





## Private Antitrust Litigation 2012

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# Turkey

Sahin Ardiyok, Ali Ilıcak and Hilal Utku

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## Legislation and jurisdiction

- 1** How would you summarise the development of private antitrust litigation?

Private enforcement has been in force in Turkey since the entry into force of the Competition Act in 1994. As of today, however, no damages decision has yet been concluded by High Court of Appeal. This situation is due to several factors, some of which are: the limited awareness of the victims, prescription periods, hesitation of the civil courts, and the long duration of the proceedings.

Nevertheless, nowadays, the academic environment is quite interested in private antitrust litigation. Moreover, both the Turkish Competition Authority (TCA) and the High Court of Appeal are discussing possible ways to improve private enforcement. Please see 'Update and trends' for the recent developments in private antitrust litigation.

- 2** Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Yes, private antitrust actions are mandated by statute. Section 5 of the Competition Act enables the victims of the competition infringements to bring damages claims before the civil courts. The Act also stipulates the invalidity of the agreements or decisions against the Competition Act.

- 3** If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Article 57 of the Competition Act obliges 'anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services' to compensate for any damages of the injured.

The damage to be claimed is defined as the difference between the amount that has been paid by the victims and the amount that these victims would have paid if competition had not been limited. As for the competitors affected by the infringement, the Act enables these undertakings to request all of their damages to be compensated. In determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

If the damage arises from an agreement, decision or gross negligence of the parties, the Act also enables the judge, upon the request of the victims, to triple the amount of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

Civil courts have an exclusive jurisdiction over private antitrust claims, and apart from special dispositions of the Competition Act, the general principles of the Code of Obligations (CoO) on illicit acts governs the process.

- 4** In what types of antitrust matters are private actions available?

The Act clearly states the anti-competitive agreements and the abuse of dominant position as the infringements that enable the victims to claim the compensation of the damages suffered from these infringements. However, scholars discuss the possibility of damages claims for the infringement of article 7 of the Competition Act, which prohibits mergers and acquisitions that restrict competition via creation of reinforcement of a dominant position.

- 5** What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The internal competence of Turkish courts in private antitrust litigation is governed by general principles of the Code of Civil Procedure (CCP). Before entering into detail of the competence issue, brief information shall be given with regards to the CCP. The current CCP will remain in force until 1 October 2011 and will be replaced by Act No. 6100 on Civil Procedure.

In terms of the current CCP, the competent court for illicit acts is the court of the geographical district where the act has been committed. Act No. 6100 on Civil Procedure, which will enter in to force on October 2011 expands on this general principle by attributing competence to the local court of the geographic district where the damage has arisen or, the court located in the domicile of the claimant.

As for the general principle of competence, (ie, the court of the place where the illicit act (competition infringement) occurred), this place will be defined as the place where the essential elements of the act have been committed. When it comes to the location where the damage has arisen, this will probably be linked to the place where the claimant has suffered from the infringement. Taking into account the fact that the TCA defines the relevant geographical market as 'Turkey', the court of the domicile of the claimant will become competent in a significant part of the cases.

- 6** Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals, including those from other jurisdictions.

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## Private action procedure

- 7** May litigation be funded by third parties? Are contingency fees available?

In some jurisdictions, litigation financing companies fund litigation costs, bear the financial risk in case of success and receive a certain percentage of the proceeds. However, in Turkey, these instruments are not available and litigation shall only be funded by lawyers. Before the courts, only lawyers are eligible to represent and act on

behalf of clients in legal process and litigation. According to article 164 of the Attorneyship Act, the attorney fee may be agreed as a certain percentage or money to be litigated or adjudicated, not to exceed 25 per cent.

Contingency fees are available in Turkish law. In the event of a successful outcome of the proceeding, the lawyers may receive a certain percentage of the proceeds recovered by the claimant, where the claimant and the representatives (lawyers) agreed on this beforehand.

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**8** Are jury trials available?

No. Under the Turkish law, ‘jury trials’ have been recognised neither in civil nor in criminal trials in Turkey.

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**9** What pre-trial discovery procedures are available?

Under Turkish law, there are no ‘pre-trial discovery’ instruments equivalent to those in US civil law jurisdictions. On the other hand, there are some discovery proceedings (ie, requesting declaratory decisions for the breach of trademark and recording of evidence, similar to pre-trial discovery procedures in common law jurisdictions). However, it is considered that these procedures in Turkish Law system cannot be used in antitrust private litigation since the Turkish courts stipulate that the TCA’s decision is mandatory in order to file an antitrust action.

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**10** What evidence is admissible?

In general, any testimonial, documentary, or tangible evidence is admissible provided that it is enough to prove or disprove any fact that is at issue in the proceeding. As per the CCP that the Competition Act refers to, evidence may be divided as direct evidence (confession, documents, oath, and definitive judgment) or circumstantial evidences (witness, expert opinions, viewing). Hence, according to CCP, all kinds of evidence are admitted in private law proceedings. As stated below (question 15), any kind of evidence is admissible in private antitrust actions.

In respect of a decision of the TCA, it is disputable whether TCA’s decision may constitute direct evidence or not. The common point is that its decision may not constitute direct evidence, for the reason that this decision is not a court judgment. However, if the decision is subjected to an appeal and the Council of State refuses to annul, it may constitute direct evidence, since the approval decision is a definitive judgment.

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**11** What evidence is protected by legal privilege?

Generally, the concept of legal privilege exists in Turkey for lawyer–client communications. The claimant is not entitled to request that the defendant produces evidence that relates to communications between the defendant and its in-house counsel or lawyers. However, during the proceedings, the procedural law will be the procedure of the courts according to the CCP. In other words, the private enforcement is not subjected to the procedural rules of TCA. Then, pursuant to the general rules of law, the judges will provide required measures to protect legal privilege including the documents, electronic communication and other. However, courts may also order one of the parties or a third party to submit relevant documents regarding the case or request documents from the TCA’s file. Parties are not allowed to decline from submitting evidence to the court for trade secret reasons.

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**12** Are private actions available where there has been a criminal conviction in respect of the same matter?

In accordance with the Turkish legislation, competition law infringements are not subject to criminal law. In the event that the TCA imposes an administrative fine based on the Competition Act, criminal proceedings related to the same matter are not allowed. However, if the actions or behaviour that will normally constitute a crime under criminal law or specific law area, (ie, public procurement law), and are part of the cartel practice, then they will also be penalised under the competition law. As a result, there are no private actions where there has been a criminal conviction in respect of the same matter since the private actions depend on the competition law infringements, which are penalised by the TCA.

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**13** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

As stated above (question 12), criminal proceedings are not recognised in Turkish competition law.

Leniency applicants are not protected from follow-on litigation. According to the administrative procedure of the TCA, where the undertaking involved in a cartel informs the TCA, it avoids punishment or benefit from a reduction of fine under certain circumstances. However, there are currently no rules on leniency during private enforcement procedure. In practice, leniency applications may not be protected from follow-on litigation, in order to recover the losses of the claimant. Further to this, the Draft Act on the Amendment of the Competition Act stipulates an essential amendment on the article that envisages private enforcement against infringements. Article 26 of the Draft Act protects defendants from triple damage claims, in case a non-imposition and reduction of fines is applied with regard to those actively cooperating with the TCA.

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**14** In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Under article 57 of the Turkish Competition Act, a private action does not depend on the Competition Authority’s enforcement decision that is pending or appealed. Thus, it is possible to bring a private action theoretically even if no administrative proceeding, (ie, investigation or preliminary investigation) have been initiated or no final decision has been adopted by the Turkish Competition Authority.

However, the procedure seems to be changed based on the court practices in Turkey. In this respect, the High Court of Appeal ruled in one of its decisions that if there is no decision that constitutes the basis of the action for damages adopted by the TCA, a court of first instance dealing with private action must stay proceedings until a decision by the TCA is resolved. Thus, if the TCA has already launched an investigation regarding the infringements of competition rules that is also the subject of the case before the court of first instance, notwithstanding the fact that no imperative legislation provides this, the court will usually prefer to wait until the investigation of the TCA is finished before continuing civil proceedings. In addition to this, if the TCA has not launched any investigation related to the assertions in the private action case before the national court, in this case, the national court will request that the plaintiff apply to the TCA in order to be given an administrative decision regarding the alleged competition breach.

It should be noted that although there are not any legal obstacles in order to bring a private action related to the competition law infringements before the courts directly, the courts of first instance prefer to stay its proceedings based on the High Court of Appeal practice mentioned above. In this respect, the new Draft Competition Act has provisions aimed at solving this problem. For example, the court may request that the Competition Authority provides an

opinion with regard to the alleged anti-competitive conduct as a mandatory legal expert. In this case, the court may stay its proceedings until the opinion of the Competition Authority is adopted.

**15** What is the applicable standard of proof for claimants and defendants?

Under the CCP, in general, the burden of proof lies with the plaintiff who asserts that the acts of the other party constitute an infringement of Competition Act. It should be noted that action for damages arising from competition law infringements are subject to general evidence rules applicable to the illicit acts in civil law. In this respect, to succeed in obtaining damages, plaintiffs must provide convincing evidence of a breach of competition law attributable to the defendant, the existence of damage, and the causal link between the unlawful act and the damage which has occurred.

The CCP does not define the standard of proof such as ‘balance of probabilities’ or ‘beyond reasonable doubt’. However, it can be said that proving or showing of the relevant fact is sufficient for standard of proof. Moreover, in terms of Turkish legislation, the judge has a discretionary power to analyse the evidence and decide whether it is sufficiently convincing.

In accordance with article 59, titled ‘Burden of Proof’, of the Turkish Competition Act, the existence of agreements, decisions and practices restricting competition can be proved by any kind of evidence. Although burden of proof lies with the plaintiff, an exception, in the event that a specific condition is provided, prevails regarding proof of the concerted practice. Accordingly, if the injured parties submit to the courts proofs such as, particularly, the actual sharing of markets, stability of the market price for quite a long time, the price increase within close intervals by the undertakings operating in the market, which gives the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof lies with the defendants that the undertakings are not engaged in concerted practice.

**16** What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

‘Collective party proceedings’ have not been recognised in private enforcement proceedings in Turkey. As for the ‘single party enforcements’, there is no standard timetable for court proceedings. The High Court of Appeal is the last instance for reviewing rulings and judgments rendered by first instance courts upon appeal. It is also able to modify and revise its own ruling upon request.

The parties have no explicit rights to accelerate proceedings. Each party has the possibility to accelerate the proceedings by its own conduct, such as by not requesting an extension of time limits, etc. Generally, the duration of court proceedings is relatively long and the total length of proceedings including all instances is therefore two-and-a-half to three years, approximately. However, the New Act No. 6100 on Civil Procedure recognises an essential change that may affect the duration of the proceedings. According to articles 184 and 186, following the legal examination, the court shall summon the parties to hearing after the evidences are evaluated. In other words, there will be no hearing in case the evidence on claims and the defences are not examined. For this reason, the new recognition may reduce the long process. In addition, the opinions rendered by the High Court of Appeal are taken as precedents for legal rulings in the courts of first instance, so that uniform application may be achieved. It is considered to be possible for the parties to include more precedents in their applications to accelerate long discussion proceedings.

**17** What are the relevant limitation periods?

In Turkey, the question of whether a private action is time-barred or not is governed by the Code of Obligations. According to article 60,

a private claim shall expire in one year, but in any case, the ability to claim for damages expires after 10 years. These limitation periods are soon to be amended by the New Code of Obligations (to become effective on 1 July 2012) to two years for the private claim and 10 years in any case.

As for the starting dates of the limitation, the one-year period (two years for the New Act) for general or intangible damage based on tort liability under competition law starts from the date when the party has received awareness. The 10-year period starts from the date when the act causing damage took place. Customising these to the competition rules requires a comprehensive interpretation.

According to article 54 of the Competition Act, the periods start from the reasoned decision. In other words, the rights and obligations shall be valid from the date the reasoned decision is notified to the parties. Thus, the logic of the commence date is that the prejudiced party receives knowledge of the damage and of the person liable only after the reasoned decision is noticed.

**18** What appeals are available? Is appeal available on the facts or on the law?

Parties can appeal the decision of the courts of first instance both on the facts and on the procedure to the High Court of Appeal. However, it should be noted that under the CCP there are two kinds of legal remedies for the decisions of courts of first instance; Regional Court of Appeal and High Court of Appeal. Appealing a decision before the Regional Court of Appeal allows that all evidence can be assessed based on the grounds including errors of law, fact, or procedure as is in the court of first instance’s proceeding. However, under the Turkish legal system, regional courts of appeal have not entered into effect yet. Therefore, the High Court of Appeal had to fill this gap as the single appeal authority regarding the decisions of the courts of first instance, including private antitrust action.

**Collective actions**

**19** Are collective proceedings available in respect of antitrust claims?

There are no provisions regarding collective actions under the CCP, which is still in force. However, the new Act No. 6100, which will enter into force on 1 October 2011, recognises collective action proceedings. However, it should be noted that the collective action proceedings that will be recognised have a very limited scope. A ‘class’ will consist of a group of people who are a member of an association or another legal entity and it will not be possible to widen the scope of this class to other persons who are harmed as a result of the same action but who are not the members of the said association or legal entity. In other words, it will not be possible to define the class on a case-by-case basis but the class is pre-defined as the members of the association or legal entity whose rights have been violated.

Therefore, from 1 October 2011, collective proceedings, with a very limited scope, will be available in respect of antitrust claims.

**20** Are collective proceedings mandated by legislation?

No, collective proceedings are not mandated by law, but some associations have the right to commence collective proceedings. For example, under article 24 of Code on the Protection of Consumers, consumer organisations have the right to commence legal proceedings, if mass-produced goods are defective. Also, under article 23/4 of the same Code, it is stated that consumer organisations and the relevant ministry have the right to commence legal actions if there is a violation of the Code on the Protection of Consumers and such violation is not a concern of an individual consumer but it concerns all the consumers. However, even though the consumer organisations are allowed to represent consumers who are not its members, the scope of this right is limited to the violations of Act No. 4077

### Update and trends

Even though there is not any case law approved by the High Court of Appeal in the field of private antitrust litigation, this domain will probably be subject to significant developments in the future. First of all, the High Court of Appeal has become more interested in this area and seems to be motivated to ensure the effective application of the Competition Act. In this respect, the High Court of Appeal is aware of the fact that the common interpretation with respect to the application of prescription periods and other conditions of liability is required. On the other hand, the Competition Board's decisions are more detailed with regards to the scope and nature of the harm caused by the infringement, when compared to decisions adopted in the first years of its establishment.

The Draft Act on the Amendment of Competition Act, which has been discussed at the relevant Commissions of the Turkish National Assembly since 2008, provides more detailed provisions with regards to private antitrust litigation. First of all, the breach of article 7 of the Competition Act on the notification of mergers and acquisitions is clearly stated as an infringement that enables claimants to seek the compensation of their damage. Furthermore, the Draft Act ends the debate with regards to the scope of the triple damage claims, by stating 'up to three times of the damage'. Although the current Act clearly states 'triple damage', this issue has been discussed for a long time in order to conclude whether it shall be read as 'up to three times' or 'triple damage'. Finally, as stated in our answer to question 13, the Draft Act also contains special provisions to ensure the efficient application of leniency disposition, by protecting leniency applicants from triple damage claims.

The Draft Act stipulates that courts may appoint the Competition Board as a mandatory legal expert. However, this provision should be amended as such a rule would transfer the judicial power to the TCA. Yet in Turkey, judicial power lies solely with the courts and such a power should not be transferred to an administrative body.

The major problem with the private actions is the concept of 'stay of proceedings', which is not mandated by law but was introduced by the precedents of High Court of Appeal. 'Stay of proceedings' with respect to competition law refers to a case where the proceedings of the private actions are halted until the TCA renders a decision and the Council of State upholds or overrules that decision. Such a precedent, which has no statutory basis, changes the judicial system entirely. As the appeal court for the decisions of the Competition Board is the Council of State and the appeal court for private actions is the High Court of Appeal, it can be argued that the legislator had knowingly allowed the same issue to be handled by both the administrative law and the private law. However, if it is thought that a conflict of judgments would be a problem, the remedy would be to follow the French example and the make the High Court of Appeal the appeal court for the decisions of the Competition Board.

As a conclusion, although the private antitrust application has not been applied effectively in Turkey up to now, both the new approach of the Competition Board and of the High Court of Appeal and the Draft Act on the Amendment of the Competition Act aim to ameliorate this situation.

and thus, consumer organisations cannot commence collective action claiming damages regarding an antitrust injury.

- 21** If collective proceedings are allowed, is there a certification process? What is the test?

According to article 113 of the new CCP, which will come into force on 1 October 2011, only an association or a legal entity can commence collective proceedings to protect the rights of its members. The same article also dictates that the legal entity must act in accordance with its statute (for example its articles of association) and must not exceed the limits set by that statute.

- 22** Have courts certified collective proceedings in antitrust matters?

No, the courts have not certified collective proceedings in antitrust matters yet, however there are no legal barriers for the courts to do so. Moreover, when it is considered that Code on the Protection of Consumers explicitly states that consumer organisations have the right to launch collective proceedings in certain issues, it is probable that these organisations will also be allowed to use collective proceedings in antitrust issues.

- 23** Are 'indirect purchaser claims' permissible in collective and single party proceedings?

There are no explicit provisions regarding indirect purchaser claims. However, article 58/2 of the Competition Act states that any damaged party has the right to ask for compensation. Still, there is no case law in Turkey that shows that the indirect purchaser claims are permissible, in either collective or single party proceedings. However, it should be reminded that under the Turkish Code of Obligations, damage should not be compensated more than once. Thus, it is considered that if the injured party is an indirect purchaser, that is, the consumer in a cartel case, provided that the direct purchaser's claim is accepted and his damage is compensated, the indirect purchaser's claims will not be admissible.

- 24** Can plaintiffs opt out or opt in?

Both the current CCP, which is still in force, and the new Act No. 6100 on Civil Procedure, which will be in force as of 1 October 2011, have provisions similar to 'join of parties'. According to article 43/2 of the current Act, and article 57/c of the new Act, the plaintiffs will be able to opt in as long as their claims have a common basis with the claims of the pending adjudication. The plaintiffs are also able to opt out if they wish to do so. However, the plaintiff may lose his or her right to raise the same claims again in the future.

- 25** Do collective settlements require judicial authorisation?

As a general rule, disputing parties are allowed to reach an out-of-court settlement. However, since collective settlements are not mandated by legislation in Turkey, judicial authorisation is not required for the collective settlement under Turkish law.

- 26** If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Turkey is not divided into multiple jurisdictions.

- 27** Has a plaintiffs' collective-proceeding bar developed?

No, a plaintiffs' collective bar association has not developed yet in Turkey since the collective proceedings is a new institution for the Turkish legal system, which has been recognised for the first time in the new CCP. (Please see questions 19 and 20.)

### Remedies

- 28** What forms of compensation are available and on what basis are they allowed?

In the Turkish law of obligations, principally, the injured party is only entitled to request compensation amounting up to its damages. However, the treble damages practice in Turkish competition law is an exception to this rule.

As per the Code of Obligations, the amount of compensation is determined by the court depending on the nature of the situation and the level of the defendant's fault. If the injured party had any benefits as a result of the infringement, these benefits will be deducted from the amount of the compensation.

In the Competition Act, it is specifically provided that the injured party has the right to claim damages, which is the difference between the cost they paid and the cost they would have paid if competition had not been limited. Also, treble damages is claimable in Turkish competition law where the damages arise from an agreement or decision of the parties, or from cases involving gross negligence of them including abuse of dominance cases.

**29** What other forms of remedy are available?

The claimant may also seek interim measures from the court if it is harmed by anti-competitive behaviour. In the event that an immediate risk arises from the potential delay of the decision, the claimant can request from the court to seize the assets of the defendant. Furthermore, courts can issue interim measures ordering the defendant to perform a certain action, such as supplying the claimant with certain goods, if the claimant would otherwise lose important customers. The Draft Act on the Amendment of the Competition Act provides the claimants with the possibility of demanding interim measures in order to cease the infringement.

**30** Are punitive or exemplary damages available?

The court can determine compensation in favour of the claimant amounting to three times the material damages suffered. Treble damages are intended to serve a purely punitive function.

**31** Is there provision for interest on damages awards?

There is no specific provision regarding interest on damages awarded. On the other hand, there is a precedent of the Assembly of Civil Chambers in Court of Appeals in 2005 in respect of interests on damages arisen from torts which is as follows: 'The defendant is liable from the interests on damages as of the date the illicit act is accrued.'

Consequently, the defendants are liable for the default interest, which is determined by law as 9 per cent of the damages as of 1 January 2011.

**32** Are the fines imposed by competition authorities taken into account when settling damages?

Fines imposed by competition authorities are not taken into account in determining civil damages.

**33** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The legal costs including the costs of the court proceedings and the attorneys' fees are allocated depending on the outcome of the case, in other words, the unsuccessful party bears the legal costs. Attorneys' fees are calculated on the basis of statutory fees.

**34** Is liability imposed on a joint and several basis?

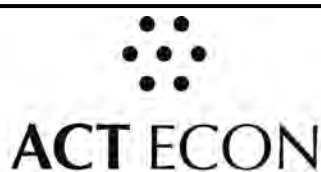
Principally, the claimant has the right to claim damages from one of or all of the defendants who caused the damages severally. This principle is also repeated in article 57 of Competition Act. According to article 50 of Turkish Code of Obligations, liability on joint and several basis is only applicable when the defendants 'sustained the damages severally'. Each defendant is liable for the totality of the damages incurred by the claimant regardless of its participation level and/or its contribution position.

**35** Is there a possibility for contribution and indemnity among defendants?

Where several defendants are held severally liable for an anti-competitive behaviour, the claimant is able to recover the totality of the damages granted by the court from any of the defendants. However, Turkish Code of Obligations (article 50/1) provides that the Court rules whether the defendant who paid the totality of the damages can recourse and if so, the amount for which each defendant is liable, according to the degree of seriousness of the fault committed by each of them and its effect.

**36** Is the 'passing-on' defence allowed?

Since there is no relevant precedent on this matter, the answer is not yet known.



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**37** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There is no special defence that would permit companies or individuals to defend themselves against competition law liability. However, if an anti-competitive behaviour results from an obligation required by a different area of law, the undertaking concerned can avoid the liability by putting forward the provision of law leading to the breach of competition.

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**38** Is alternative dispute resolution available?

Since there is no relevant precedent on this matter, the answer is not clear yet. But in principle, arbitration proceedings are available under Turkish law. However, such proceedings are only admissible if an arbitration clause has been agreed between the parties.



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