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

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Application Area of the Decree on Protection of the Value of the Turkish Currency Nr. 32 in Labor Law Contracts

The Presidential Decree Nr. 85 on Amendments to the Decree on Protection of the Value of the Turkish Currency Nr. 32 entered into force on 13.09.2018. According to the Presidential Decree, the contract value may not be determined in foreign currency for certain types of contracts, the parties shall re-determine the agreed value in the contracts within thirty days following the effective date of the decision. ***(Page 2)***

Scope of the Expression "Disposition" Under Section 31/Iii of the Financial Leasing, Factoring and Financing Companies Law Nr. 6361

A financial leasing contract is an agreement under which an investment property is purchased by the lessor and leased to the lessee and made use of within the term of the agreement. If mutually agreed under the contract (Section 23 / I of the Financial Leasing, Factoring and Financing Companies Law Nr. 6361), the lessor transfers the ownership of the property to the lessee at the end of the term of the agreement. ***(Page 4)***

Determining the Applicable Law to the Arbitration Agreement Concerning the Recent Landmark Case from UK

With respect to the doctrine of separability, which treats an arbitration clause as a separate agreement from the main contract in means of validity and enforceability, related to internationally executed contracts; the law governing an arbitration agreement may differ from the law that was chosen to govern the main contract that contains the arbitration agreement. ***(Page 8)***

Establishment of Branches of Foreign Companies in Turkey

Although being legally independent, branches are not considered as a legal person, and they are closely associated with their parent companies with respect to sharing their internal management. However, branch offices of non-resident companies in Turkey are independent in terms of accounting and conducting commercial transactions in Turkey. ***(Page 11)***

Smart Contracts From the Perspective of Turkish Law

Smart Contracts nowadays are very popular with an increasingly high importance as one of the new legal concepts of the contracts. However, many legal systems still have difficulties in following these developments in technology at the same speed. This raises many problems, especially in terms of "proving" and "enforceability" of the Smart Contracts in legal terms, especially when any dispute arises from those contracts. ***(Page 13)***

Recent News

APPLICATION AREA OF THE DECREE ON PROTECTION OF THE VALUE OF THE TURKISH CURRENCY NR. 32 IN LABOR LAW CONTRACTS

The Presidential Decree Nr. 85 on Amendments to the Decree on Protection of the Value of the Turkish Currency Nr. 32 entered into force on 13.09.2018. According to the Presidential Decree, the contract value may not be determined in foreign currency for certain types of contracts; the parties shall re-determine the agreed value in the contracts within thirty days following the effective date of the decision.

In addition to this, the Ministry of Treasury and Finance has issued regulations on application of the Presidential Decree under which some exceptions have been granted with respect to determination of the contract value in foreign currency or indexing to foreign currency [1].

As per the Labor Law; all kinds of salaries, premiums, bonuses, and all similar payments shall be paid in Turkish Liras. If such payments are fixed in a foreign currency, payments may be effected on the exchange rate prevailing on the date of payment.

However; pursuant to the Turkish Code of Obligations, debts shall be paid in the currency of the country where they are borrowed. If the payment is fixed in another currency other than the domestic currency, then the debt may be paid in the domestic currency on the basis of the exchange rate prevailing on the date of payment, unless the contract contains a provision that requires effectuation of the payment in the original currency.

If the payment is fixed in another currency other than the domestic currency and if the contract does not contain any contrary provision and if the debt is not paid on the maturity date, then the creditor may demand that the debt be paid in the original currency or in the domestic currency on the basis of the exchange rate prevailing on the date of payment.

Another regulation, set out under the general provisions of the Turkish Code of Obligations, allows debtors to ask the judge to adjust the contract to new conditions and authorize them to cancel the contract if, after executing the contract, extraordinary situations occur that are unforeseeable by the parties and that cause excessive difficulties to fulfill the contractual obligations thereof.

The text of the Article states that this regulation shall be applied also for debts in foreign currencies. Whereas the statutory regulations are in this format, amendments brought on the secondary regulations related to the Law on the Protection of the Value of Turkish Currency nr. 1567 have forbidden some contract types to have payment liabilities in foreign currencies.

The Presidential Decree nr. 85 sets out that this prohibition took effect on 13.09.2018.

This decree prohibits persons, resident in Turkey, to establish contract prices or other payment obligations emanating from contracts in "foreign currencies or index such obligations to foreign currencies" in some contracts they execute, which excludes some situations determined by the Ministry of Finance.

Scope of the Term "Labor Contract" Used under the Decree
In General Terms

Whereas it is understood that the term "Service Contract", as used under the Decree and the Communiqué, does not technically refer to labor (service) contracts and this does not represent the service contracts regulated by the Turkish Code of Obligations, the term "labor contract" used under the said Decree covers the Labor Law, the Maritime Labor Law, Labor Law on the Press and the labor/service contracts of all employees that are covered by the Turkish Code of Obligations.

The said Decree does not refer to any law while mentioning labor contracts and it does not contain any expression stating that the prohibition is specific to employees that are bound by a certain law.

Considering the scope of labor contracts, it is seen that following the amendment made on 16 November 2018, labor contracts, to which seamen are a party, have been included as exceptions.

The type of labor contract does not have any importance for entering the scope of the Decree.

It does not matter if the labor contract is executed for a definite-indefinite period, is based on working on-call working or telecommuting, or if the employee has a temporary business relationship, or not.

SCOPE OF THE PROHIBITION IN TERMS OF LABOR CONTRACTS

Determination of Contract Price and Other Payment Obligations Arising from the Contract in Terms of Labor Contracts

As the Decree prohibits, without any differentiation, to establish all payment obligations arising from labor contracts in foreign currencies, all salaries as well as all payments that are made in addition to such payments covered by the said agreements, for which the prohibition is valid, shall be assessed within this scope.

This scope also includes payments such as employees' basic salary, overtime, annual leave, receivables such as premiums, advance payments, family-child-education allowances, fuel allowances and food allowances.

This scope further includes penal clauses, death indemnities, penal clauses & counteractions in terms of competition bans and the amounts that are due and payable as per mutual rescission contracts.

It does not only include the payments, of which the employer is the debtor, but also the payment obligations of the employee.

For instance, if the labor contract is prematurely terminated without any just cause, and if the agreement includes a penal provision therefor, then the penal clause incumbent on the employee shall also be covered by the prohibition.

A similar situation exists for penal clauses foreseen for violations of competition bans or educational expenses the employee will be obliged to pay under certain circumstances.

The Prohibition Does Not Include a Prohibition on "Payments"

The prohibition, introduced by the Decree on labor contracts and other agreements, only prevents contract prices or other payment obligations arising from the contract from being established in foreign currencies or from being indexed to foreign currencies.

At this point, it should be noted that a fundamental exception is introduced to the Decree and provisions by the Communiqué, and that therefore, these provisions should be interpreted on a narrow scope.

For instance, when the salary is established in Turkish Liras (e.g.: TRY 10.000.-), the Decree does not prohibit the parties from paying the said TRY 10.000.- in a foreign currency on the basis of the-then exchange rate upon their mutual consent.

EXCEPTIONS FORESEEN FOR LABOR CONTRACTS

General Rule: Absence of Prohibition for Those Not Resident in Turkey

The Decree only prohibits "persons resident in Turkey to determine the contract price and other contractual payment obligations on the basis of foreign currencies or the values thereof in labor contracts that they execute with each other".

Thus, this prohibition does not apply if either of the parties is not resident in Turkey.

Exceptions Foreseen for Persons Resident in Turkey

The exceptions, set out under Article 8 of the Communiqué for labor contracts, are as follows:

- Labor contracts executed abroad;
- Labor contracts including seamen as (a) party (ies);
- Labor contracts having parties that are resident in Turkey but not citizens of the Republic of Turkey;
- Labor contracts including public bodies and institutions as (a) party (ies);
- Labor contracts including the companies of the Turkish Armed Forces Foundation as (a) party (ies);
- Labor contracts, the parties of which include the branch offices, liaison offices, representation offices of persons resident abroad or which include their shareholders who own fifty percent or more of their shares or which include the companies, of which such foreign persons possess the common control and/or control by more than fifty percent or more;
- Labor contracts, the parties of which include companies operating across free zones as employers within the scope of their activities across such free zones.

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SCOPE OF THE EXPRESSION "DISPOSITION" UNDER SECTION 31/III OF THE FINANCIAL LEASING, FACTORING AND FINANCING COMPANIES LAW NR. 6361

I- Financial Leasing Contract

A financial leasing contract is an agreement under which an investment property is purchased by the lessor and leased to the lessee and made use of within the term of the agreement.

If mutually agreed under the contract (Section 23 / I of the Financial Leasing, Factoring and Financing Companies Law Nr. 6361, referred briefly as the "Law Nr. 6361"), the lessor transfers the ownership of the property to the lessee at the end of the term of the agreement.

The contract must be in writing, and if the subject under the contract is an immovable property, the contract must be registered with the land registry office, and if it is a movable property subject to registration, it must be registered with the respective registry. In practice, this procedure is called "financial leasing annotation".

Movable properties not subject to registration are registered with the exclusive registry held by the Union of Financial Leasing, Factoring and Financing Companies (Section 22 of the Law nr. 6361)

Under the contract, the lessor is obliged to deliver the property subject to the contract to the lessee within minimum two years (Section 22 of the Law Nr. 6361). The lessee has to use and maintain the property in accordance with the terms set out under the contract.

On the other hand, the lessee is also responsible for the maintenance and repair of the property subject to the contract.

The property subject to the contract has to be insured, and insurance premiums are covered by the lessee.

Moreover; damages, loss and decrease in value of the property subject to the contract caused by contractual use and are not covered by the insurance will be at the lessee's risk (Section 24 of the Law nr. 6361).

By this means, particularly small- and medium-sized companies are able to acquire any and all equipment, tools, immovable properties, and similar goods, as necessary for their activities, without having to pay large amounts of money at once.

Another important reason for choosing the financial leasing method is that companies find the opportunity to acquire property without using their own resources.

II- Termination of the Financial Leasing Contract, and Termination by the Lessor

It is stated clearly, under the Law nr. 6361, that the financial leasing contract will be terminated automatically if the contract expires, the lessor dies or loses her/his capacity to act (Section 30 of the Law Nr. 6361).

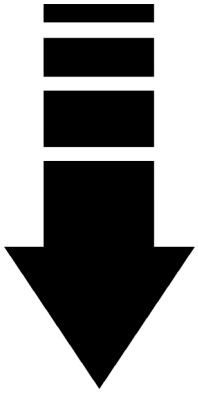
Similarly, it is regulated under the same section that unless otherwise agreed, the lessee may terminate the contract before it expires if the s/he enters into liquidation process or liquidates her/his business where the property subject to the contract is assigned for, even if s/he does not enter into a full liquidation process.

Breach of contract is regulated under the Section 31 of the Law Nr. 31. It reads as follows:

> *"The lessor may terminate the contract if the lease amount is not paid within the thirty-day period granted to the lessee who is in default in paying the lease amount.*
>
> *However, if it is agreed under the contract that the ownership will be transferred to the lessee at the end of the term of the agreement, this period may not be less than sixty days.*
>
> *Contracts entered into with lessees, who have been warned due to the failure to pay three or two consecutive lease amounts in a year, may be terminated by the lessor."*

Under this section, two alternatives on termination are provided to the lessor depending on the breach of the contract by the lessee.

One of them is the case where three or two consecutive lease amounts are not paid on time in a year.



When one of these conditions is met, the lessor can directly terminate the contract by sending a notice to the lessee.

In this case, the lessor is not required to grant time to the lessee, and it is not sought for the lessee to go into default.

The second alternative takes place in the first sentence of the section, and accordingly, the lessor has to put the lessee into default in accordance with Section 117 of the Law of Obligations by sending her/him a notice.

However, the lessee being in default is not sufficient for termination of the contract.

The lessor also has to cause the lessee to fall into default in thirty days for her/him to pay her/his debt.

If the lessee fails to pay her/his debt within this period, the lessor may terminate the contract.

It is also highlighted, under the section, that if the parties have agreed upon the transfer of the ownership of the property subject to the contract to the lessee at the end of the term of the agreement, the time to be granted by the lessor may not be shorter than sixty days.

It is set out, under section 31/II of the Law Nr. 6361, that if either of the parties acts in breach of the contract and in cases where the other party may not be expected to sustain the contract, the contract may be terminated.

Since financial leasing contracts are considered to be contracts with continuous obligations, the lessor's claims under the scope of the termination will be determined in accordance with the Section 126 of the Law of Obligations.

Accordingly, the contract may be terminated and compensation for damages suffered due to the termination of the contract before its term may be requested.

The aforementioned damages are accepted to be positive damages according to the legislative intent.

Positive damages are explained in the doctrine as follows (1):

"Positive damages refer to the damages suffered by the creditor due to failure of the occurrence of her/his interest in fulfillment of the obligation. In other words, the difference between the status of the creditor's assets in the event that the debt is fulfilled and the condition that the debt has not been fulfilled is a positive damage."

In this case, for instance, if the lessor terminates the contract before its term due to insolvency of the lessee and may not lease the property subject to the contract in the remaining term of the agreement or lease it in consideration of a lower fee, the lessor may claim the loss from the lessee.

III- Assessment of Section 31/III of the Financial Leasing, Factoring and Financing Companies Law Nr. 6361

Financial leasing contracts are synallagmatic contracts with continuous obligations.

Therefore, disputes often arise and may be subject to civil law cases due to the failure to perform the bilateral obligations.

Since financial leasing contracts aim to provide merchandisers with tools, equipment, and immovable properties, as necessary for their commercial activities, properties subject to the contract are usually very expensive and valuable.

In this regard, for instance, if there is a case arising from the insolvency of the lessee, financial leasing companies face the risk of decrease in the value of the property subject to the contract, establishment of limited real rights on the property subject to the contract such as lien and have difficulty in debt collection, since it takes a very long time for lawsuits to be finalized in our country.

IT IS SET OUT, UNDER SECTION 31/II OF THE LAW NR. 6361, THAT IF EITHER OF THE PARTIES ACTS IN BREACH OF THE CONTRACT AND IN CASES WHERE THE OTHER PARTY MAY NOT BE EXPECTED TO SUSTAIN THE CONTRACT, THE CONTRACT MAY BE TERMINATED.

SINCE FINANCIAL LEASING CONTRACTS ARE CONSIDERED TO BE CONTRACTS WITH CONTINUOUS OBLIGATIONS, THE LESSOR'S CLAIMS UNDER THE SCOPE OF THE TERMINATION WILL BE DETERMINED IN ACCORDANCE WITH THE SECTION 126 OF THE LAW OF OBLIGATIONS.

For this reason, Section 31/III of the Law Nr. 6361 sets an exceptional way for financial leasing companies:

> *"If a court renders a decision of preliminary injunction in a dispute regarding a financial leasing contract between the lessor and the lessee and the property subject to the contract is given to the lessor or a third party, the lessor may dispose of the property subject to the contract by depositing money in the amount of the market value of the said property.*
>
> *However, if the termination of the contract is ruled to be unjust, the lessor is obliged to compensate for the damages of the lessee."*

As it is seen, if the court gives the property, subject to the contract, to the lessor or a third party, the lessor may dispose of the property by depositing money in the amount of the market value of the property.

There is no consensus upon the scope of the expression "disposition", as set out under the section.

Turkish Language Association defines the expression "*disposition*" as follows:

> *The authority to use something at its own will.*

In the doctrine, it is explained as:

> *"Dispositional transactions are legal transactions that directly affect a right in the assets of the disposer, transfer or restrict that right to another person, impose burden, change or terminate that right. Transfer of property, assignment of receivables, transferring the right; Establishing an easement right on an immovable property can be shown as examples of a disposition process that limits the property right." (2)*

As it can be interpreted from both definitions, disposition authority is the widest authority provided to a person upon a property.

The person who is authorized to dispose of a property may establish a limited real right on the property and even transfer the ownership of the property to another person.
In this scope, it has to be acknowledged that the expression "disposition" has been deliberatively chosen by the legislator.

Therefore, once the lessor pays the deposit as stipulated by the law, the lessor may carry out any transaction upon the property subject to the contract and transfer its property to a third party.

Thus, it has been underlined, under the recent decisions by the Regional Court of Justice, that the financial leasing company who has roughly proved its claim and paid the necessary deposit has to be provided with the authority to dispose, as set forth under Section 31/III of the Law Nr. 6361, and this authority may be used to sell the property:

> *"In summary, the attorney to the plaintiff claimed, under his appeal petition, that the property belongs to the client, the request for an interim injunction is obligatory for protection of the client's rights, that the immovable property remains in the responsibility of the lessee will cause its wear, Section 31/3 of the Law Nr. 6361 gives the right to dispose of the property, the client company will take back the leased real estate with a cautionary decision, with a letter of guarantee or guarantee under which he stated that the real estate will be sold to a third party in accordance with the power of disposal, and that the property right is secured by the constitution, and demanded that an order be issued to annul the decision…*
>
> *The lawsuit is about full restitution of the property subject to the financial leasing contract. The present dispute is regarding the decision of rejection of the preliminary injunction claim…*
>
> *Under the notice sent to the counter party on 24.04.2019 by the party who requested a preliminary injunction, it was stated that the contract had been terminated and payment of the receivables had been requested to be made within 60 days, the return of the goods had been requested 3 days after expiry of this period.*
>
> *The notice had been delivered to the counter party on 26.04.2019. It was set forth, under Section 31/III of the Financial Leasing, Factoring and Financing Companies Law Nr. 6361, that the lessee is obliged to return the property when the contract is terminated by the lessor.*
>
> *The lessee did not argue that the notices were unlawful or that the payment had been made in accordance with the contract.*
>
> *According to Section 389 of the Code of Civil Procedure, the claimant is expected to roughly prove her/his claims.*
>
> *When the present case is investigated in the light of the explanations above, considering that the contract was terminated by the lessor and considering the Law Nr. 6361 and the provisions of the contract between the parties, it is against the procedure and law to decide in writing as a result of an erroneous evaluation instead of ruling for a preliminary injunction."*

(The decision, dated 17.01.2020, numbered 2020/61 and bearing the file number 2019/2959, by the 16th Civil Chamber of the Regional Court of Justice of Istanbul)

As clearly set forth in the decision, the expression "disposition" provides the lessor, who has paid the deposit and roughly proved her/his claim according to Section 389 of the Code of Civil Procedure, with the greatest authority upon a property, and the lessor may sell the property subject to the contract within this scope.

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THE PRESIDENTIAL DECREE ON INDUSTRIALIZATION EXECUTIVE COMMITTEE PROMULGATED ON THE OFFICIAL JOURNAL

The Presidential Decree, setting out the principles and procedures on establishment of the industrialization executive committee to enhance the domestic production and technological capabilities, as well as the duties and powers thereof, was promulgated on the Official Journal on 14.10.2020.

To be convened by the president granted with the authority to set the meeting agenda items, the committee will be able to adopt resolutions to enable the public institutions and organizations to perform long-term procurements and to invest in strategical areas where the domestic production remains limited, in a manner to create new opportunities for domestic production.

The committee will also adopt resolutions to be binding on the public institutions and organizations in relation to the products which will be primarily produced by domestic means, as well as resolutions to guide the public practices to strengthen the capital structures of industrial production companies, and to encourage mergers, if and when so required.

The committee is granted with the power to intervene in the capital structures of the companies, which is the most striking and questionable power of the committee.

In accordance with the power granted under the said Presidential Decree, the committee will be able to adopt resolutions on any and all acts and actions in relation to changes in the capital structures of the critical companies which might put the sustainability of domestic production and national security at risk.

As the limitations on such power have not been set out clearly, the committee has been granted with a highly extensive discretion especially on the capital structures of the companies, which has created uncertainty for the principle of legal certainty and the property right.

Source:
https://www.resmigazete.gov.tr/eskiler/2020/10/20201014-6.pdf

LAYOFFS ARE PROHIBITED FOR THREE MONTHS!

A new law proposal was prepared within the scope of anti-coronavirus measures in March. According to the articles in the draft bill, which is also submitted to the opinions of the business world, layoffs are prohibited for three months. The President may extend this ban up to six months if he wishes so. If the employer wishes, s/he can take the worker for free leave, in this case, the worker will be paid 39 liras and 24 kurushes per day. In addition, the same amount will be paid to workers who are laid off after March 15 and cannot receive unemployment benefits. The dismissal was extended for another 2 months from November 17th.

Source:
https://www.resmigazete.gov.tr/eskiler/2020/10/20201027-1.pdf
ollows:

SOCIAL MEDIA REGULATIONS PUT INTO EFFECT IN TURKEY!

For a long time, the place, and limits of social media in the legal order have been the subject of discussion in many countries. In Turkey, it is seen that the regulations regarding social media and the Internet Broadcasts, in general, have started with the law numbered 5651 titled 'Regulation of Publications on the Internet and Combating Crimes Committed By Means of Such Publication'. The Law has been amended many times so far; but the last amendment was published on the Official Gazette on 31 July 2020, and it is highly important since it involves noticeable changes and further additions such as definition of Social Network Providers.

Source:
https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5651.pdf

DETERMINING THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT CONCERNING THE RECENT LANDMARK CASE FROM UK

I. Introduction

In the UK, the Supreme Court has clarified the grounds for determining the applicable law to an arbitration agreement in a recent landmark case of Enka v Chubb, which is left ambiguous regarding the jurisdiction by the contracting parties, as distinguished from the main contract.

With respect to the doctrine of separability, which treats an arbitration clause as a separate agreement from the main contract in means of validity and enforceability, related to internationally executed contracts; the law governing an arbitration agreement may differ from the law that was chosen to govern the main contract that contains the arbitration agreement.

Since that there is no unified regulation within the international law regarding the applicable law to the substantial validity of an arbitration agreement, divergent rulings are to be encountered in different jurisdictions for the same clause.

Although it is generally accepted that if there is not any chosen law by the parties to apply to the arbitration agreement, the law of the place of arbitration is the accepted approach, or the law that applies to the main contract.

Whereas in Turkey, the laws and regulations concerning the validity of an arbitration agreement are in parallel with international regulations, the relevant provisions can be directly invoked in disputes.

Therefore, there would not be any need for a legal debate in respect of the law to be applied to the form and the applicable law need not be discussed.

However, in some countries like the UK, the application of an arbitration agreement is determined independently from these rules.

II. The Background of the Case

On 1 February 2016, a Russian power plant was severely damaged by fire. Chubb Russia, the appellant, is a Russian insurance company which had insured the owner of the power plant, Unipro, against such damage, brought proceedings in Russian courts against 11 companies, including a Turkish subcontractor taking part in the construction of the power plant, Enka. Chubb argued that these companies were liable for the damage caused according to the contract executed between them.

The respondent, Enka, brought a claim in the Commercial Court in London seeking an anti-suit injunction to restrain Chubb from continuing the Russian proceedings.

Enka argued that the Russian proceedings had been brought in breach of an arbitration agreement in article 50.1 of the construction contract, which provided for arbitration in London under ICC Rules. Neither the main contract nor the arbitration agreement within the contract included an explicit governing law clause.

At trial, the Commercial Court dismissed Enka's claim on the basis that the English court was not the competent authority for a decision.

Following an expedited appeal, the Court of Appeal considered that "the time has come to seek to impose some order and clarity on this area of the law" and held that, unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the "seat", as a matter of implied choice, and allowed Enka's claim, holding that questions as to whether the English courts were competent were irrelevant, the arbitration agreement was governed by English law and that an anti-suit in-

junction should be given to restrain the Russian proceedings. Chubb appealed to the Supreme Court.

Even though there were not any dispute on the applicable law concerning the main contract, the contracting parties disagreed on the applicable law governing the arbitration agreement.

The central conflict was, whether if the arbitration agreement was governed by Russian law, because the main contract was governed by Russian law, or, the law of the arbitration agreement was that of the seat of the arbitration, namely English law.

III. The Subject of The Dispute

The main issues to be determined on the appeal are laid out by the Court as;

> *(1) the correct approach to determining the proper law of an arbitration agreement,*
>
> *(2) the relevance of the parties' choice of law for the main contract under Rome I, and*
>
> *(3) the role of the court of the seat of an arbitration and in what circumstances is it appropriate or permissible for the English court to permit a foreign court to decide whether proceedings before the foreign court are a breach of an arbitration agreement.*

So, the central question for the court was;

"how the governing law of an arbitration agreement is to be determined when the law applicable to the contract containing it differs from the law of the "seat" of the arbitration, the place chosen for the arbitration in the arbitration agreement?"

Chubb argues that the correct approach to determine the applicable law to the arbitration agreement is that, in the absence of strong indications to the contrary, a choice of law for the contract is a choice of that law to govern the arbitration agreement.

In the present case the contracting parties have chosen Russian law to govern the construction (main) contract between them and that the implication that they intended the arbitration agreement included in that contract to be governed by Russian law is not displaced by their choice of London as the seat of arbitration.

According to Chubb, "because the arbitration agreement is governed by Russian law, the Russian courts are best placed to decide whether or not the arbitration agreement applies to the claim", whereas Enka, sought a declaration that Chubb Russia's claims in the Russian court fall within the scope of the arbitration agreement and damages.

On one side the claim is that;

⇒ *the law that governs a contract should generally also govern an arbitration agreement which, though separable, forms part of that contract.*

On the other side;

⇒ *the law of the chosen seat of the arbitration should also generally govern the arbitration agreement.*

IV. The Judgment and the Applicable Law

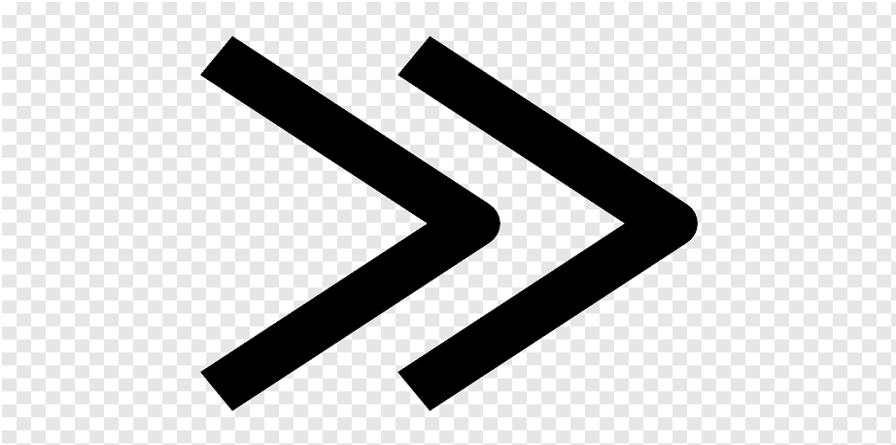
The appeal was dismissed by a 3:2 majority.

The Supreme Court at first-handed, considered the Rome I Regulation; this regulation is the system that the court must apply normally to determine which system of national law governs a contract. However, according to Article 1(2)(e) of the Rome I Regulation, arbitration agreements and agreements on the choice of court are excluded from its scope of application.

Therefore, the court then turned to the common law rules, to decide which system of law governs the validity, scope, or interpretation of an arbitration agreement for determining the law governing contractual obligations. Those rules are that a contract (or relevant part of it) is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which it is "most closely connected" to the arbitration agreement.

In either case, the court expressed that, the arbitration agreement and the main contract containing it should be construed by applying the rules of contractual interpretation of English law as "the law of the forum".

THE COURT STATED THAT, IN CASE OF WHERE THE CONTRACTING PARTIES HAVE NOT CHOSEN THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT, ALTHOUGH THEY HAVE SPECIFIED THE LAW TO GOVERN THE MAIN CONTRACT; THE CHOICE OF LAW REGARDING THE MAIN CONTRACT GENERALLY APPLY TO THE ARBITRATION AGREEMENT.



As a result; the court stated that, in case of where the contracting parties have not chosen the applicable law to the arbitration agreement, although they have specified the law to govern the main contract; the choice of law regarding the main contract generally apply to the arbitration agreement.

This general rule, according to the Supreme Court, encourages;

- *Legal certainty, by assuring the parties that an agreement as to the governing law will generally be an effective choice in relation to all of their contractual rights and obligations and to all of their disputes,*
- *Consistency, by setting forth the same system of law governs all the parties' rights and obligations, and*
- *Coherence, by avoiding complexity, uncertainties, and artificiality.*

In addition to that, the Supreme Court stated that, the

> *"strong presumption" verdict that The Court of Appeal gave was wrong assuming that the parties have chosen the law of the seat of the arbitration to govern the arbitration agreement, by implication. Where there is no express choice of law to govern the contract, a choice of the seat of the arbitration does not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of the seat.*

Applying the Closest Connection Test

Where there is no choice of law applicable to the arbitration agreement, the court stated that it must determine the law with which the arbitration agreement is most closely connected.

Generally speaking, the arbitration agreement considered to be the most closely connected with the law of the seat of arbitration.

The considerations that were taken by the court were;

* The "seat" was where the arbitration is to be performed (legally, if not physically), the place where the transaction is to be performed is the connecting factor to which the common law has long attached the greatest weight.
* This approach was maintaining consistency with international law and legislative policy as embodied in the 1958 New York Convention and other international instruments.
* This rule was likely to uphold the reasonable expectations of contracting parties who specify a location for the arbitration without choosing the law to govern the contract.
* This approach was providing a recognition for a clear default rule in the interests of legal certainty, allowing parties to predict easily which law the court will apply in the absence of choice.

V. Conclusion

The central issue in this case was determining the applicable law of the arbitration agreement where the applicable law of the main contract containing it differed from the law of the seat of arbitration.

This decision was particularly important for businesses who deliberately execute international contracts and use arbitration clauses in them, as well as for the sake of certainty in English law for arbitration agreements.

Since that the contract in this case does not contain a choice of the law that is intended to govern the contract or the arbitration agreement within it, the Supreme Court decided that in these circumstances the validity and scope of the arbitration agreement is governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected.

For different considerations that form the connection test; the majority upholds the Court of Appeal's conclusion that English law governs the arbitration agreement, because of the seat of arbitration is London.

This decision also explicitly demonstrated that, even if there was a longing need for a clarification for determining the law applying to the arbitration agreement, the crucial element is that, the contracting parties must set out clear, express terms in regard of the key clauses in their contracts.

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ESTABLISHMENT OF BRANCHES OF FOREIGN COMPANIES IN TURKEY

Foreign investors may choose to invest in Turkey by establishing a branch office on behalf of an existing foreign business entity, established in another country, as an alternative to directly establishing or participating in a stock corporation.

Although being legally independent, branches are not considered as a legal person, and they are closely associated with their parent companies with respect to sharing their internal management.

However, branch offices of non-resident companies in Turkey are independent in terms of accounting and conducting commercial transactions in Turkey. They are also subject to corporate taxes independently in Turkey.

Establishment of a branch in Turkey requires quite more formal requirements and documentation than establishing a new company in Turkey.

In addition, only companies whose capital is divided into shares can open branches. (Joint Stock Company, Limited Liability Company, and Limited Partnership).

This process is more difficult for foreign companies that are not established in Turkey.

In order for foreign companies to open branches in Turkey, it is also necessary to obtain permission from the Ministry of Trade of the Republic of Turkey.

All stages of the process are listed below along with the necessary documents.

1. First, the company must appoint a fully authorized representative, who is resident in Turkey, to open a branch in Turkey.

The power of attorney, granted to the same, should include the powers, in particular on the following matters;

◊ To represent the company in order to fulfill the operations specified under the company's articles of association,

◊ To represent the company in cases arising from transactions on behalf of the company,

◊ To appoint an attorney in case of temporary leave from Turkey,

◊ To assign a representative to secondary branches that will be opened depending on the main branch.

Note: This should be signed by the authorized person of the parent company and should be issued either before the Turkish Consulate and/or before the notary public. If it is issued before the notary public, it needs to be apostilled.

2. After the representative is appointed, it is necessary to apply to the Ministry of Trade for permission to be obtained by the company or the representative.

The documents sought for this application are as follows;

- The petition of application signed by the person who will be appointed as the director to the branch by the Parent Company

Such petition needs to include the Company's Trade Name, the date of establishment of the company, the company's nationality, the company's capital, the name and surname of the fully authorized representative in Turkey, the commitment that the representative shall comply with the applicable laws and regulations in the transactions he will perform within the borders of Turkey, the branch's address, the branch's field of activity, and information on the branch's capital.

- Branch opening declaration signed by the authorized person(s) of the Parent Company

It needs to be signed by the authorized person(s) of the Parent Company. It should be certified either by a notary public or the Turkish Consulate. If it is certified by the notary public, it needs to be apostilled accordance with the Hague Convention.

- Articles of Association of the Parent Company

It needs to be certified either by a notary public or the Turkish Consulate. If it is issued before the notary public, it needs to be apostilled.

- The certificate of establishment of the company, and the document showing that it is still operating. These documents need to be presented along with their originals and translations.

It needs to be certified either by a notary public or the Turkish Consulate. If it is issued before the notary public, it needs to be apostilled.

- The original and translation of the power of attorney granted to the representative in Turkey.

It needs to be certified either by a notary public or the Turkish Consulate. If it is issued before the notary public, it needs to be apostilled.

3. After obtaining permission from the Ministry of Trade, it is necessary to apply to the respective Trade Registry Office along with the following documents:

- Documents showing that the permission has been obtained from the Ministry of Trade,
- Branch opening declaration signed by the authorized person(s) of the Parent Company

It needs to be certified either by a notary public or the Turkish Consulate. If it is issued before the notary public, it needs to be apostilled.

- Notarized power of attorney,
- Chamber of Commerce registration form,
- Statement of signature of the branch representative.

If the foreign director issues the statement of signature abroad, it needs to be issued before the notary public in Turkish (Apostille and/or translation is not acceptable.) The certified copy of the passport should also be added.

- Confirmation of the recognition in accordance with the Section 29 of the Trade Registry Regulations
- A notarized ID card if the branch representative is of Turkish national, a copy of the notarized passport if s/he is of foreign national.

Please Note: The title of the initial branches of foreign companies to be opened in Turkey must be as follows: "Parent Company's title + country where the head office is situated + Main Branch in Istanbul".

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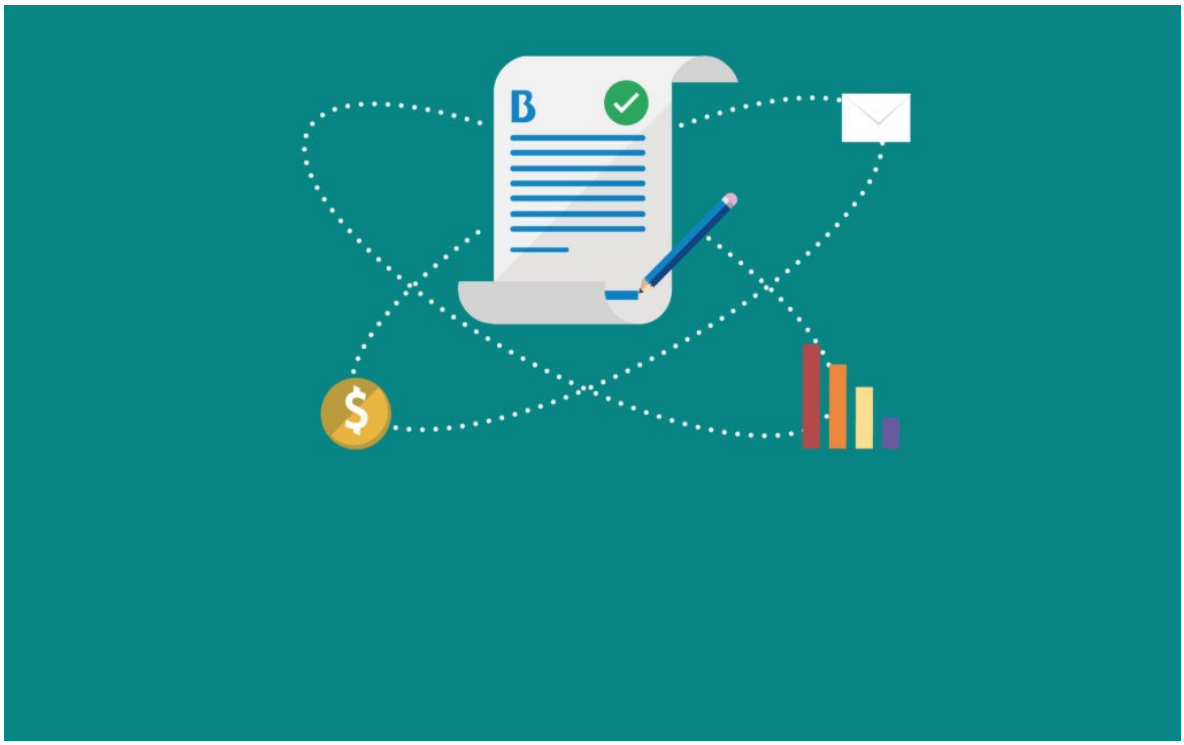
ESTABLISHMENT OF A BRANCH IN TURKEY REQUIRES QUITE MORE FORMAL REQUIREMENTS AND DOCUMENTATION THAN ESTABLISHING A NEW COMPANY IN TURKEY.

IN ADDITION, ONLY COMPANIES WHOSE CAPITAL IS DIVIDED INTO SHARES CAN OPEN BRANCHES. (JOINT STOCK COMPANY, LIMITED LIABILITY COMPANY, AND LIMITED PARTNERSHIP).

IN ORDER FOR FOREIGN COMPANIES TO OPEN BRANCHES IN TURKEY, IT IS ALSO NECESSARY TO OBTAIN PERMISSION FROM THE MINISTRY OF TRADE OF THE REPUBLIC OF TURKEY.

SMART CONTRACTS FROM THE PERSPECTIVE OF TURKISH LAW



- An Assessment in Terms of Standards of Proof and Enforceability -

Introduction

Smart Contracts nowadays are very popular with an increasingly high importance as one of the new legal concepts of the contracts.

However, many legal systems still have difficulties in following these developments in technology at the same speed.

This raises many problems, especially in terms of “proving” and “enforceability” of the Smart Contracts in legal terms, especially when any dispute arises from those contracts.

The main problem here is the questions of which smart contracts will be legally enforceable and how the contract is enforced through a legal proceeding when a party breaches the contract. In short, how those contracts will become “visible” before the legal authorities when a dispute occurs?

Within this scope, it is now an inevitable requirement for modern law systems to renovate themselves and regulate their laws to cover this new and ever-developing type of contract, which has already been widely accepted in technological life.

In this article, we will first define smart contracts in general terms and then evaluate smart contracts within the framework of Turkish law, especially in terms of “provability” and “enforceability”.

What is A Smart Contract?

Smart contracts are defined as the agreements wherein execution is automated, usually by computers.

Such contracts are designed to ensure performance without recourse to the courts.

Automation ensures performance, for better or worse, by excising human discretion from contract execution

According to another definition, a smart contract is an agreement whose execution is both automatable and enforceable.

Automatable by computer, although some parts may require human input and control.

Enforceable by either legal enforcement of rights and obligations or tamper-proof execution.” However, as the technology improved, the definition of "smart contract" has also changed. Especially with the emergence of digital currency systems, which have been very popular in recent years, smart contracts have taken on another dimension.

According to the current definition; "Smart contract" is the name used to describe a computer code maintained on a blockchain-based platform that automatically fulfils all the obligations of a contract.

According to Meyer/Schuppli, smart contracts are digital programs which are “based on Blockchain, that execute themselves when certain conditions occur and self-executive and tamper-proof due to decentralized and cryptographic design of Blockchain” (Meyer and Schuppli, 2017: 208)

What is the Content of a Smart Contract?

Nick Szabo, law professor, computer scientist and author first theorized and described smart contracts in a series of articles he wrote in the mid-1990s. According to him; the oldest samples to this kind of contract are the contract which people made with the vending machines. Yes, that is correct!

If the machine is operating properly and money is inserted into the machine, then a contract for sale will be executed automatically, which is just a smart contract!

You may see no legal problem with making such an agreement with a vending machine since your risk is limited to the question of whether it will give you the product or not. When the machine gives the packet of the crisps you choose, the contract is completed.

However, in today's world a smart contract usually means more than this, even it sometimes means a huge bundle of the commercial and financial risks.

So, the question rises up; what is the concept of the "Smart Contract"?

In Smart Contract platforms, like Ethereum, each user has their own account and can send transactions from account to account. If this transaction contains instructions, we call it a "smart contract".

As stated, a smart contract is actually consisting of a computer code.

According to a very well-known example, brought up by Nick Szabo, describing what can happen to someone who rents a car with a smart contract and violates their rent;

> *"If the car is being used to secure credit, strong security implemented in this traditional way would create a headache for the creditor - the repo man would no longer be able to confiscate a deadbeat's car.*
>
> *To redress this problem, we can create a smart lien protocol: if the owner fails to make payments, the smart contract invokes the lien protocol, which returns control of the car keys to the bank.*
>
> *This protocol might be much cheaper and more effective than a repo man.*
>
> *A further reification would probably remove the lien when the loan has been paid off, as well as account for hardship and operational exceptions. For example, it would be rude to revoke operation of the car while it is doing 75 down the freeway.*
>
> *In this process of successive refinement, we have gone from a crude security system to a reified contract:*
>
> *(1) A lock to selectively let in the owner and exclude third parties;*
>
> *(2) A back door to let in the creditor;*
>
> *(3a) Creditor back door switched on only upon non-payments for a certain period of time; and*
>
> *(3b) The final electronic payment permanently switches off the back door."*

Within this scope, we can actually say that Smart Contracts automatically contains two types of main "instruction" which are also found in many traditional contracts.

- Make Payment if certain prerequisites are met
- Impose sanctions in case of non-compliance with obligations

But unlike traditional contracts, smart contracts automatically execute these "instructions" via an electronic code, without any human intervention.

So, just like in an episode from Black Mirror, you give the instruction and the codes run the rest!

But what is the reflection of this new type of contract in the actual legal system, which is shaped by human life and various possibilities?

Actually, it is still debated in most of the legal systems whether smart contracts are contracts in legal sense or not.

WITHIN THIS SCOPE, IN CASE WE PUT ASIDE THE PROBLEMS IN TERMS OF "ENFORCEABILITY" OF SMART CONTRACTS UNDER TURKISH LAW, WE CAN SAY THAT THERE ARE NO LEGAL OBSTACLES TO MAKE A SMART CONTRACT IN CASE THE TYPE OF THE CONTRACT IS NOT SUBJECT TO THE FORM REQUIREMENT.

Smart Contracts Under Turkish Law

Provisions on the regulation of contracts in the Turkish legal system are included in many relevant legislations, especially in the Turkish Code of Obligations No. 6098.

In order to explain the validity of smart contracts according to Turkish law, it is necessary to explain the "principle of contractual freedom" that applies to contracts in Turkish law.

In accordance with Article 26 of Turkish Code of Obligation, the parties of a contract are free to determine to conclude a contract and to determine the content of the contract as long as;

◊ the contract is not contrary to public order

◊ the contract does not violate any personal rights

◊ the subject of the contract is not impossible

Besides, in accordance with Article 48 of Turkish Constitution

> *"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."*

Under the light of the foregoing, contracts structured in accordance with free will of the parties and which do not breach limitations determined under Turkish Code of Obligations are valid contracts.

However, this can be stated only for the contracts which are not subject to any form requirement according to the Law.

Because, according to Turkish law, some contracts are subject to form requirements.

For example, vehicle sales agreements must be in written form and issued before the notary; or a real estate sales contracts are valid only if they are made in in written form and before the land registry.

Within this scope, in case we put aside the problems in terms of "enforceability" of smart contracts under Turkish Law, we can say that there are no legal obstacles to make a smart contract in case the type of the contract is not subject to the form requirement.

However, this is a rough inference made only according to the wording of the law. In Turkish law practice, there is no actual implementation of a smart contract – made on the basis of a blockchain and/or other means of crypto currency- , since crypto currency is not accepted as one of the means of payment regulated in Turkish law.

Evaluation of The Smart Contracts in Terms of Standards of Proof Under Turkish Law

The "principle of circumstantial proof" is preferred under the Turkish law.

In cases where the Law does not require proving by means of a certain evidence, it is possible to prove any matter by means of any other proofs which are not prescribed under the Law.

Proofs are divided into two groups, namely formal proofs, and discretionary proofs, depending on the manner of consideration thereof by the judges.

In accordance with the Turkish Code of Civil Procedure, in general terms, we define the proofs as "Conclusive Proof" and "Discretionary Proof".

The Conclusive Proofs are DEEDS (sec. 200 et seq. of the Code of Civil Procedure), oaths (sec. 225 et seq. of the Code of Civil Procedure) and final judgments (sec. 303 of the Code of Civil Procedure).

The discretionary proofs are namely; witnesses (sec. 240-265 of the Code of Civil Procedure), experts (sec. 266-287 of the Code of Civil Procedure) and views (sec. 288-292 of the Code of Civil Procedure).

From the point of view of standards of proof under Turkish Law, the type of the "smart contract" is important.

In this context, the definitions and applications of "Deed" and "documents" under Turkish law should be evaluated carefully.

First, the definition of "Document" shall be introduced. The TCCP defines what constitutes a "Document" under the sec.199 as follows:

> *Written or printed texts or documents, certificates, drawings, plans, sketches, photographs, films, visual or audio data and electronic data and other means of collection of information, which are convenient for proving the facts related to the dispute, are records under this Act."*

Section 205 Conclusive force of ordinary deeds

> *(1) The ordinary deeds from those who have been admitted before the court or who have denied it by the court ordinary promissory notes that are considered SAD are considered conclusive proof unless proven otherwise.*
>
> ***(2) Electronic data created duly with secure electronic signature shall serve as the deed.***
>
> *(3) The judge examines ex officio that whether the electronic signed document, presented to the court as proof, has been created with secure electronic signature, or not*

Within this scope, the smart contract which exist in digital platform and can be seen through the electronic data that creates itself, can be deemed as "document" in accordance with Article 199 of Turkish Code od Civil Procedure.

Besides, in accordance with Article 205 in case a smart contract is created duly with secure electronic signature, it can be served as the deed, which means a conclusive proof.

Are Smart Contracts Really Enforceable Under Turkish Law?

Unlike traditional contracts, smart contracts, are pre-conditioned digital contracts that depend on the realization of some kind of conditions.

In smart contracts, the result of the contract depends on the realization of the obligation. In this sense, payment occurs automatically if a condition is met.

So, when the debtor does not pay on time he incurs in breach -non-performance- and the procedure of the smart contract ends.

Therefore, to the content of the contract in accordance with the codes of that smarts contract and the debt and liability of smart contracts cannot arise unless alternative situations are written.

In other words, all possibilities including all terms, penalties, debts and liabilities and any conditional routing need to be included in the digital content of the codes of the smart contracts.

In this sense, in technical terms, a breach of the smart contract means termination of the contract. So, a breach of contract imposes its own sanction.

However, termination of a contract of course is not the only result of the breach of the contract.

In Turkish law; in case one of the parties breaches the contract, the other party can bring a claim for his “positive/ negative losses " and/or can apply the "rights of choice" etc.

In our opinion, if the existence of a smart contract is proven in accordance with the rules of proof damages arising from that contract should be claimed.

Besides, the party who does not breach the contract should be able to use the rights of choice regulated under Turkish Code of Obligations.

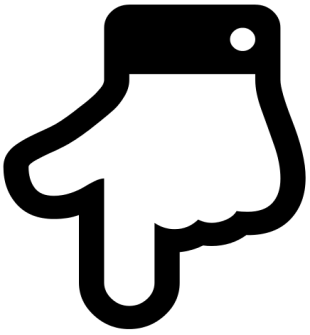
However, the problem here is that; in smart contracts, where the subject matter of the contract is usually decided as based on digital money (especially as a “crypto currency”), the economic equivalent of these losses is unclear.

This is exactly why, although there is no legal obstacle to make smart contracts under Turkish Law, it is not easy to say that those types of contract are fully enforceable under Turkish Law.

Is it possible to amend a Smart Contract?

In traditional contracts, contracts can be amended upon the mutual agreement of parties. In addition, in the case of hardship or excessive difficulty in performance, there is a possibility to request the adaptation of the contract. Well is this possible in a smart contract?

It can be said that in smart contracts, the code of the contract is written at the beginning and it is not possible to change it.



This change can only be resolved by creating a separate legal contract between the parties.

However, in this case, the contract between the parties turns into a mixed type contract and it is not only a smart contract anymore.

Is it possible to terminate a Smart Contract?

In traditional contracts in the event of justified reasons or force majeure, one of the parties may terminate the contract.

So, is this possible in smart contracts?

As mentioned, smart contracts are a set of code software. In this sense, it is quite difficult to determine the “termination conditions” for smart contracts.

Because the justifiable conditions for termination can be interpreted by human mind and the question of how the codes under the smart contracts can evaluate those “justifiable conditions” is an important problem.

In this sense, there is no legal certainty as to whether unilateral termination of smart contracts due to justified reasons and/or force majeure is possible or not.

Conclusion

In conclusion, a smart contract, with its own computer code can well be considered as a kind of sui generis regulation which has its own existence in the legal field.

It is clear that smart contracts will provide many convenience and practicality in both commercial and social life.

However, because of its automatic structure, which does not accept any human intervention, those contracts do not tolerate any error either.

Therefore, the lawyers and legislators should begin to develop an understanding of the specific problems brought by these technologies and produce legally compatible solutions.
Last but not least, it is impossible to separate this development from developments related to digital money.

Therefore, it is an inevitable requirement for Turkish law, to renovate itself and regulate laws to cover this ever-developing means of money and the new types of contracts.

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WIPO LAUNCHES NEW FREE DATABASE OF JUDICIAL DECISIONS ON INTELLECTUAL PROPERTY: WIPO LEX-JUDGMENTS

The World Intellectual Property Organization (WIPO) today launched WIPO Lex-Judgments, a new database providing free-of-charge access to leading judicial decisions related to IP law from around the world.

WIPO-Lex Judgments contributes to a greater overall understanding of how courts are handling these issues, by making available judgments - selectively curated by the relevant authorities in participating member states - that establish precedent or offer a persuasive interpretation of IP law in their jurisdiction. At launch, WIPO Lex-Judgments contained over 400 documents from 10 countries.

By fostering accessibility of information on judicial decisions, WIPO Lex-Judgments will contribute to informing and strengthening courts' analyses and reasoning, as well as to discerning both converging and contrasting national approaches to common IP questions.

Source:
https://www.wipo.int/pressroom/en/articles/2020/article_0022.html

A GUIDANCE ON DIGITAL DATA ANALYSIS FOR ON-SITE CHECKS PUBLISHED BY THE TURKISH COMPETITION

The Turkish Competition Authority published the "Guidance on Digital Data Analysis for On-Site Checks". The guidance sets out that the personnel of the commissioned Institution are authorized and empowered to perform analyses on digital media including any and all kinds of data in relation to the establishment, as well as the principles and procedures on such analyses.

Although the guidance is a repeated version of the current practices, it is a quite important innovation to see that the portable means of communication (mobile phone, tablet, etc.) may be now reviewed by the Commissioned Professionals to determine that whether they include any digital data in relation to the establishment, or not.

As per this provision, even the personal telephones of the company's employees may be inspected to determine that whether they are used only for personal or business-related purposes.

(For further information on the guidance, please see: https://www.rekabet.gov.tr/Dosya/kilavuzlar/yerinde-inceleme-kilavuz1-20201009091644514-pdf)

E-HEARING SYSTEM EMPLOYED IN TURKISH LAW CASES!

During the pandemic arising due to Covid-19, lawyers had great difficulties in attending the hearings held in different provinces as long-distance travels were banned in various times across Turkey and it created a high level of health-related risks during times even such ban was not implemented.

Furthermore, it has become riskier to visit the court houses to attend the hearings even in the same province during these times when the virus has become more and more effective.

Following such developments, the e-hearing application, employed based on the mutual consent of the parties before (which was not seen to have been realized in practice), is now allowed to be employed upon the request of either of the parties and based on the decision of the judge, thanks to the Law put into effect on July 28, 2020. In line with this regulation, witnesses and experts may be heard at their respective place by audio-visual means.

With its first trials held in 5 courts at the Western Court House of Ankara, the e-hearings were started to be employed in 42 courts across various court houses in Istanbul as of October 20. The Ministry of Justice aims to increase the number of courts with e-hearing system in place to 200 by the end of this year, and to extend this application across Turkey as much as possible in 2021.

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