseases and sickness insurance. Other persons listed in the provision, such as trainees, students working part-time at universities, and various grantees shall benefit from insurance for occupational hazards and diseases and all persons listed in the provision shall be insured pursuant to article 4/I(a) of the Act No. 5510. Among these groups, those who are not a dependent of other persons shall benefit from the universal healthcare insurance. (Article 5/I(b))
- The payment of invalidity pensions of war veterans who are disabled and various groups of persons who are disabled during active duty and who continue to work as insured persons pursuant to article 4/I(a), (b) or (c) shall not be interrupted. Among these groups, those who work as an insured person under article 4/I(c) shall be subject to long-term insurance schemes and those insured under articles 4/I(a) or (b) shall benefit from insurance for occupational hazards and diseases. Those who are in the latter group shall benefit from long-term insurance schemes upon submitting their request thereof to the SSI. Additional premiums for universal healthcare insurance shall not be requested from persons subject to this provision. (Article 5/I(c))
- Participants of the training courses organized by the Turkish Employment Institution (İŞKUR) on obtaining, developing and changing vocations shall benefit from insurance for occupational hazards and diseases, as well as the universal healthcare insurance. Persons subject to this provision shall be insured pursuant to article 4/I(a) of the Act No. 5510. (Article 5/I(e))

- Turkish nationals who are employed by employers in foreign countries with which Turkey does not have social security agreement shall benefit from short-term insurance schemes, as well as the universal healthcare insurance. Persons subject to this provision shall be insured pursuant to article 4/I(a) of the Act N. 5510. Those subject to this provision shall benefit from voluntary insurance scheme upon their request to benefit from long-term insurance schemes. (Article 5/I(g))
- Other persons set forth in relevant legislations

Non-insured Persons: Persons who are exempt from the coverage of social insurance schemes are provided in article 6 of the Act No. 5510. These persons are listed as follows:

- The spouse of the employer who works in the establishment without pay. (Article 6/I(a))
- Work performed within the household and among relatives up to third degree (inclusive) kinship without any third-party participation. (Article 6/I(b))
- Domestic workers; except those who are insured pursuant to additional article 9/II and those who work 10 or more days under the same person. (Article 6/I(c))
- Persons performing their military service as privates and the students of reserve officer school. (Article 6/I(d))
- Persons regulated in Article 6/I(e) who certify that they are insured in a foreign country. The provisions of international social security agreements are reserved. (Article 6/I(e))
- Students of higher education who perform construction and production activities as part of their education. (Article 6/I(f))
- Persons with diseases or persons with disabilities who are rehabilitated or integrated into working life via healthcare service providers. (Article 6/I(g))
- Independent workers or public servants who are under the age of 18. (Article 6/I(h))
- Agricultural or forestry workers specified in Article 6/I(i). (Article 6/I(i))
- Independent workers specified in article 6/I(k) with low income. (Article 6/I(k))
- Persons employed in foreign missions of public administrations as specified in article 6/I(l). (Article 6/I(l))
- Persons who are assigned duties in youth and sports activities as specified in article 6/I(m). (Article 6/I(m))
- Independent workers who continue working while receiving old-age pensions. (Article 6/I(n))

Voluntary Insurance: In principle, social insurance is compulsory. Persons who are within the personal scope of application of the social insurance schemes are legally bound to be insured under these schemes. The consent of the individual is not required to be insured under the social insurance schemes.

The voluntary insurance scheme constitutes an exception to the compulsory nature of social insurance. This type of insurance provides uninsured persons the possibility to be insured under the long-term insurance schemes and the universal healthcare insurance. According to Act No. 5510 numbered Act, the following conditions shall be met in order to join the voluntary insurance scheme:

- The insured person has to either reside in Turkey or to be a Turkish citizen who, while residing in Turkey, is sent to a country with which Turkey has not signed a social security agreement.
- The voluntarily insured person shall not be insured under the long-term social security schemes as a result of their employment. Exceptionally, those who are not employed full time may join the voluntary insurance scheme for the complementary hours.
- The voluntarily insured persons shall not be receiving disability allowances or old-age pensions from the SSI as a result of any previous employment.
- The person applying to voluntary insurance scheme shall be at least 18 years old.
- The person shall apply to the SSI with the claim of joining the voluntary insurance scheme.

In case of voluntary insurance, the insured person will be insured under article 4/I(b) of the Act No. 5510 regarding the long-term insurance schemes.

Territorial Scope of Application

The territorial scope of application of the Act No. 5510 is based on the unit of establishment as defined in article 11 of the Act No. 5510. The definition of establishment adopted in this provision is parallel to that of the Labour Act No. 4857. Accordingly, the establishment is adopted as the place where insured persons perform work with material and immaterial elements. The adherent part, adjunct facilities and vehicles are also deemed establishment.

Pursuant to article 11/II of the Act No. 5510, the employer is under the obligation to submit the declaration of establishment to the SSI latest by the day of employment of an insured person.

Types of Social Insurance Schemes

The social insurance schemes governed under the Turkish law are categorized as short-term social insurance schemes and long-term social insurance schemes.

Short-Term Social Insurance Schemes

The short-term social insurance schemes consist of insurance for occupational hazards and diseases, sickness insurance and maternity insurance.

Insurance for Occupational Hazards and Diseases

Among the short-term social insurance schemes, the insurance for occupational hazards and diseases is governed in articles 13-25 of the Act No. 5510. The provisions of this insurance shall not be applicable to insured persons subject to article 4/I(c) of the Act, namely to public servants. Workers falling under this category are subject to the provisions of the Act No. 5434 with regard to occupational hazards and diseases.

Occupational Hazard: The definition of occupational hazard is given in article 13/I of the Act No. 5510 which reads as follows: Occupational hazard is an incident which immediately or *post facto* causes physical or psychological disability of the insured person which takes place,

a. while the insured person is at the establishment,
b. as a result of the activity pursued by the employer or in case of an independent worker, as a result of the activity pursued by the independent worker,
c. during the time when the insured person who is working under an employer is not performing his/her main activity while assigned by the employer to another place other than the establishment,
d. during the nursing break granted to insured women subject to the article 4/I(a) of the Act No. 5510 pursuant to the labour law legislations
e. during the transfer of the insured person to or from the place of activity via a vehicle provided by the employer.

Pursuant to article 13/II of the Act No. 5510, an occupational hazard shall be notified to the SSI. With regard to insured persons subject to article 4/I(a) and article 5, this obligation to notify an occupational hazard lies with the employer who shall immediately inform the local police force and notify the SSI within three workdays following the hazard. Workers subject to article 4/I(b) are under the obligation to notify the SSI themselves and within three workdays following the elimination of the reason arising out of their injury that prevents them from submitting their notification, provided that it does not exceed one month.

The failure of or late notification by the employer will result in the reimbursement of the incapacity benefits to the SSI by the employer for the days that were not notified. With regard to independent workers, the payment of incapacity benefits will start following the date of notification in cases of failure of or late notification.

Occupational Disease: According to article 14/I of the Act No. 5510, an occupational disease is a temporary or permanent disease, physical or psychological disability that is caused by a repetitious reason or conditions of work in relation to the nature of the work performed by the insured person.

The occupational disease shall be notified by the employer or in case of independent workers by the insured person him/herself to the SSI within three workdays following the finding out about the disease. In case of failure to fulfil this obligation by the employer or the independent worker, all expenses made and temporary incapability benefits paid by the SSI shall be reimbursed to the SSI by the employer or the independent worker.

The entitlement to benefits within the framework of the insurance occupational hazards for and diseases is listed as monetary benefits. Entitlement to healthcare benefits due to an occupational hazard or disease is covered within the framework of the universal healthcare insurance. The monetary benefits granted to insured persons who are victims of an occupational hazard and disease are temporary incapacity benefits or permanent incapacity benefits; in case of the death of the insured person, death benefits to the right-holders, funeral payments for the deceased insured person and marriage benefits to the daughters of the deceased insured person. Subject to conditions as specified in article 32-36 of the Act No. 5510, the right-holders in terms of the death benefits are the widowed spouse, children and parents of the insured person.

Pursuant to article 21 of the Act No. 5510, the SSI may recourse the monetary benefits provided to the insured person or the right-holders to the employer and third-parties depending on their involvement and delict in the occurrence of the occupational hazard or disease.

Sickness Insurance

Sickness is a social risk that an individual may encounter which may have a dual effect on the economic situation of the individuals and their families. In this respect, an individual who gets sick temporarily loses his/her capacity to work and thus, encounters a loss of income due to inactivity. Secondly, it causes extra expenses for the individual, such as examination, drugs and treatment.

With a view to overcome the economic burden that arises out of sickness and inactivity, the sickness insurance provides the insured person a temporary incapability benefit for the period the insured person remains inactive due to sickness. Those who may benefit from this benefit are persons insured under article 4/I(a) and article 5. The healthcare benefits arising out of sickness are within the coverage of the universal healthcare insurance and are not part of the sickness insurance.

Maternity Insurance

Maternity is another social risk that creates economic burden due to the loss of income as a result of loss of labour capacity, i.e. inactivity and due to the emergence of new expenses. In this respect, women insured under article 4/I(a) and 4/I(b) are entitled to temporary incapability benefits and nursing benefit as part of maternity insurance. The healthcare benefits in cases of pre-birth, birth and post-birth are within the scope of the universal healthcare insurance.

Long-Term Social Insurance Schemes

The types of insurance that are governed within the framework of the long-term insurance schemes are the invalidity insurance, old-age insurance and death insurance.

Invalidity Insurance

Invalidity in terms of invalidity insurance is the state in which the person has permanently lost all or part of his/her capacity to work. In order to be entitled to an invalidity pension the following conditions shall be met:

- The insured persons shall have lost all or some of their labour capacity or ability to earn their living. Article 25 of the Act No. 5510 makes a distinction between persons insured under article 4/I(a) and (b) and those insured under article 4/I(c). In this respect, persons insured under article 4/I(a) and 4/I(b) shall have lost 60% of their capacity to work or 60% of their capacity to earn their living in their occupation due to an occupational hazard or disease. Persons insured under article 4/I(c) shall either have lost 60% of their capacity to work or their capacity to earn their living in their occupation that would preclude them from performing their duties.
- The insured person shall have been insured for at least 10 years.

- The insured person shall have declared 1800 days of premium for the long-term social security scheme
- The insured person shall apply to the SSI upon the ending of their employment.

The entitlement to invalidity pensions for cases after the date of effect of the Act No. 5510, the provisions of this Act shall be applicable. On the other hand, insured persons who were entitled to invalidity pensions pursuant to the abrogated Acts of 506, 1479, 2925, 2926 or 5434 remain to be subject to these acts.

Old-Age Insurance

Old-age is another social risk that an individual will encounter in the course of life. Old-age results in the partial or full loss of capacity to work and thus, loss of income. With a view to overcome the disadvantages of losing capacity to work due to old-age, old-age insurance provides security and an income guarantee to those who have served a certain amount of time in the labour market and desire to retire from work.

The legislation on social security and in this respect old-age insurance has been subject to many changes over the years. In determining the conditions of entitlement to the old-age pension, the laws that were in force at the time when the insured person was insured for the first time shall be taken as reference. For those who are insured for the first time after 30th of April 2008, the following conditions shall be met in order to be entitled to old-age pensions:

- Persons insured under article 4/I(a) shall have declared minimum 7200 days of premium.
- Persons insured under article 4/I(b) or (c) shall have declared minimum 9000 days of premium.
- The age requirement for being entitled to old-age pensions for women is 58; whereas the age requirement for men is 60. However, there is a gradual increase in the age requirement starting from 2036. By 2048, the age requirement to be entitled to old-age pensions will be 65 for both women and men.
- The insured person working under an employment contract shall end his/her employment relationship.
- The insured person shall apply to the SSI.

Article 28/III of the Act No. 5510 provides an easier option for being entitled to old-age pension. Accordingly, those who have declared minimum 5400 days of premium can be entitled to old-age pension if they meet the relevant age requirement plus three years, provided that it does not exceed the age of 65.

Indebted Services: Although the days of declaration of premiums are in relation to the days spent in employment, articles 41, 46 and provisional article 4 of the Act No. 5510 present various cases which may be indebted as service periods under the long-term social security schemes. Although the periods referred to in these articles are periods spent outside employment, they can still be taken into account in calculating the days of premium declaration, provided that the individual pays the relevant premiums corresponding to those periods. These periods are as follows:

- Periods spent in legal unpaid maternity leave and up to two years after the birth of the child during which the mother does not actively work. This possibility is limited to three births.
- Periods spent in recruitment in the army as a private or in the reserve officer schools
- Unpaid leaves of civil servants
- Periods spent in doctoral education or specialization in medicine, provided that the individual is not otherwise insured under the social security system
- Periods spent in legal internship as a precondition for becoming licensed attorneys
- Periods spent in detention or arrest, provided that the individual is acquitted from all accusations
- Periods spent in strikes and lock-outs
- Voluntary assistantship of medical doctors
- The inactive period of civil servants who resigned from their posts in order to run for elections
- The remaining hours of part-time workers to be deemed full-time workers

- The period spent as an official student abroad over the age of 18, provided that they are sent under the 1416 numbered Act and have successfully completed their education and their compulsory service upon returning
- The successful education period in the higher education institutions of those who were later appointed to specified positions either in the Turkish Armed Forces or the Turkish National Police, provided that the education was received at their own expenses
- Periods set forth in provisional article 4 of the 5510 numbered Act.

Death Insurance

The final type of insurance within the framework of the long-term insurance schemes is death insurance. The objective of death insurance is to provide income security to the dependents of the insured persons who have lost a significant source of income upon the death of the insured person. In case the conditions of being entitled to death benefits as set forth in articles 32 and 34 are met, the spouse, children and parents of the deceased insured person will be awarded benefits under this scheme.

Unemployment Insurance

Unemployment insurance is regulated under the Unemployment Insurance Act No. 4447. According to article 47/I(c) of this act, unemployment insurance is a "compulsory insurance which operates with the insurance technique and compensates for a specific period part of the loss of income of the insured person as a result of being unemployed, who have lost their jobs without their own malice and fault despite having the will, competence, health and proficiency to work." The scope of application of unemployment insurance consists of workers employed under an employment contract. Independent workers and civil servants are excluded from the scope of the unemployment insurance scheme.

In order to be entitled to unemployment benefits, the following conditions shall be met:

- Unemployment insurance premiums shall have been paid in the last 120 days before the termination of the employment contract.
- Unemployment insurance premiums shall have been paid for a minimum of 600 days in the last three years before the termination of the employment contract.
- Termination of the employment contract shall be a result of the reasons set forth in article 51 of the Act No. 4447 which are not due to the malice or fault of the insured person. These reasons are listed could be one of the following:
  - Termination of the employment contract by the employer with notice
  - Termination of the employment contract by the employee without notice
  - Termination of the employment contract by the employer without notice for reasons stipulated in article 25/I, and article 25/III of the Labour Act
  - Unemployment as a result of expiration of the term of the fixed term employment contract.
  - Termination of the employment contract as a result of the transfer or permanent shut down of the establishment or the change in the nature of the work or the establishment
    - ✓ The insured person requesting unemployment benefits should not be receiving old-age pension of the SSI.
    - ✓ The insured person shall apply to İŞKUR requesting payment of unemployment benefits.

Universal Healthcare Insurance

Provision of healthcare services by the state is among the fundamental requirements of a social state. It derives from the most fundamental human right to life and the right to lead a healthy life. In this respect, the universal healthcare insurance aims to ensure individuals with security against the social risk of illness by providing them healthcare services.

As a "universal" insurance scheme, the healthcare insurance has a broad personal scope of application which is governed in article 60 of the Act No. 5510. Apart from specific groups set forth in this article, all persons residing in Turkey are covered within the universal healthcare insurance either as insured persons or as their dependents.

your turn 3

One of the conditions of joining the voluntary insurance scheme is not being insured under the long-term social insurance schemes due to one's work. An exception to this rule is established for part-time workers. What is the objective behind this exception?

Summary

LO 1 Understand the fundamental concepts of the Turkish Labour Law

The subject of labour law is the legal relationship between employees and employers. Employment relationships diverge from other private law relations in terms of the dominance of state interference with the former. The objective of labour law is to ensure social justice by protecting workers who are in a disadvantaged position against the employer in terms of bargaining power in the conclusion of the employment contract. For this reason, the rules and principles governing labour relations bear unique characteristics which award it the position of a separate branch of law with traces of both public law and private law.

LO 2 Obtain notion about the rights and obligations arising out of an employment relationship

In an employment contract, one party (employee) undertakes to subordinately perform work; whereas the other party (employer) pays remuneration as a consideration for the performance of work. Although parties to an employment contract are provided with a level of freedom of contract, the rights and obligations arising out this of relationship are strictly governed in the labour law legislations. Due to the personal nature and the income generating aspect of an employment relationship for the employee, significant limitations on the freedom of contract at all stages of an employment relationship, in particular concerning employers, are imposed.

LO 3 Gain insight into the Turkish social security system

The main principle on which social security law is based upon is the principle of social state. Being among the most fundamental economic and social rights, the right to social security is a fundamental human right that is ensured and protected in many international instruments on human rights. The objective of social security is to provide a level of guarantee to individuals who encounter social risks of unemployment, death, old-age, disability, sickness, birth, marriage, etc. by minimizing the negative consequences of such risks to the most possible extent.

Test Yourself

1 Which of the following is **false** about labour law?

A. It is based on contractual relationships.
B. It regulates relationships between two equal parties.
C. Public servants are not within the personal scope of application of labour law.
D. The state's interference is a dominant aspect of labour law.
E. Trade unions are the subject matter of collective labour law.

2 Which of the following is placed at the lowest level in the hierarchy of norms:

A. Statutes
B. Establishment practices
C. Employer's right of direction
D. Collective labour agreements
E. Internal regulations

3 Which of the following is correct about the principal employer – subcontractor relationship?

A. Turnkey projects are common practices of a principal employer – subcontractor relationship
B. The legal relationship of a principal employer and a subcontractor is based on an employment contract.
C. The relationship between the principal employer and the subcontractor's employees is based on an employment contract.
D. Auxiliary tasks can be fully delegated to a subcontractor.
E. A subcontractor may undertake work only from one principal employer.

4 In which of the following cases an employment contract for definite duration cannot be concluded under the Turkish Labour Act?

A. Agreement of the parties to make an employment contract for three years
B. To substitute an employee who has taken her maternity leave
C. For a project of architecture that lasts four years
D. To substitute an employee who, due to an occupational hazard, cannot work for a period of time
E. To develop a software program for the IT department of a company

5 Which of the following is **false** about non-competition agreements?

A. It should be concluded in writing.
B. It can be in the form of a non-agreement clause in the employment contract.
C. Their objective is to ensure non-competition by the employee after the employment relationship has ended.
D. It can be concluded for indefinite duration.
E. Minors cannot be parties of non-competition agreements.

6 Which of the following can **not** be protected under the provisions of job security?

A. An athlete
B. A construction worker
C. A journalist
D. An attorney-at-law
E. A waiter

7 Which of the following can be a valid reason for termination?

A. Participating in a union activity on the weekly rest day
B. Filing a suit against the employer for the unpaid wages
C. Refusing to perform work of illegal nature despite the employer's persistence
D. Witnessing against the employer in the court of law
E. Repeatedly coming to work late

8 In which of the following cases, an employee will **not** be entitled to severance allowance unless otherwise agreed by the parties?

A. Termination by the employee with a just cause
B. Termination by the employer with a valid reason
C. Termination with notice by the employee
D. Termination by the employee for the purpose of receiving old-age pensions
E. Termination by the employer due to *force majeure*

9 Which of the following risks is **not** a subject of social insurance schemes?

A. Unemployment
B. Illness
C. Disability
D. Giving birth
E. Being a victim of thievery

10 In which of the following cases one can **not** talk about an occupational hazard?

A. Accident in the subway while on the way to work
B. Accident during nursing breaks
C. Accident in the establishment's cafeteria during lunch break
D. Accident in the hotel where the employee stays during her business trip
E. Accident in the establishment while doing the work of a co-worker, rather than one's own duties

Suggested answers for "Your turn" Answer Key for "Test Yourself"

1. B	If your answer is wrong, please review the "General Introduction to Labour Law" section.	6. A	If your answer is wrong, please review the "Individual Labour Law" section.
2. C	If your answer is wrong, please review the "General Introduction to Labour Law" section.	7. E	If your answer is wrong, please review the "Individual Labour Law" section.
3. D	If your answer is wrong, please review the "General Introduction to Labour Law" section.	8. C	If your answer is wrong, please review the "Individual Labour Law" section.
4. A	If your answer is wrong, please review the "Individual Labour Law" section.	9. E	If your answer is wrong, please review the "Social Security Law" section.
5. D	If your answer is wrong, please review the "Individual Labour Law" section.	10. A	If your answer is wrong, please review the "Social Security Law" section.

your turn 1

What is the difference between an establishment and an enterprise?

An establishment differs from an enterprise in the sense that the former is a narrower concept and pursues a technical objective of production; whereas the latter is a broader concept and may involve a number of establishments. Furthermore, an enterprise pursues an economic interest where the objective is to gain profit.

your turn 2

What are the criteria established in the judgments of the Court of Cassation in determining subordination as an element of an employment contract?

The judgments of the Court of Cassation concerning subordination have gone through significant changes over the years. For many years, the main criterion for the Court of Cassation in determining subordination was performance of work in the employer's establishment. According to this outdated position of the Court of Cassation, in order to talk about an employment relationship, the employee had to work in the establishment of the employer. Otherwise, the condition of subordination would not be satisfied since the employee will not be a direct addressee of the employer's orders and instructions. However, due to the dynamic nature of labour law and the emergence of non-typical employment relationships such as distance work, this position no longer bears validity. This fact is also recognized in the recent judgments of the Court of Cassation which today assesses the employee's position vis-à-vis the employer. In this respect, the Court investigates various facts in determining whether or not there is an employment contract in question such as: whether there is a regular payment, who provides the tools and materials for the work, to what extent is the performer bound by the orders and instructions of the employer, does the performer of work has the right to refuse work, etc.

One of the conditions of joining the voluntary insurance scheme is not being insured under the long-term social insurance schemes due to one's work. An exception to this rule is established for part-time workers. What is the objective behind this exception?

your turn 3

In principle, in order to join the voluntary insurance scheme, the applicant shall not be insured under the long-term insurance schemes due to his/her employment. However, insured persons who work in part-time employment constitute an exception to this group. The reason why the legislator chose to provide an exception to these groups is to provide them with the opportunity to make up for their disadvantaged position in terms of the days of declaration of premiums. Since the premiums of part-time workers are not declared full time, it becomes impossible for part-time workers to satisfy the premium condition in order to be entitled to old-age pension. With the voluntary insurance scheme, these workers have the means to pay the premiums for the complementary hours and thatfore, satisfy the premium condition to be entitled to old-age pension.

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Chapter 8 Mediation and International Commercial Arbitration

After completing this chapter, you will be able to;

Learning Outcomes

1. Learn the basic concepts about mediation, and advantages of solving civil law disputes through mediation
2. Learn basic concepts about international commercial arbitration, and its advantages, forms, and legal sources
3. Learn the effects of an arbitration agreement and how to draft an efficient arbitration agreement
4. Learn the scope of application of the Turkish International Arbitration Law, and basic information about the arbitration agreement, arbitration procedure and setting aside of the arbitral awards under the Turkish International Arbitration Law

Chapter Outline

Introduction
Mediation
International Commercial Arbitration
Turkish International Arbitration Law

Key Terms

Mediation
International Commercial Arbitration
Arbitration Agreement
Turkish International Arbitration Law
Arbitral Award

INTRODUCTION

The delays in the resolution of disputes before courts in Turkey, due to the enormous workload of the courts, are not only recognized by the lawyers; but also is known and experienced by many of the Turkish citizens. You do not have to be a judge or a practicing lawyer to guess that once you apply to a court for the resolution of a legal dispute, it will take at least 2-3 years for the dispute to be finally settled. The belated justice provided by the Turkish courts has been criticized by the Council of Europe and the European Union since many years. Improving the use of alternative dispute resolution mehods can be a sound solution to this problem.

The long length of cases before courts had been subject to a European Court of Human Rights ("ECHR") decision, where the ECHR recommended the use of mediation in family law disputes. In the *Cengiz Kilic v. Turkey* case, it took the Turkish family court more than 8 years to decide on the staying and visiting contact right of the applicant, father, with his son after he divorced his wife. ECHR, found a violation of the right to respect for private and family life, and condemned Turkey to a compensation of 17.000 Euros.

Mediation and other alternative dispute resolution methods are also mentioned in the European Union Progress Reports. In 2015, it is stated in the Report that *"Mediation and other various alternative dispute resolution mechanisms are in place but are only marginally used."* The same criticism takes place in the 2016 Report, where the Istanbul Arbitration Centre is referred to, and the fact that it became operational and published its arbitration and mediation rules and tariffs is praised.

Therefore, the development of alternative dispute resolution methods and more frequent use of them are very important, not only for lawyers, but for all citizens in their search for justice. It is particularly important for actors of trade and business, as time means money for them. This is why, the alternative dispute resolution methods, mediation and international commercial arbitration, are introduced in this chapter.

MEDIATION

The Law on Mediation of Civil Law Disputes ("Mediation Law") was published in the Official Gazette dated June 22, 2012 and entered into force on June 22, 2013. The Regulation on the Law on Mediation of Civil Law Disputes was published in the Official Gazette dated January 26, 2013 and entered into force on June 22, 2013.

The Mediation Law is expected to reduce the workload of the judiciary and allow rapid, low-cost and effective resolution of civil law disputes as well as possible contribution to social peace.

What is Mediation and When can the Parties Refer to Mediation?

According to Article 2/1/b of the Mediation Law, mediation is a dispute resolution method conducted voluntarily with the participation of an impartial and independent third person who has gone through a special training and who, by applying systematic techniques, is bringing the parties together to discuss and negotiate; ensuring mutual understanding between the parties and the development of a communication process in order for them to produce their own solutions, and who may suggest a resolution in case it becomes apparent that the parties may not find a mutual solution.

Mediation in Civil Law Disputes

In many jurisdictions, mediation is a voluntary process. This is in line with the principle of freedom of will which is a fundamental principle in civil and commercial law. According to Article 3/1 of the Mediation Law, the parties are free to refer to, continue, terminate or withdraw from mediation proceedings. Therefore, the parties may not refer to or be forced to refer to mediation unless both of the parties wish so. The parties may mutually decide upon referring to mediation after a dispute has arisen between them, even while the court proceedings are pending; or they may enact a mediation agreement for a potential dispute that might arise, in the future, in connection with an existing legal relation between them. In practice, usually a prior mediation agreement exists as a part of a main contract between the parties, in order to enable those parties to resort to mediation in case of a dispute that might arise out of that contract. However, despite a prior written mediation agreement, the parties may always refer to courts. There is no legal consequence of referring to the court before trying mediation despite the existence of a mediation agreement. In other words, a prior

mediation agreement is not binding upon the parties; there is no legal way to force an unwilling party to refer to or continue mediation.

It is not possible for the parties to refer to mediation for all kinds of disputes. According to Article 1/2 of the Mediation Law, only private law disputes arising out of matters that the parties may freely dispose of, including those that carry a foreign element, can be subject to mediation. Therefore, the disputes arising out of subject matters related with public policy can not be referred to mediation. For example, spouses may not refer to mediation for divorce; or disputes concerning affiliation of a child to one of his/her parents may not be subject to mediation.

Mediation in Labor Law Disputes

The new Labor Courts Law, which was published in the Official Gazette on October 12, 2017, makes mediation in labor disputes mandatory as of January 1, 2018. According to Article 3 of this new Law, the disputes concerning receivables or indemnity arising out of law, individual or collective labor agreement, and re-employment cases shall be first brought before a mediator. Only cases relating to accidents at work place or occupational illnesses are an exception. Referring to mediation is a pre-condition to file a lawsuit before the labor courts. Therefore, the judge will deny the case on procedural grounds if he/she sees that the dispute was not previously brought before a mediator.

The party of a labor law dispute shall refer to the mediation office located at the domicile of the other party, or where the work had been performed. The relevant mediation office appoints the mediator from the list created by the General Directorate of Mediation. It is also possible for the parties to mutually agree upon the appointment of another mediator, who is included in the list.

The mediator shall finalize the submission to mediation within three weeks following his/her appointment. He/she may extend this period only for an additional one week if necessary. In the event that the mediator cannot reach the parties, or the parties do not attend the negotiations; or a settlement is reached, or it is understood that a settlement will not be reached as a result of negotiations, the mediator terminates mediation, and immediately informs the relevant mediation office.

If the mediation is terminated because one of the parties did not attend the first meeting, the non-attending party will be responsible of whole of the court costs even though he/she is found fully right at the end of the court proceedings; and he will not be entitled to the reimbursement of the fees he/she paid to the attorneys.

important

A party to a labor dispute may not just ignore the mediation negotiations even though he/she is not willing to find a solution through mediation, because his/her non-attendance to the negotiations will be penalized at the end of the court proceedings.

The costs of mediation will be equally shared by the parties if they reach a settlement. If not, such costs will be borne by the Ministry of Justice and will be paid by the losing party at the end of the relevant court proceedings.

Other aspects of mediation, which have not been specially regulated in the Labor Courts Law, will be governed by the Mediation Law. Therefore, the explanations concerning mediation in civil law disputes are also valid for labor law disputes.

Picture 8.1

Source: https://sgkrehberi.com/images/news/640x320/134369.jpg.

Who can be a Mediator?

According to Article 20 of the Mediation Law, only Turkish citizens, who are graduates of law faculties, and who possess at least five year experience in his/her profession, may be a mediator. The mediator shall also have full capacity, not be condemned due to an intentional crime, and finish the mediation training and pass the written exam

to be conducted by the Ministry of Justice. In order to be a mediator, one has to be registered as a mediator in the relevant central registry.

The mediator or the mediators are appointed by the mutual agreement of the parties (Article 14).

Mediation Procedure

The impartiality of the mediator is very important for the parties to trust that the dispute will be resolved in a fair and just way as a result of mediation. According to Article 9 of the Mediation Law, the mediator shall act diligently, impartially and in person. The mediator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality. The mediator may not later act as the lawyer of one of the parties in a subsequent lawsuit related with the dispute.

The fair treatment of the parties is guaranteed by Article 3/2 and Article 9/3 of the Mediation Law. According to the former provision, the parties have equal rights throughout the mediation procedure. According to Article 9/3, the mediator shall seek to maintain fair treatment of the parties.

According to Article 15 of the Mediation Law, after his/her appointment, the mediator must invite the parties to the first meeting as soon as possible. With regards to the procedure, the parties are entitled to agree upon the procedure to be adhered to, provided that such agreement does not contravene the mandatory provisions of law. In the absence of an agreement between the parties, the mediator is to determine the procedure for the mediation having regard to the nature of the dispute, the wishes of the parties and the need for the expedient resolution of the dispute. The parties may attend the mediation negotiations by themselves or accompanied by their lawyers. Experts, who can contribute to the resolution of the dispute, may also attend negotiations. If it becomes apparent that the parties will not be able to agree upon a mutual solution, the mediator may suggest a resolution to the dispute.

The mediator may suggest a resolution to the dispute, only if it becomes apparent that the parties will not be able to agree upon a mutual solution.

The mediator and the parties shall keep all information confidential (Article 4). The documents shared and information disclosed by the parties during the mediation proceeding cannot be used before courts or arbitral tribunals (Article 5). Article 33(1) provides that in the event the confidentiality obligation is breached and a party's legal interest thereby sustains a loss, the responsible party shall be punished by imprisonment for up to six months.

Unless otherwise agreed upon by the parties, the fee of the mediator is determined pursuant to the Table of Minimum Fees for Mediators in force at the time the mediation is terminated, and the fees of the mediator and other costs of mediation are equally shared by the parties (Article 7).

Enforcement of the Settlement Agreement Reached at the End of Mediation

According to Article 18 of the Mediation Law, if the parties conclude a settlement agreement as a result of the mediation proceedings, they will need the approval of the court in order to enforce it. The settlement agreement approved by the court will be deemed as a court judgment and may be enforced accordingly. The approval will be given by ex parte proceedings. The court will examine whether the relevant dispute may be subject to mediation, and whether the settlement agreement is enforceable or not. No further examination or interference by the court is possible. On the other hand, if it is not only the parties, but also their lawyers and the mediator who sign the settlement agreement, such agreement will be deemed as a court judgment and may be enforced as a court judgment without any approval from a court.

If the settlement agreement is signed only by the parties, that agreement needs an approval from the court in order to be enforced as a court judgment. A settlement agreement bearing the signatures of the parties, their lawyers and the mediator, may be enforced as a court judgment without any approval from a court.

The settlement agreement is binding for the parties. They may not initiate a lawsuit before the courts concerning the matters agreed upon by the settlement agreement (Article 18/5).

your turn [1]

What are the basic features of mediation in Turkish law?

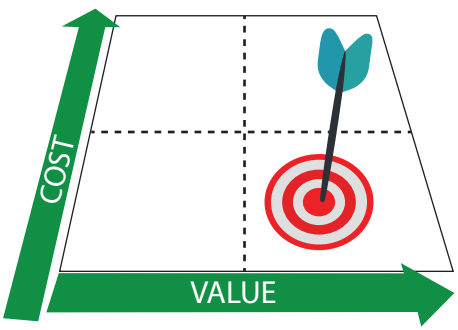
INTERNATIONAL COMMERCIAL ARBITRATION

In an international commercial relationship, usually the parties are from different countries and different legal cultures, speaking different native languages. Contracting parties from one country are generally unwilling to submit to the national courts of the other party. There is often a distrust of foreign courts, and moreover a hesitation for their suitability for certain types of international contractual relationships. Therefore, arbitration, as an alternative dispute resolution method, flourished and bloomed for the resolution of international commercial disputes.

Arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship, by independent arbitrators, in accordance with rules chosen by the parties.

Advantages of Arbitration

- Neutrality: Parties to an international contract usually come from different countries and so the national court of one party will be a foreign court for the other party. The court will have its own formalities, and its own rules and procedures developed to deal with domestic matters, not for international disputes. The court will also have its own language. On the other hand, a reference to arbitration means that the dispute will be determined in a neutral place of arbitration, rather than on the home ground of one party or the other. Each party will be given an opportunity to participate in the selection of the arbitrators who will be independent and impartial.
- Expert arbitrators: Particularly for disputes that are relevant with special sectors, parties are able to select arbitrators with expert knowledge on that sector.
- Flexibility: Provided that the parties are treated fairly, an arbitral proceeding may be tailored to meet the specific requirements of the dispute, rather than conducted in accordance with fixed national procedural law rules usually unfamiliar to one or both of the parties.
- Confidentiality: The privacy of arbitral proceedings and the confidentiality that surrounds the process are a powerful attraction to companies and institutions that may become involved in legal proceedings. There may be trade secrets or competitive practices to protect, or there may be a reluctance to have details of a commercial dispute being the subject of adverse publicity.
- Expedition: Arbitration is quicker than national courts, especially those with a heavy burden of workload.
- Enforcement: At the end of the arbitration, the arbitral tribunal will issue its decision in the form of an award. The outcome of the arbitral process will be a binding decision and not just a recommendation that the parties are free to accept or reject as they please. In its international enforceability, an award also differs from the court judgment, since the international treaties that govern the enforcement of an arbitral award have much greater international acceptance than do treaties for the reciprocal enforcement of judgments.



Picture 8.2

Source: https://image-store.slidesharecdn.com/06eb239f-4b66-4d86-a547-d7231262ded9-original.jpeg.

Forms of Arbitration

There are two basic forms of arbitration: *ad hoc* and institutional. The parties must choose which form they prefer while selecting arbitration.

Institutional arbitration: There are a large number of arbitration institutions. These institutions aim to provide arbitration services in order to assist with the conduct of the arbitration. These institutions have their own arbitration rules. Institutional arbitration is where parties prefer to enjoy the arbitration services provided by an institution, and choose to submit their disputes to an arbitration procedure under the rules of that institution.

An advantage of institutional arbitration is the image behind the name of the institution. Especially in some countries where the courts or the laws are not arbitration-friendly, parties consider it beneficial when seeking to enforce an award that carries the name of an internationally respected institution. Another advantage of institutional arbitration is that, there is often an authority to apply for assistance. For example, if the parties cannot agree upon the name of the arbitrator, the institution helps with the resolution of this problem; hence, the parties do not have to resort to national courts whose decision will take longer to obtain.

There are many international arbitration institutions. Some of the oldest and most professional ones may be listed as follows: International Chamber of Commerce International Court of Arbitration, London Court of International Arbitration, American Arbitration Association, Arbitration Institute of the Stockholm Chamber of Commerce. There are also arbitration institutions located in Turkey that provide international arbitration services. To illustrate: Union of Chambers and Commodity Exchanges of Turkey Arbitration Council, Istanbul Chamber of Commerce Arbitration Center, Istanbul Arbitration Centre.

Ad hoc arbitration: When parties are silent and have not selected an institutional arbitration, the arbitration will be *ad hoc*. While agreeing on *ad hoc* arbitration, the parties may agree on the arrangements for initiating the procedure, selecting the arbitrators, determining the procedural rules etc.

Ad hoc arbitration is generally favored where the parties are unable to agree on the arbitration institution. When parties have opposing views as to which institution to choose, *ad hoc* arbitration is often the compromise. Another advantage of *ad hoc* arbitration is that it can be less expensive than institutional arbitration because fees of some institutions are very high.

Legal Sources of Arbitration

When studying arbitration law, one will encounter with many different sets of rules or legal materials. The distinction among these, and when and in which order they are applied shall be clear.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"): The major facilitator for the development of an international arbitration regime was the adoption of the New York Convention in 1958. The Convention seeks to provide common legislative standards for the recognition of arbitration agreements, and recognition and enforcement of foreign arbitral awards under the laws of contracting countries. It is possible to say that the New York Convention sets the standard requirements for a successful international arbitration process. The success of the Convention is illustrated by the fact that over 150 countries are party to the Convention. Therefore, rules of the New York Convention have a direct influence on the development of international arbitration practice and law, and provide guidance for parties, arbitrators, and national courts, regardless of their nationality. Furthermore, it is now generally accepted that the courts of most countries, which are party to the New York Convention, will enforce agreements to arbitrate and arbitration awards.

For the text and status table of the New York Convention, see: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

Party autonomy (arbitration agreement): Party autonomy is the primary source of the arbitration and the procedure. The arbitration will be governed by what the parties have agreed in the arbitration agreement. The arbitration agreement is only

limited by mandatory rules of the applicable national arbitration law.

Institutional Arbitration Rules: As explained above, there are many arbitration institutions providing arbitration services, each with its own arbitration rules and procedures.

UNCITRAL Arbitration Rules: UNCITRAL is the abbreviation for United Nations Commission on International Trade Law. In the early 1970s there was an increasing need for a neutral set of arbitration rules suitable for use in *ad hoc* arbitrations. The UNCITRAL Rules for *ad hoc* arbitration were prepared with the intention to be acceptable in developed and developing countries, and in common law and civil law jurisdictions. The UNCITRAL Rules have achieved international recognition and are widely used. The UNCITRAL Rules deal with every aspect of arbitration from the formation of the arbitral tribunal to rendering an arbitral award.

The UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") and National Arbitration Laws: As a result of the development of established arbitration practice in the 1970s, it became clear that some uniformity was needed to reflect the commonly accepted standards for international arbitration. The benchmark event in this respect was the introduction of the UNCITRAL Model Law in 1985 to form a model and a source of inspiration for different countries in their adaptation of their national arbitration laws to the commonly accepted standards. The Model Law is not a binding legal material as it is, but there are many countries, which have transplanted the Model Law as their national arbitration laws; and there are many countries that have been influenced by its provisions. Therefore, most of the developed and developing countries, today, have special national laws applicable to international arbitration, such as the Turkish International Arbitration Law which will be dealt with in detail below.

The relationship between these legal sources may best be illustrated with an example. Let's imagine that at the outset of the arbitration proceedings, the question arose with regard to the number of arbitrators and the method of their appointment. The answer to this question must first be sought at the arbitration agreement because party autonomy is the primary source of arbitration. If the parties did not make any relevant indication in the arbitration agreement either by insertion of a special provision on this matter, or by reference to a set of arbitration rules such as the UNCITRAL Arbitration Rules, then the answer will vary if this is an institutional or *ad hoc* arbitration. If this is an institutional arbitration, the answer will be very probably found in the rules of the chosen arbitration institution. If an *ad hoc* arbitration is concerned, then the national arbitration law applicable to the arbitration procedure will apply. The parties may choose the national law applicable to the arbitration procedure; and failing that, it will be the national law of the place of arbitration. If this hierarchy is not respected, this will mean that the number of arbitrators is determined and the appointment of arbitrators is made in a manner contrary to the will of the parties. The legal consequence of such contradiction will be that the award rendered by these arbitrators is not recognizable and/or enforceable in a country party to the New York Convention.

Arbitration Agreement

In order for a dispute to be resolved through arbitration instead of national courts, the parties shall enact a valid arbitration agreement. The arbitrators derive their power from an arbitration agreement. Therefore, drafting an efficient arbitration agreement has a key importance for an arbitral proceeding.

The arbitration agreement is an agreement whereby two or more parties agree that a dispute which has arisen or may arise between them in connection with a particular legal relationship will finally be settled by one or more arbitrators.

The arbitration agreement has three effects: First, the arbitration agreement establishes an obligation to arbitrate between the parties. Second, an arbitration agreement vests the arbitrators with the necessary power to resolve those disputes that the parties agreed to entrust to the arbitral tribunal. Third, a valid arbitration agreement excludes the jurisdiction of national courts.

The parties to a dispute may enter into a separate arbitration agreement for the resolution of that dispute. However, in practice, the arbitration agreement is usually in the form of an arbitration

clause as part of a main contract regulating the main legal relationship between the parties. The arbitration clause provides that future disputes that might arise out of or in connection with the main contract shall be resolved through arbitration. However, the validity of the main contract and the validity of the arbitration clause are distinct from each other. In other words, the invalidity of the main contract does not automatically mean that the arbitration clause is also invalid. This is called the principle of separability. The principle of separability can be considered a transnational rule of international commercial arbitration; and it is found in most national arbitration laws and in many institutional rules. It is provided in Art. 16/1 of the UNCITRAL Model Law as follows: *"an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

A valid arbitration agreement is subject to the following four requirements:

- The arbitration agreement must meet the requirements as to its form provided by the relevant law.

The national arbitration laws generally require a written agreement for the formal validity of the arbitration agreement. However, usually, the meaning of "written agreement" does not only encompass a document duly undersigned by the parties; it refers to a broader concept as to include, for example, an exchange of emails. For example, Art. 7/2-6 of the UNCITRAL Model Law reads as follows: *"(2) The arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference; [...]. (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other. (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."*

- The arbitration agreement must clearly indicate the parties' consent to submit to arbitration certain disputes which have arisen or which may arise between them in respect of a defined legal relationship.

The use of words such as "arbitrator", "arbitral tribunal", "arbitration" or similar terms usually indicates that the parties want their dispute to be resolved by arbitration. It is not necessary to explicitly exclude the jurisdiction of the national courts or to draft a detailed arbitration agreement. Clauses such as "Dispute: Arbitration in Zurich" or "Arbitration: in Paris" in a contract usually fulfills the minimum requirements of consent to arbitration. However, when entering into an arbitration agreement, the parties should try to express their consent in a clear manner so as to leave as little room as possible for ambiguity or alternative interpretations, and to ensure the validity of the arbitration agreement. Nevertheless, arbitration agreements regularly suffer from defects which may put the validity of the arbitration agreement at risk or which may cause lengthy discussions over validity at the outset of the arbitral proceedings. For example, the reference to an arbitration institution may be incorrect or inaccurate. The parties wishing for an institutional arbitration may refer to a non-existing institution by mistake; or their reference may be interpreted to mean more than one institution. Best method will be to use the model arbitration clauses suggested by the desired arbitration institution. Another example to a defect is when the arbitration agreement appears to allow submission of disputes to arbitration as an option to national courts. Validity of clauses such as "The parties may refer their disputes to arbitration or local courts located in Stockholm" will be questionable.

To see the International Chamber of Commerce model arbitration clause, https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/

It is also of utmost importance that the disputes which may arise in respect of a legal relationship are clearly definedbecause arbitrators can only hear disputes over issues which the parties have agreed to put before them. According to Art. 7/1 of the UNCITRAL Model Law, an arbitration agreement *"is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship."*

- It is required that the subject matter of the dispute can be validly submitted to arbitration.

It is not possible to submit all kinds of disputes to arbitration. Each country decides which matters may or may not be submitted to arbitration in accordance with its own political, social and economic policy. Usually, the matters which the parties may freely dispose of are considered to be arbitrable. This is the solution, for example, in Belgium, Italy, the Netherlands, Sweden and Turkey. As a result, for example, consumer contracts, labor contracts, family law and succession matters are not arbitrable.

- The parties to an arbitration agreement must have capacity to enter into an arbitration agreement on their own behalf; and/or the parties must be capable of entering into an arbitration agreement in the name and on behalf of another person or entity.

As for the capacity to conclude an arbitration agreement, most national arbitration laws do not contain specific provisions setting out the requirements of capacity. Capacity in arbitration is often treated in the same way as the capacity to conclude contracts in general. Consequently, as a rule, a person who can validly enter into a contract is deemed capable of validly concluding an arbitration agreement.

With regard to the requirements to validly represent a third party for the conclusion of an arbitration agreement, national laws demonstrate a great variety of different rules, as well. Therefore, one must be very careful to ensure that the representative undertaking an arbitration agreement has capacity to do so according to applicable laws. For example, according to Article 504 of the Turkish Code of Obligations, a representative must be specifically authorized to enter into arbitration agreements on behalf of his/her principal; a general power of representation will not suffice.

Place of Arbitration (Seat of Arbitration)

Although it is not essential for the validity of an arbitration agreement, it is advisable to the parties drafting an arbitration agreement to determine the place of arbitration as well. The choice of the place of arbitration has significant legal consequences.

- It influences which law governs the arbitration procedure. Unless otherwise agreed upon by the parties, the legal provisions on arbitration of the place of arbitration are applied.
- It determines which courts can exercise supervisory and supportive powers in relation to the arbitration.
- It determines the competence and the procedure before the national courts to rule upon applications to set aside any arbitral award.

For these reasons, parties should ensure that the national arbitration law and its application by the courts of the place of arbitration are supportive to the arbitration process. If the parties cannot or do not agree on the place of the arbitration, the decision will be taken by the institution, if any, or the tribunal. The hearings or the deliberation meetings of the arbitral tribunal may be held at a place other than the place of arbitration. Therefore, the parties must primarily consider the legal consequences of their choice, and not only practical issues such as transportation and/or accommodation expenses etc.

your turn 2

What are the basic features of arbitration?

TURKISH INTERNATIONAL ARBITRATION LAW

The Turkish International Arbitration Law was published in the Official Gazette on June 21, 2001 and entered into force on July 5, 2001. It is mostly inspired by the UNCITRAL Model Law and the relevant articles of the Swiss Private International Law.

Scope of Application

The International Arbitration Law shall be applicable where a dispute has a foreign element and the place of arbitration is determined to be in Turkey; or where the Law is chosen as the governing law of arbitration by the parties or the arbitrator or arbitral tribunal (Article 1/II).

It must be noted that, even if the place of arbitration is not in Turkey, the parties or the arbitrators can choose the Turkish International Arbitration Law as the law governing the arbitration procedure, provided that a foreign element within the meaning of the Law is involved. On the other hand, in the event that the place of arbitration is in Turkey and the dispute has a foreign element, it must not be concluded that the application of the Turkish International Arbitration Law is mandatory. As explained above, party autonomy is the primary source of international arbitration; thus, the parties are free to choose another law as applicable law to procedure. Only if the parties have not chosen another law expressly or tacitly, Turkish International Arbitration Law applies as the Law of the place of arbitration. In addition, even if the parties have chosen another law, the gaps in this chosen law should be filled by the application of the Turkish International Arbitration Law.

The foreign element is defined in Article 2 in a very broad manner. Accordingly, the existence of any of the following circumstances demonstrates that the dispute has a foreign element and, under such circumstances, arbitration is considered as international:

1. where the parties to the arbitration agreement have their domiciles or habitual residences or places of business in different States;
2. where one of the following is situated outside the State in which the parties have their domiciles or habitual residences or places of business;

   a. the place of arbitration, which is determined in, or pursuant to, the arbitration agreement; or

   b. a place where a substantial part of the obligations arising from the underlying contract is performed or a place where the dispute has the closest connection;
3. where a shareholder of the company which is a party to the underlying contract that constitutes the basis for the arbitration agreement has brought foreign capital into Turkey in accordance with the laws concerning the encouragement of foreign capital or where a loan and/or guarantee agreement needs to be signed for the execution of the underlying contract;
4. where, in accordance with the underlying contract or with the underlying legal relationship, the movement of capital or of goods shall be made from one country to another.

Article 1/IV excludes certain disputes from the scope of application of the Turkish International Arbitration Law. These are disputes related to real rights concerning immovables located in Turkey, and disputes that are not within the parties' disposal. This provision determines which issues are arbitrable under the Turkish law.

Arbitration Agreement

Article 4/I of the Turkish International Arbitration Law defines an arbitration agreement as follows: *"Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

The Turkish International Arbitration Law accepts the principle of separability. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement (Article 4/I). An arbitration agreement, which forms part of a contract, shall be treated as an agreement independent of the other terms of

the contract. A decision by the arbitral tribunal that the contract is null and void shall not automatically entail the invalidity of the arbitration clause (Article 7H/I).

Picture 8.3

Source: http://lindleylawoffice.com/blog/wp-content/uploads/2015/11/arbitration-clause-John-C-Lindley-III.jpg

A valid arbitration agreement obliges the parties to resort to arbitration for the resolution of the dispute subject to the relevant arbitration agreement instead of national courts. If one of the parties infringes his/her obligation to arbitrate and brings an action before the court a matter, which is the subject of an arbitration agreement, the other party may make an objection as to the arbitration pursuant to Article 5. The acceptance or denial by the court of that objection and disputes concerning the validity of the arbitration agreement are subject to the provisions of the Code of Civil Procedure concerning initial objections. This means that the respondent must claim the existence of an arbitration agreement latest with his/her statement of defense before making any submission concerning the merits of the dispute. If such objection is accepted, then the court shall dismiss the action on procedural grounds. Article 5 is applicable even if the place of arbitration is a place outside of Turkey (Article 1/III). This means that, even if a certain arbitration agreement is outside the scope of application of the Turkish International Arbitration Law, a Turkish court should respect a valid arbitration agreement between the parties, and not deal with the merits of the dispute.

Another provision of the Turkish International Arbitration Law, which is applicable even if the place of arbitration is a place outside of Turkey, is Article 6 concerning interim measures of protection and interim attachments. Even if there is a valid arbitration agreement between the parties, they may request from a court an interim measure of protection or an interim attachment. This will not be a breach of the obligation to arbitrate because the arbitrators have a limited competence to order an interim measure of protection. Unless otherwise agreed upon by the parties, the arbitrators may order interim measures in favor of one of the parties, and may also order that party to provide appropriate security if necessary; but such measures cannot be enforced through execution offices or executed through other official authorities, or be binding upon third parties. If a party does not comply with the interim measure or attachment ordered by the arbitrators, the other party may request the assistance of the competent national court for taking an interim measure of protection or an interim attachment.

important

Article 5 of the Turkish International Arbitration Law provides a guarantee for a party of an arbitration agreement against the other party who ignores the arbitration agreement and initiates a lawsuit before a Turkish court. This article is applicable even though the place of arbitration is outside of Turkey.

Arbitrators

The parties are free to determine the number of arbitrators. However, the number shall be odd. If the number of arbitrators is not determined by the parties, three arbitrators shall be appointed (Article 7A).

The parties are also free to determine how the arbitrators will be appointed. Article 7B will be applicable if the parties did not make any agreement on the method of appointment of the arbitrators. Accordingly, in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the civil court of first instance. In an arbitration with three arbitrators,

each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the civil court of first instance. The third arbitrator appointed shall be the chairman of the arbitral tribunal. In an arbitration with more than three arbitrators, the arbitrators who will appoint the last arbitrator shall be appointed by the parties in equal numbers in accordance with the procedure set forth above.

Where under an appointment procedure agreed upon by the parties, a party fails to act as required under such procedure; the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or a third party, including an institution, that is empowered to appoint arbitrators, fails to perform any function entrusted to it under such procedure, the appointment of the arbitral tribunal shall be made, upon a party's request, by the civil court of first instance. The civil court of first instance's decision given, if necessary, upon hearing the parties, shall be final. The court, in appointing an arbitrator, shall give due regard to: (i) any qualifications of the arbitrator that is contained in the agreement of the parties, (ii) securing the appointment of an independent and impartial arbitrator, and (iii) the principles as to: (a) in the case of appointment of the sole arbitrator [or the third arbitrator], the advisability of appointing an arbitrator of a nationality other than those of the parties, and (b) in case of appointment of a panel of three arbitrators, the advisability of making sure that two of the arbitrators do not have the same nationality as any of the parties. In case of appointment of more than three arbitrators, the above principles shall also be applicable (Article 7B/II).

The impartiality and independence of the arbitrators have an utmost importance for a fair and efficient arbitral proceeding. Therefore, an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence at the outset and throughout the arbitral proceedings. If an arbitrator does not possess the qualifications that were agreed to by the parties, or if the circumstances give rise to justifiable doubts as to his/her impartiality or independence, he/she may be challenged (Article 7C). The parties are free to agree on a procedure for challenging an arbitrator; and in the absence of such an agreement, the procedure provided in Article 7D shall be applicable.

According to Article 7D, a party who intends to challenge an arbitrator shall, within thirty days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance that may give rise to a challenge, send a written statement of the reasons for the challenge to the arbitral tribunal. A party who challenged one or more arbitrators before the arbitral tribunal shall provide its request and reasoning. A party who becomes aware that the challenge is not successful may, within thirty days after having received notice of the decision rejecting the challenge, apply to the civil court of first instance for lifting such decision and removal of the arbitrator or the arbitrators. A challenge to the sole arbitrator, or all members of the arbitral tribunal, or a challenge to the number of arbitrators that may remove the decision-making majority of the tribunal, shall only be made to the civil court of first instance. The court's decision is final. The arbitration will come to an end, if the court accepts the challenge to the sole arbitrator, all members of the arbitral tribunal, or the part of the arbitral tribunal that may remove the decision-making majority. However, unless the arbitral tribunal is designated by name in the arbitration agreement, a new tribunal shall be appointed.

In Practice

One of the advantages of international commercial arbitration is the expertise of the arbitrators; and based on such expertise, the resolution of the disputes in a fairer way within a shorter period of time. Additionally, the arbitrators' impartiality and independence are of utmost importance. Therefore, if an arbitrator deceives the parties on the level of his/her knowledge over the subject matter of the dispute, especially if it requires a special knowledge; or causes delay of proceedings due to his/her personal schedule; or intentionally in favor of one of the parties; or in any other way does not act in line with his/her impartiality or independence, the said advantages of arbitration will not be realized. Furthermore, losses and damages may occur to the detriment of the parties. In such cases, are the arbitrators responsible of their acts?

The obligations of the arbitrator are as follows:

- To resolve the dispute between the parties;
- To continue acting as an arbitrator until the end of the proceedings;
- To retain his/her impartiality and independence during the proceedings;
- To act fairly and cause no unnecessary delay;
- To respect confidentiality

In the event that the arbitrator does not fulfill his/her obligations, the legal consequences may differ. In some cases, challenge and replacement of an arbitrator may be possible before his/her failure causes more damages. For example, according to Article 15/2 of the International Chamber of Commerce ("ICC") Arbitration Rules, an arbitrator may be replaced on the ICC Court of Arbitration's own initiative when it decides that the arbitrator is not fulfilling his/her functions in accordance with the Rules or within the prescribed time limits. In the event that the relevant party cannot accomplish replacement of the arbitrator, he/she may claim setting aside of the arbitral award at the end of the arbitral proceedings. In both cases, the interests of one of the parties or maybe both of the parties will be hindered. The challenge and replacement of the arbitrator and any related discussions will cause unnecessary waste of time and costs; whereas, the setting aside of the award will make the whole of the arbitral proceedings futile.

Are the arbitrators responsible of their acts? There is no internationally accepted or unified answer to this question. There is no special provision in the UNCITRAL Model Law concerning the liability of the arbitrators. Therefore, the answer depends on the agreement of the parties, the applicable arbitration rules and/or national arbitration law.

In institutional arbitration, if there is a special provision in the rules of the relevant institution, that rule shall apply. In many arbitration rules, the arbitrators are held responsible for their acts or omissions constituting willful misconduct or gross negligence (Art. 52 of the Stockholm Chamber of Commerce Arbitration Rules; Art. 44.2 of German Arbitration Institution Rules; Art. 31.1 of London Court of International Arbitration Rules). According to Article 41 of the ICC Arbitration Rules, the arbitrators shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

As clearly stated in the ICC Rules, the limitation of liability is subject to mandatory rules of applicable national rules. Therefore, the national law applicable to arbitral procedure must also be taken into account. If Turkish International Arbitration Law is applied, the relevant rule will be Article 7E. Accordingly, unless otherwise agreed by the parties, an arbitrator who accepts his office shall be responsible to indemnify any damages that are related to the failure of the arbitrator to perform his duties without a justifiable reason. Furthermore, according to Article 115 of the Turkish Code of Obligations, any prior agreement exempting the debtor from his/her gross omission or negligence shall be null and void.

Bibliography: Süral, C. (2011) "Hakemin Sorumluluğu", İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, Yıl 10, Cilt 10, Sayı 2, ss. 229-254.

Arbitration Procedure

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. They may, in the determination of such procedure, make a reference to any other national law, or international or institutional arbitration rules. If there is no such agreement between the parties, the arbitral tribunal shall conduct the proceedings in accordance with the provisions of the Turkish International Arbitration Law (Article 8A).

The fair treatment and equality of the parties is very significant. Whichever procedural rules are applicable, the arbitrators shall ensure that the parties have the same rights and powers. Each party shall be given a full opportunity to assert his/her arguments. This is clearly provided in Article 8B. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party (Article 11A/III).

The parties or an arbitration institution chosen by the parties are free to determine the place of arbitration. Failing such agreement or determination, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The arbitral tribunal may meet upon notification in advance to the parties at any place where the circumstances of the arbitration so require (Article 9).

Unless otherwise agreed by the parties, an award shall be rendered within one year, in the case of a sole arbitrator, from the date of his appointment or, in the case where there is an arbitral tribunal, from the date when the minutes of the tribunal's first meeting are kept. The term of arbitration may be extended, upon agreement of the parties, or, in case of failure on agreement, upon a party's request, by the civil court of first instance (Article 10B).

The language of the arbitration shall be Turkish or any other language, which is the formal language of a state that is recognized by the Republic of Turkey. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages. The agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal (Article 10C).

Article 11C shows the arbitrators what to do in the event that one of the parties to the dispute does not actively attend the arbitration proceedings. If the claimant fails to timely or in an adequate manner communicate his/her statement of claim, the arbitral tribunal shall terminate the proceedings. If the respondent fails to communicate his/her statement of defense, the arbitral tribunal shall continue the proceedings without treating such failure, in itself, as an admission of the claimant's allegations. If any party fails to appear at a hearing or to produce evidence, the arbitral tribunal may continue the proceedings and may make the award on the evidence before it.

Unless otherwise agreed by the parties, the fees of the arbitrators shall be fixed between the arbitral tribunal and the parties, by taking into consideration the amount in dispute, the nature of the dispute and the term of arbitral proceedings (Article 16A).

The arbitral tribunal shall state the costs of arbitration in its arbitral award. The costs comprise of:

1. the fees of the arbitrators;
2. the arbitrators' travel and other expenses;
3. the fees paid to the experts, and to the other persons whose assistance is sought and who are, collectively, appointed by the arbitral tribunal, and the costs for the site inspection;
4. the witnesses' travel and other expenses to the extent approved by the arbitral tribunal;
5. if he/she is represented by a lawyer, the successful party's attorney fees;
6. the charges to be made for the applications, when necessary, to the courts;
7. the notification expenses with respect to the arbitral proceedings (Article 16B).

The arbitral tribunal may request that the claimant deposit an advance for the arbitration costs. If the advance is not paid within the period determined in an arbitral decision, the arbitral tribunal may suspend the proceedings. If the advance is paid within thirty days following the notification of the suspension to the parties, the arbitral proceedings shall be continued; otherwise, the arbitration shall come to an end (Article 16C).

Unless otherwise agreed by the parties, the costs of proceedings shall be borne by the unsuccessful party. If

both parties' claims are partially upheld in the arbitral award, the costs of arbitration shall be apportioned among the parties by taking into account the degree of justification of their claims (Article 16D).

Setting Aside Procedure of the Arbitral Award

At the end of the arbitral proceedings, the arbitrators render an arbitral award. Such an award cannot be scrutinized by any court on its merits. In other words, the courts have no unlimited power of supervision over the arbitral tribunals. However, this does not mean that the courts have no control over the arbitral awards. The arbitral award may be subject to a setting aside procedure. The setting aside procedure is prescribed in Article 15A of the Turkish International Arbitration Law.

The arbitral awards cannot be reviewed as to the merits by the courts within a setting aside procedure. The grounds for setting aside are related with formal and procedural issues.

The application for setting aside an award may be made to the courts of first instance within thirty days following the receipt of the award by the relevant party.

The grounds for setting aside an award are limited and the court may not conduct any further scrutiny over the award. There are two categories of these grounds for setting aside an award. The first category consists of the ones that the court can take into consideration on its own motion regardless of the fact whether the party requesting the setting aside claimed it or not; and the second category covers the ones that the parties should claim and prove.

An arbitral award may be set aside where the party making the application furnishes proof that:

1. a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Turkish law;
2. the composition of the arbitral tribunal is not in accordance with the parties' agreement, or, failing such agreement with the Law;
3. the arbitral award is not rendered within the term of arbitration;
4. the arbitral tribunal unlawfully found itself competent or incompetent;
5. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
6. the arbitral proceedings are not in compliance with the parties' agreement as to the procedure, or, failing such agreement, with the Law provided that such non-compliance affected the substance of the award;
7. the parties are not treated with equality

An arbitral award may be set aside where the court, on its own motion or upon request of the claimant, finds that:

1. the subject matter of the dispute is not capable of settlement by arbitration under Turkish law; or
2. the award is in conflict with the public policy.

Enforcement of an Arbitral Award

If no application for setting aside of an arbitral award is made within the relevant time limit of thirty days, or denial of an application for setting aside becomes final and binding, the party who wants the enforcement of the award may apply to the court of first instance to obtain a certificate for the enforceability of the award. This is called an exequatur. No court charges are applicable to the issuance of an exequatur. In granting an exequatur, the court of first instance shall, on its own motion, review whether the subject matter of the dispute is capable of settlement by arbitration under Turkish law, or the award is in conflict with the public policy.

It is not possible to directly take an arbitral award to the execution authorities. An exequatur obtained from a court is necessary.

your turn 3

Explain why the scope of "foreign element" defined in the Turkish International Arbitration Law is considered to be very broad?

Further Reading

The concept of public policy, which the courts should take into account in their examination of an arbitral award, is not a strictly defined concept; it is subjective and vague. Judges have a great room for discretion to decide whether an arbitral award is contrary to public policy or not. While exercising such discretion, the judges shall be careful not to accept the concept of public policy so broad as to impede the enforcement of arbitral awards; make Turkey to have a reputation of being arbitration unfriendly, and international commercial arbitration an inefficient method of dispute resolution.

However, there are certain decisions of the Court of Cassation, which interpret the concept of public policy very broad. The decision of the 13th Civil Chamber of the Court of Cassation, dated April 17, 2012 and numbered E.2012/8426, K.2012/10349, is such a decision which got the heaviest negative criticism in the doctrine and in practice.

The subject of the setting aside case was an arbitral award related to an arbitration proceeding conducted under the Rules of the International Chamber of Commerce and seated in Istanbul for a dispute arising out of a concession agreement subject to Turkish law between state agencies, Ministry of Communication and Undersecretariat of Treasure, and a telecommunications company, where the latter should pay a contribution of 15% of its gross sales to the Treasury. The dispute arose out of the definition and calculation of the "gross sales". The telecommunications company argued that discounts in wholesales must be excluded from the gross sales amount; so that the value of the due treasury shares and contribution to be paid by the company decreases. The arbitral tribunal decided in favor of the telecommunications company. The Treasury applied to the court for setting aside of the award; but the court of first instance denied the request. However, the Court of Cassation annulled the decision of the court of first instance; and decided that the arbitral award is contrary to public policy.

The Court of Cassation ruled as follows: *"Although the due treasury shares and contribution agreed to be paid by the telecommunications company are not taxes, they are significant and continuous items of income resulting from the transfer of public service by the State. In the present case, … the exclusion of discounts in wholesales from the gross sales amount, results in a decrease in the amount of treasury shares and contribution aiming to provide continuous income; disrupt the budget balance and public policy. As the arbitral tribunal's award, rendered by a subjective interpretation, results a decrease in the treasury shares contrary to the real wills of the parties, Turkish law rules and objectives underneath them, the effects of the award are contrary to the nature of the concession agreement, the State's aim to establish a continuous income, mandatory rules of law, public interests; and thus the Turkish public policy."*

The understanding of the Court of Cassation's idea of public policy is so broad that if it is taken as a guiding precedent in the future by the courts of first instance and other civil chambers, any arbitral award decreasing the income of the State or putting the State under any monetary obligation will be deemed to be contrary to public policy and thus be set aside; and only those awards in favor of the State will be found in line with the public policy and thus be capable of enforcement.

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Summary

LO 1 Learn the basic concepts about mediation, and advantages of solving civil law disputes through mediation

Mediation is first regulated in Turkish law with the Law on Mediation of Civil Law Disputes that entered into force on June 22, 2013. Mediation is an alternative dispute resolution method conducted voluntarily with the participation of an impartial and independent third person, who is bringing the parties together to discuss and negotiate in order for them to produce their own solutions, and who may suggest a resolution in case it becomes apparent that the parties may not come to a mutual solution. Only private law disputes arising out of matters that the parties may freely dispose of, including those that carry a foreign element, can be subject to mediation. Mediation is voluntary; however, the new Labor Courts Law makes mediation in labor disputes mandatory as of January 1, 2018. If at the end of mediation, the parties can agree upon a settlement agreement, such agreement is binding for the parties. They may not initiate a lawsuit before the courts concerning the matters agreed upon by the settlement agreement.

LO 2 Learn basic concepts about international commercial arbitration, and its advantages, forms, and legal sources

Learn the effects of an arbitration agreement and how to draft an efficient arbitration agreement

Arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship, by independent arbitrators, in accordance with rules chosen by the parties. Advantages of arbitration are; neutrality; resolution of the dispute by expert arbitrators; application of flexible procedural rules; respect for confidentiality; expedition; and easy enforcement.

There are two basic forms of arbitration: ad hoc and institutional. Institutional arbitration is where parties prefer to enjoy the arbitration services provided by an institution, and choose to submit their disputes to an arbitration procedure under the rules of that institution. Where parties are silent and have not selected an institutional arbitration, the arbitration will be ad hoc.

In order for a dispute to be resolved through arbitration instead of national courts, the parties shall enact a valid arbitration agreement. The arbitrators derive their power from an arbitration agreement. A valid arbitration agreement is subject to the following four requirements: (i) The arbitration agreement must meet the requirements as to its form provided by the relevant law; (ii) The arbitration agreement must clearly indicate the parties' consent to submit to arbitration certain disputes which have arisen or which may arise between them in respect of a defined legal relationship; (iii) The subject matter of the dispute can be validly submitted to arbitration; (iv) The parties to an arbitration agreement must have capacity to enter into an arbitration agreement on their own behalf; and/or the parties must be capable of entering into an arbitration agreement in the name and on behalf of another person or entity.

LO 3 Learn the scope of application of the Turkish International Arbitration Law, and basic information about the arbitration agreement, arbitration procedure and setting aside of the arbitral awards under the Turkish International Arbitration Law

Summary

The Turkish International Arbitration Law shall be applicable where a dispute has a foreign element and the place of arbitration is determined to be in Turkey, or where the Law is chosen as the governing law of arbitration by the parties or the arbitrator or arbitral tribunal. Disputes related to real rights concerning immovables located in Turkey, and disputes that are not within the parties' disposal can not be subject to arbitration.

A valid arbitration agreement obliges the parties to resort to arbitration for the resolution of the dispute subject to the relevant arbitration agreement instead of national courts. If one of the parties infringes his/her obligation to arbitrate and brings an action before the court a matter, which is the subject of an arbitration agreement, the other party may make an objection as to the arbitration.

The parties are free to determine the number of arbitrators. The parties are also free to determine how the arbitrators will be appointed. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

At the end of the arbitral proceedings, the arbitrators render an arbitral award. Such an award can not be scrutinized by any court on its merits. This does not mean that the courts have no control over the arbitral awards. The arbitral award may be subject to a setting aside procedure. The grounds for setting aside an award are limited and they are all related with formal or procedural issues.

Test Yourself

1 In which of the cases below can the parties first try to settle through mediation?

A. A case initiated by the public prosecutor against a thief
B. A case initiated by a wife to divorce her husband
C. A case initiated by a distributor against his/her supplier due to unjustified termination of the distribution agreement
D. A case initiated by a child against his biological father to determine that he is the father
E. A case initiated by the father of a child against the child's mother to terminate the custody right that was previously granted to the mother

2 Which of the following is **not** a condition to be a mediator?

A. Being a lawyer with at least 5 years of experience
B. Being at least 21 years old
C. Being registered as a mediator in the relevant central registry
D. Having passed a written exam
E. Being a Turkish citizen

3 Which settlement agreement reached at the end of mediation will be deemed as a court judgment and may be enforced accordingly?

A. A settlement agreement bearing the signatures of the parties, their lawyers and the mediator
B. A settlement agreement drafted in more than one language
C. A settlement agreement bearing the signatures of the parties and the mediator
D. A settlement agreement bearing the signatures of the parties and their lawyers
E. A settlement agreement certified by a notary

4 Which of the following is **not** an advantage of arbitration?

A. Resolution of the dispute by expert arbitrators
B. Flexible procedural rules
C. Confidentiality
D. Low costs of arbitration proceedings compared to costs of national courts
E. Quicker resolution

5 Which of the following is **not** an existing arbitration institution?

A. European Arbitration Institution
B. International Chamber of Commerce International Court of Arbitration
C. Arbitration Institute of the Stockholm Chamber of Commerce
D. Union of Chambers and Commodity Exchanges of Turkey Arbitration Council
E. London Court of International Arbitration

6 In an ad hoc arbitration, where the place of arbitration is determined as Istanbul, and no further explanation is given concerning the method of appointment of the arbitrators, where do you need to look at to determine the method of appointment of the arbitrators?

A. UNCITRAL Arbitration Rules
B. Turkish International Arbitration Law
C. UNCITRAL Model Law
D. New York Convention
E. International Chamber of Commerce Arbitration Rules

7 Which of the following is false about the arbitration agreement according to Turkish International Arbitration Law?

A. The arbitration agreement shall be in writing.
B. An arbitration agreement obliges the parties to resort to arbitration for the resolution of the dispute subject to the relevant arbitration agreement instead of national courts.
C. If there is a valid arbitration agreement between the parties, they may not request from a court an interim measure of protection or an interim attachment; this will be a breach of the obligation to arbitrate.
D. Despite the existence of an arbitration agreement, if one of the parties infringes his/her obligation to arbitrate and brings an action before the court a matter, which is the subject of an arbitration agreement, the other party may make an objection as to the arbitration.
E. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

8 Which of the following has an utmost importance in the determination of an arbitrator?

A. He/she must be a lawyer
B. He/she must speak a language other than his mother tongue very fluently
C. He/she must have at least five years of experience in law and arbitration
D. He/she must be impartial, and independent of the parties
E. He/she must have an academic degree in the field of his/her specialization

9 Which of the following can the court review in granting an exequator to an arbitral award?

A. Whether the arbitral award is rendered within the term of arbitration
B. Whether the subject matter of the dispute is capable of settlement by arbitration under Turkish law
C. Whether one of the parties to the arbitration agreement was under some incapacity
D. Whether the arbitral tribunal unlawfully found itself competent or incompetent
E. Whether the composition of the arbitral tribunal is not in accordance with the parties' agreement

10 In an institutional arbitration, where the place of arbitration is determined as Istanbul, and no further explanation is given concerning the number of arbitrators, where do you need to look at if the parties can not agree upon the number of arbitrators?

A. UNCITRAL Arbitration Rules
B. Turkish International Arbitration Law
C. The arbitration rules of the arbitration institution chosen by the parties
D. New York Convention
E. UNCITRAL Model Law

Answer Key for "Test Yourself"

1. C	If your answer is wrong, please review the "Mediation" section.	6. B	If your answer is wrong, please review the "International Commercial Arbitration" section.
2. B	If your answer is wrong, please review the "Mediation" section.	7. C	If your answer is wrong, please review the "Turkish International Arbitration Law" section.
3. A	If your answer is wrong, please review the "Mediation" section.	8. D	If your answer is wrong, please review the "Turkish International Arbitration Law" section.
4. D	If your answer is wrong, please review the "International Commercial Arbitration" section.	9. B	If your answer is wrong, please review the "Turkish International Arbitration Law" section.
5. A	If your answer is wrong, please review the "International Commercial Arbitration" section.	10. C	If your answer is wrong, please review the "International Commercial Arbitration" section.

Suggested answers for "Your turn"

What are the basic features of mediation in Turkish law?

your turn 1

The basic features of mediation are:

- It is voluntary. The parties may not be forced to refer to mediation except for the labor law disputes.
- It is not a judicial proceeding. It does not aim to reveal the legally right party but aim to build a win-win position for both parties.
- It aims to make the parties discuss and negotiate in order to produce their own solutions, but the mediator may suggest a resolution in case it becomes apparent that the parties may not come to a mutual solution.
- If the parties reach a mutual agreement at the end of mediation, they may not bring the same dispute before a court.

What are the basic features of arbitration?

your turn 2

The basic features of arbitration are:

- It is an alternative to national courts.
- It is a private mechanism for dispute resolution.
- It is selected and controlled by the parties; party autonomy has priority.
- Parties' rights and obligations are determined in a final and binding manner.

Explain what is making the scope of "foreign element" defined in the Turkish International Arbitration Law broad?

your turn 3

In its definition of "foreign element", the Turkish International Arbitration Law does not only take the geographic criteria; but also economic criteria. The first two circumstances listed in Article 2 are based on the geographic criteria; and are classic cases where an existence of a foreign element is accepted. In other words, where the domiciles, habitual residences or places of business of the parties are located in different countries; or one of these is located in a country other than that of the place of performance; the existence of a foreign element is clear. The last two circumstances, however, are based on economic criteria; or in these circumstances the interests of international commerce are at stake. In all these circumstances, all other elements of the dispute may be domestic. For example, two companies registered in Turkey may enter into a construction contract for the construction of a major project, such as a large shopping mall. If, one of the Turkish companies has foreign shareholders; or the construction company obtained credit from a foreign bank in order to realize the project; or it is essential for the contract that certain raw materials of the construction are brought from abroad, a foreign element will exist even though the contract is between two Turkish companies for a construction work to be performed in Turkey.

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