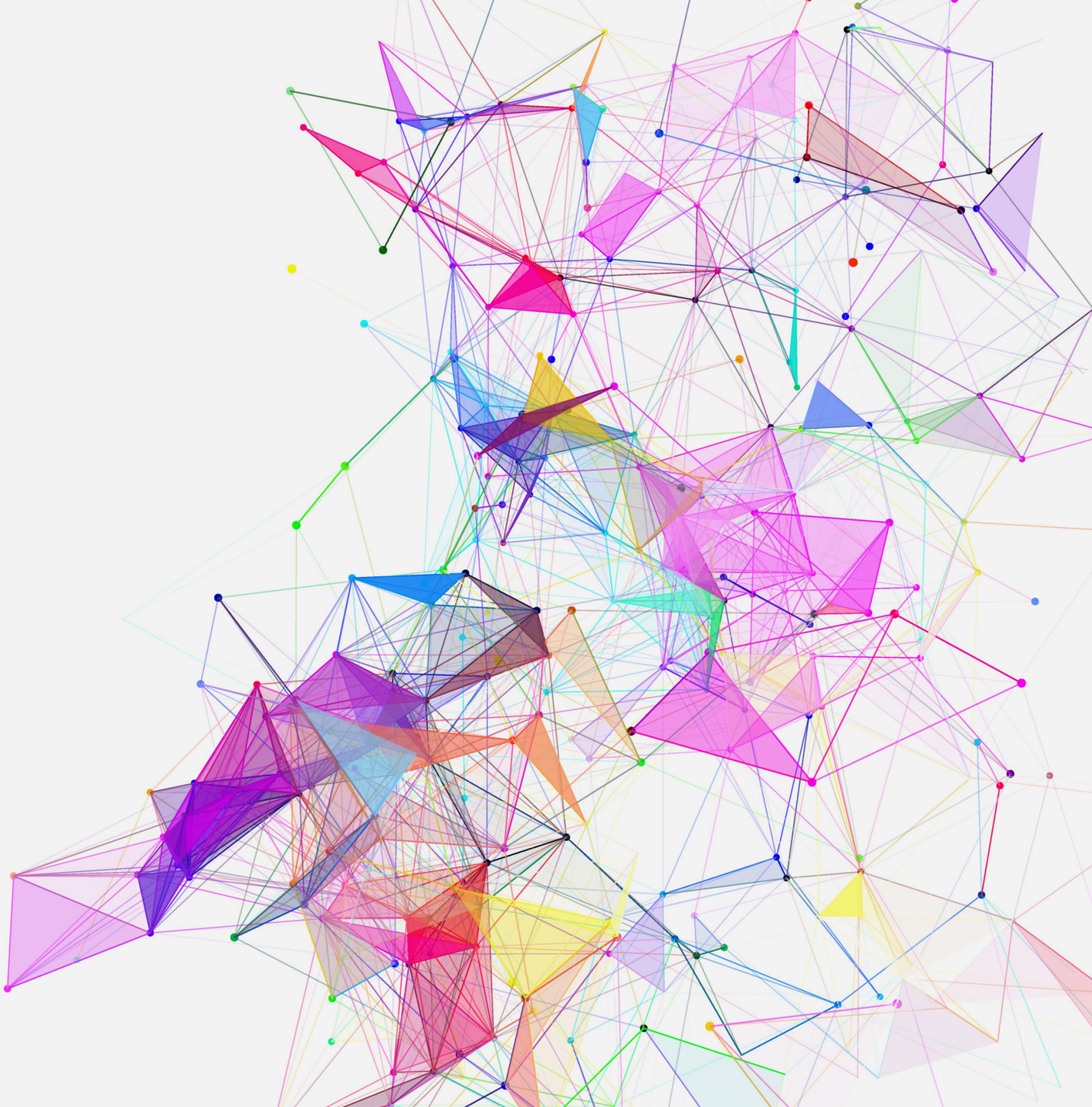
Esin Attorney Partnership.

Esin Litigation Quarterly



Issue 1 | Spring 2023

As we approach the halfway point of 2023, the overload of litigation continues unbated and this issue remains as concerning as ever. On one hand, the courts are still very busy, and on the other hand, we see a number of innovations coming to balance this busyness. In addition, with the rapid globalization of the world, steps are being taken to globalize litigation.

In this issue of Litigation Quarterly, we have compiled decisions of Turkish courts as well as foreign courts that had global significance in the past year. We have also covered developments in the field of litigation for the last three months, the new trends in the world of litigation, as well as recent data that has shed light on the past year of litigation.

Contents

01 Significant court decisions concerning litigation

1.1 The constitutional court underlined that court decisions should be reasoned within the scope of the right to a reasoned decision.[1]

In its recently published decision, the constitutional court emphasized the "right to a reasoned decision" within the right to a fair trial and ruled that, even if the courts use their discretionary power, the reasons considered whilst doing so must be indicated and explained.

The application subject to the decision was brought before the constitutional court by a subcontracted worker in a state institution. The applicant applied to the administration to be appointed as a permanent worker. The administration rejected the application on the grounds that the security investigation conducted on the applicant was negative and, accordingly, the applicant's employment contract was terminated. The applicant challenged the decision before the administrative courts, arguing that they were not informed of the reasons for the negative outcome of the security investigation. The first instance court rejected the application, stating that the administration had discretionary power on the matter. The applicant then filed an appeal against the decision, but this application was also rejected by the appellate court.

The constitutional court emphasized that the requirement for a positive outcome of the security investigation for appointment as a permanent worker makes the process ambiguous. This is because, whether the outcome of a security investigation is positive or negative may depend on the initiative of the person or persons authorized to make this decision. This may lead to arbitrary practices and, at the end of the day, to a loss of trust in the state. Therefore, the constitutional court stated that the court decisions have to be reasoned because of the requirement of right to a fair trial and, in this context, it is necessary to provide a reasonable justification for the discretion used in reaching the conclusion and the reasons behind such decision to prevent arbitrary practices.

Additionally, the issues determined as a result of the investigations and examinations carried out by the courts must be set out in the reasoned decision in a manner that will ensure the principles of legal security and certainty and prevent arbitrary practices. The constitutional court, therefore, found that it was not clear why the security investigation regarding the applicant was considered negative, and the findings regarding the applicant were not shared or explained in the decision. The constitutional court added that, if there are valid reasons not to show the applicant the documents and evidence on which the judgment is based, such as public safety or the protection of the rights of others, other compensatory opportunities should be considered and provided to satisfy the relevant applicant's right to defense. These may include, for example, informing the applicant of the content of the document, giving the applicant the opportunity to examine the document in the court as long as the confidential parts are blocked out, and allowing the applicant to submit their defense and objections to the court. Therefore, since the applicant was neither notified of the reasoning nor given the opportunity to learn its content, the constitutional court ruled that the applicant's right to a reasoned decision was violated, thereby violating the right to a fair trial.

1.2 The constitutional court annulled the provision under the Code of Criminal Procedure that an objection can be made against the decision to defer the announcement of the verdict.[2]

The constitutional court annulled Article 231/12 of Code of Criminal Procedure No. 5271 (CCP) that regulates the right to object to the deferment of the verdict announcement. The annulment decision will enter into force on 23 June 2023. The deferment of the announcement of the verdict is a practice that prevents the defendant from entering a penal institution and ensures that the conviction does not have legal consequences for the defendant under certain conditions. With the decision to defer the announcement of the verdict, the defendant is subject to a five-year supervision period. If the defendant complies with the obligations and does not commit an intentional crime during this supervision period, the decision to defer the announcement of the verdict is annulled at the end of the period and the criminal case is dismissed.

Within the scope of the annulled Article 231/12 of the CCP, the legal remedy that was available against the deferment of the announcement of the verdict was regulated as an objection. In this case, the injured party or the victim of the crime had the right to object to the deferment decision.

The constitutional court found this provision contrary to the right to legal remedies regulated under Article 40 of the Constitution and annulled the provision because the objection procedure does not provide sufficient procedural guarantees, does not offer a chance of success, is decided upon only by examining the file and is not an effective means of review. With the annulment of this provision, it is expected that the legal remedy to be applied against the deferment of the announcement of the verdict will be regulated by additional regulations.[3]

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1 Constitutional Court Application No.: 2019/26463, Decision Date: 12.1.2023. You may access Constitutional Court's judgement here.

2 Constitutional Court File No.: 2021/121, Decision No.: 2022/88, Decision Date: 20 July 2022. You may access the constitutional court's judgment here.

3 You may access the details of the case from our legal alert.

1.3 The constitutional court annulled the provision under the CCP that allowed a judgment other than a conviction to be given without interrogating the defendant.[4]

The constitutional court annulled Article 193/2 of the CCP, which stipulates that if a judgment other than a conviction is to be given, the trial can be concluded even if the defendant has not been interrogated. Pursuant to the annulled paragraph 2 of Article 193 of the CCP, if the court were to render "any judgment other than a conviction" in accordance with the evidence gathered, it could do so in the defendant's absence, even if the defendant had not been interrogated.

The annulled provision did not make a distinction while referring to the "judgments other than conviction". That is why, the abolished rule also included decisions that are not convictions; however, are given if it is ruled that the defendant has committed the relevant crime. For instance, the "decision regarding there is no need for a penalty" and "decision to impose security measures" are amongst such decisions. In this regard, given that the defendant's legal responsibility persists despite such decisions, the constitutional court found that giving such judgements without interrogating the defendant resulted in disproportionate limitation of the defendant's right to be present and defend themselves at trial, and hence their right to a fair trial. Based on these reasons, the constitutional court deemed the provision in question to be in contravention of article 13 on the limitation of fundamental rights and freedoms and article 36 on the right to legal remedies of the constitution and annulled the provision.[5]

1.4 The Court of Cassation General Assembly on the Unification of Judgments ruled that, when the debtor against whom an enforcement proceeding has been initiated, objects to the enforcement proceeding, the creditor's petition for the annulment of this objection must be served to the debtor, not to the debtor's attorney.[6]

The Court of Cassation General Assembly on the Unification of Judgments ("**Unification of Judgments Decision**") stated that, even if the debtor against whom an execution proceeding has been initiated objects to the proceeding through their attorney, the statement of claim for the annulment of objections to the execution proceedings to be filed by the creditor must be served to the principal (the debtor), not the attorney.

The debtor against whom an execution proceeding has been initiated may stop the proceeding by objecting to the payment order within the time limit. In this case, the creditor must file a lawsuit for the annulment of the objection to ensure that the suspended proceeding continues. There was a difference of opinion among different chambers of the court of cassation as to whether the statement of claim for the annulment of objections to the execution proceedings should be served to the principal or the debtor's attorney. While the 11th Civil Chamber of the Court of Cassation was of the opinion that it should be served to the attorney, the General Assembly of the Court of Cassation, the 3rd, (closed) 15th and (closed) 22nd Civil Chambers of the Court of Cassation were of the opinion that it should be served to the debtor. The 9th and 13th Civil Chambers of the Court of Cassation (closed) had decisions in both directions. With the Unification of Judgments Decision, these differences of opinion were resolved and it was decided that the statement of claim for the actions for the annulment of objections to the execution proceedings to be filed by the creditor should be served on the debtor, not the attorney.

In the reasoning of the Unification of Judgments Decision, the court briefly states that, pursuant to Article 67/1 of the Execution and Bankruptcy Code, the actions for the annulment of objections to the execution proceedings is a lawsuit subject to general provisions and, accordingly, the proceedings will be conducted as per the provisions of the Code of Civil Procedure (CCP). Pursuant to Articles 122 and 317 of the CCP, serving the statement of claim to the principal is regulated as a mandatory provision. Therefore, it is ruled that the statement of claim must be served on the principal (debtor), not the attorney. Pursuant to these grounds, serving the statement of claim for the annulment of objections to the execution proceedings case on the attorney instead of the debtor will constitute a violation of the mandatory provisions of the CCP. The Unification of Judgments Decision clarifies this issue and is binding for the general assembly and chambers of the court of cassation, and courts.

1.5 The Court of Cassation Assembly of Civil Chambers ruled that the party with the right of termination in the agency agreement must exercise its right of termination in accordance with the rule of good faith.[7]

The Court of Cassation Assembly of Civil Chambers (ACC)[8] ruled that the party with the right of unilateral termination in the agency agreement must exercise this right in accordance with the rule of good faith.

In the dispute subject to the decision, there is an agency agreement ("**Agency Agreement**") between an agency and a principal. The principal terminated the Agency Agreement in accordance with the right of termination granted in the Agency Agreement and without giving any further reason. The agency filed a lawsuit claiming that this termination was unjust, to which the principal responded that the termination was in accordance with the Agency Agreement and that it had just causes to terminate the agreement.

The first instance court ruled that the principal did not violate the termination procedure agreed in the Agency Agreement and determined that merchants should act prudently and foresee the results of the agreements they execute.

The court of cassation reversed the first instance court's decision. The court of cassation held that, although the principal terminated the Agency Agreement by the deadline agreed therein, the court should have also examined whether the principal complied with the rule of good faith while exercising its termination right and whether the just causes the principal set forth were in fact true and would constitute "just cause." However, the first instance court resisted its previous decision. Then, the agency appealed to the ACC against the first instance court's resistance decision.

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4 Constitutional Court File No.: 2021/118, Decision No.: 2022/98, Decision Date: 8 September 2022. You may access the constitutional court's judgment here.

5 You may access the details of the case from our legal alert.

6 Court of Cassation General Assembly on the Unification of Judgments File No.: 2021/1, Decision No.: 2022/3.

7 Court of Cassation General Assembly of Civil Chambers File No.: 2019/566, Decision No.: 2022/599.

8 If the court of cassation finds the court of first instance's decision sent to it after the regional court of justice's examination to be unlawful, it will overturn the decision. If the court of first instance's decision is reversed, the court of first instance either complies with the decision of reversal or resists against the decision of reversal. Depending on the nature of the case, the court of first instance's decision to resist is examined and decided either by the Assembly of Criminal Chambers or the ACC. As a result, both the court of first instance and the court of cassation chamber must comply with the decision of the Assembly of Criminal Chambers or the ACC. Therefore, these decisions are important for Turkish law.

The ACC emphasized that, although the Agency Agreement provides for the right of unilateral termination, this right must be exercised in accordance with the rule of good faith. The rule of good faith is a mandatory rule that must be observed when exercising all rights. It is not possible for the parties to exclude this rule within an agreement. Even if the violation of this rule is not asserted by the parties, if the violation is understood from the information and documents in the case file, the judge must ex officio take it into consideration. Therefore, the ACC stated that, according to the rule of good faith, (i) there must be a reason for the principal to exercise the right of termination, and (ii) the principal must not have established confidence that the contractual relationship will continue. For this reason, the ACC ruled that the termination by the principal in the dispute at hand was against the rule of good faith.

There was a dissenting vote on the decision saying that the termination was just. The dissenting vote argued that, as a requirement of the principle of legal security, it is essential to adhere to the Agency Agreement. It is not necessary to prove that the rights under the Agency Agreement were exercised in good faith, and it would be contrary to the rule of good faith to claim that one is not bound by the provisions of the agreement within the scope of freedom of agreement. However, this opinion was not accepted by the majority for the reasons explained above.

1.6 The Court of Cassation Assembly of Civil Chambers ruled that a notification that was not duly made was invalid and violated the right of defense.[9]

The ACC ruled that an improper notification made in violation of the provisions of Notification Law No. 7201 ("**Notification Law**") violated the addressee's right of defense. In a dispute on whether the decision of expulsion from the cooperative was duly notified to the expelled member, the ACC ruled that the notification must comply with the procedure set out in the Notification Law and the Regulation on the Implementation of the Notification Law. These laws regulate how the notification officer must act in the absence of the addressee or other persons authorized to receive the notification on behalf of the addressee at the notification address.

In this context, the ACC ruled that, if the notification officer cannot find the addressee or the person authorized to receive the notification on behalf of the addressee at the notification address, they must investigate whether the addressee is permanently or temporarily absent from that address and the reason for the absence from the address correctly. This is because the temporary absence and the definite absence will change the notification procedure to be followed, and the notifications that are not made and documented as specified in the legislation will not be valid.

In the dispute before the ACC, the plaintiff was reported to be absent from their address. Therefore, the document was served on the relevant local authority and the annotation stating such was affixed to the addressee's door. A notice was also left to the nearest neighbor. The notification officer recorded all these in the delivery record. However, the officer did not note whether the reason for the absence was temporary or permanent. The ACC determined that the purpose of the Notification Law and the Regulation on the Implementation of the Notification Law is to ensure that the notification reaches the addressee as soon as possible, that the persons concerned are informed (the informative function of the notification) and that these matters are documented (the documentation function of the notification). As such, it is obligatory to comply with the provisions of these regulations. In the dispute before the ACC, since there is no determination regarding the temporary and short-term absence of the addressee at the address, the notification was not made in accordance with the procedure, and it was not correct to establish a judgment based on an invalid notification to restrict the plaintiff's right of defense. Therefore, the decision was reversed.

1.7 Continuing contractual relationship without reservation removes right to claim penalty clause, the Court of Cassation Assembly of Civil Chambers ruled.[10]

The ACC ruled that continuing a distribution relationship without making a reservation removes the right to claim a penalty clause for the violations falling within the scope of the penalty clause agreed in the agreement.

The case subject to the decision was filed by a fuel distributor against a fuel dealer. In the case, following the termination of their agreement, the fuel distributor claimed the payment of the penalty clause retrospectively due to the fuel dealer's failure to fulfill the minimum purchase commitment in the agreement.

The first instance court decided that the fuel distributor cannot both continue supplying fuel to the dealer without any objection and not claim the penalty clause. Therefore, the court rejected the fuel distributor's request for retrospective application of the penalty clause as the time limit for making such a claim had expired.

The court of cassation reversed the first instance court's decision as it held that the fuel distributor reserved its right to all penalty clauses in the agreement between the parties and that this was sufficient for the fuel distributor to claim all penalty clauses retroactively. Upon the first instance court's resistance against the court of cassation's decision, the matter was examined by the ACC.

In its assessment, the ACC upheld the first instance court's decision. The ACC stated that the reservation of the right to request the penalty clause is a formative right and must be made explicitly at the time of performance. In the dispute, although it was agreed that the fuel dealer undertakes to purchase a certain amount of fuel oil from the fuel distributor every year and that the annual penalty clause must be paid if the fuel dealer does not purchase as much product as it has undertaken, to claim this penalty clause, it is necessary to reserve this right by placing a reservation when giving the product in the year in which the penalty clause occurs. However, it is seen that the fuel distributor made no such reservation for the years for which the penalty clause was due. Therefore, it is not possible for the fuel distributor to claim a penalty clause.

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9 Court of Cassation General Assembly of Civil Chambers File No.: 2022/126, Decision No.: 2022/160.

10 Court of Cassation General Assembly of Civil Chambers File No.: 2019/775, Decision No.: 2022/962.

1.8 The Swiss Federal Supreme Court ruled that, in the context of the General Terms and Conditions, the forum clauses do not have to be signed by the parties, but require the express written consent of both parties.[11]

The Swiss Federal Supreme Court (SFSC) decided that the forum selection clause does not need to be signed by the parties, but can be made through exchanging letters, as long as it is accepted by the other party explicitly in the context of the General Terms and Conditions (GTCs).

The dispute heard by the SFSC was regarding a carriage agreement between two Swiss companies. The consigner sued the carrier before the Lugano courts. The carrier asserted a jurisdiction plea by referring to the forum clause concluded based on emails. At the end of each email sent to the consigner, the carrier added the following statement:

> We work exclusively according to the General Terms and Conditions of the Swiss Freight Forwarders and Logistics Association (GC SPEDLOGSWISS), most recent edition — Jurisdiction is Bülach.

However, the first instance court did not find this jurisdiction plea valid and affirmed its jurisdiction. The carrier then applied to the SFSC and argued that, in the SFSC's practice regarding the GTCs, considering the business relationship between the parties, express consent is not required for the acceptance of the GTCs and that a letter exchanged between the parties will be deemed to be accepted if one of the parties does not object.

The SFSC stated that, since the forum clause replaces the competent court provided by law, it must strictly comply with the formal requirements under Swiss law and be expressly agreed to by both parties to be valid. The SFSC acknowledged that, in accordance with its established case law, such an agreement does not have to be signed by both parties, but ruled that both parties must "expressly" declare their acceptance of the agreement. In the present case, the SFSC held that the statement included by the carrier at the end of its emails could not be considered an "agreement" in favor of the Bülach courts because the consigner did not demonstrate an explicit written acceptance, such as by fax or email, and that the consigner's silence does not constitute acceptance. Therefore, the SFSC dismissed the carrier's appeal and upheld the jurisdiction of the Lugano courts.

1.9 The Supreme Court of the United States ruled that Halkbank is not immune from US prosecution under FSIA.[12]

Türkiye Halk Bankası A.Ş. ("**Halkbank**"), a bank owned by Türkiye, was indicted by the US for conspiring to evade US economic sanctions against Iran. Halkbank requested that the case be dismissed based on immunity. The US Supreme Court dismissed Halkbank's two pleas regarding immunity; however, it deemed that the court of appeals did not fully consider the arguments on common-law immunity and, for that reason, remanded the judgment to the court of appeals.

On 19 April 2023, the US Supreme Court gave its ruling. The Supreme Court denied two of Halkbank's arguments.

Halkbank argued that the Foreign Sovereign Immunities Act of 1976 (FSIA) provides instrumentalities of foreign states, such as Halkbank, absolute immunity. Regarding this argument, the Supreme Court ruled that the FSIA does not provide immunity to foreign states and their instrumentalities from criminal prosecution and, therefore, Halkbank is not immune from criminal indictment as per the FSIA. The court cited the FSIA's wording, which exclusively addresses civil suits against foreign states and their instrumentalities and does not address criminal matters.

Halkbank argued that the general federal jurisdiction statute does not extend to prosecutions of foreign states and their instrumentalities. The Supreme Court ruled that the district courts do in fact have jurisdiction for the prosecution of Halkbank as per the general federal jurisdiction statute.

In addition, Halkbank also had another plea for immunity, which was based on the principles of common-law immunity. Having reviewed the appeal and the case file, the Supreme Court found that the court of appeals did not fully consider the various arguments regarding common-law immunity. Therefore, the Supreme Court remanded the case to the court of appeals on the issue of common-law immunity, as it had not been fully considered.

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11 You may access the details of the case here.

12 You may access the Supreme Court's judgment here.

02 Statistics and other news concerning litigation

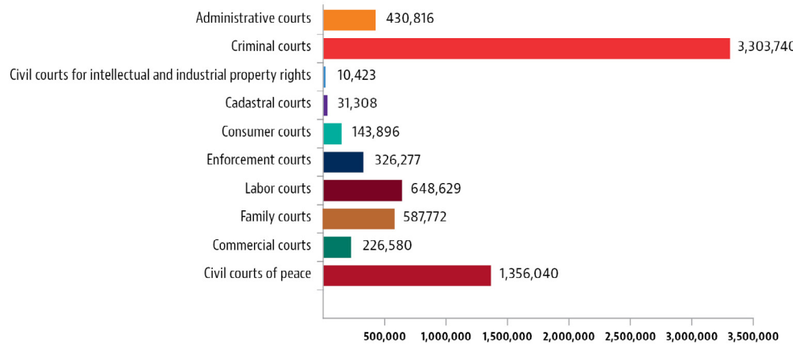
2.1 Statistics

(a) Judicial Statistics of Türkiye

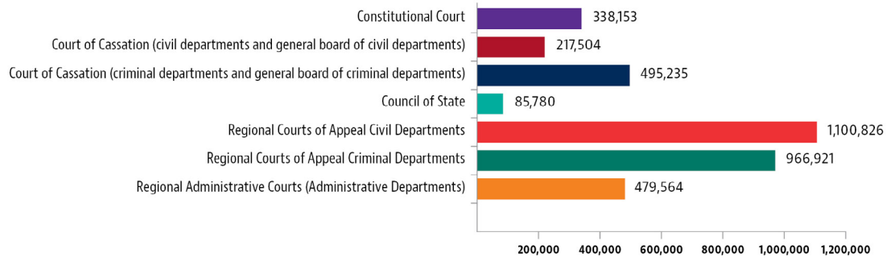
We left behind another busy and dynamic year in the Turkish judicial system. We wanted to take a closer look at how busy the Turkish courts were in the last year, how many new cases were filed and how many files were finalized. It is possible to say that this workload will be reduced to some extent in 2023 with the mandatory and voluntary mediation regulations introduced in the Mediation Act in the 7th Judicial Package, which will be explained below. Here are the Turkish judicial statistics for 2022, published by the Ministry of Justice:[13]

(i) Pending cases in 2022: A total of 7,065,571 cases were pending before the first instance courts, whereas this number was 3,683,983 for the appeal courts. In 2022, amongst the first instance courts, the busiest judicial authorities were by far the criminal courts. This was followed by the civil courts of peace, which had the second highest workload.

Number of cases pending before the first instance courts

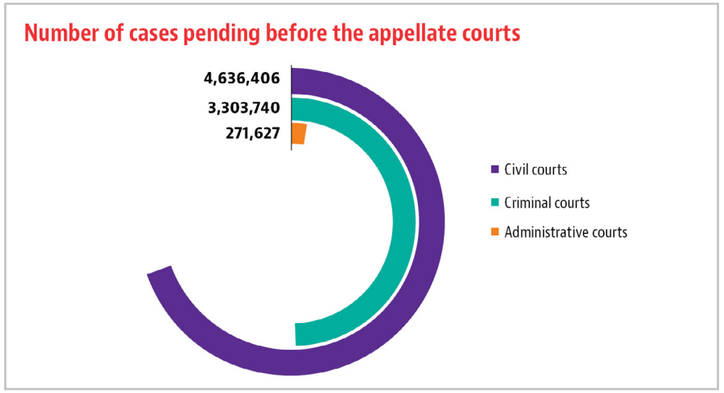


Number of cases pending before the appellate courts



(ii) Finalized lawsuits within 2022: A total of 8,211,773 cases were finalized. In 2022, 76% of the total pending cases in the courts were finalized.

Number of cases pending before the appellate courts



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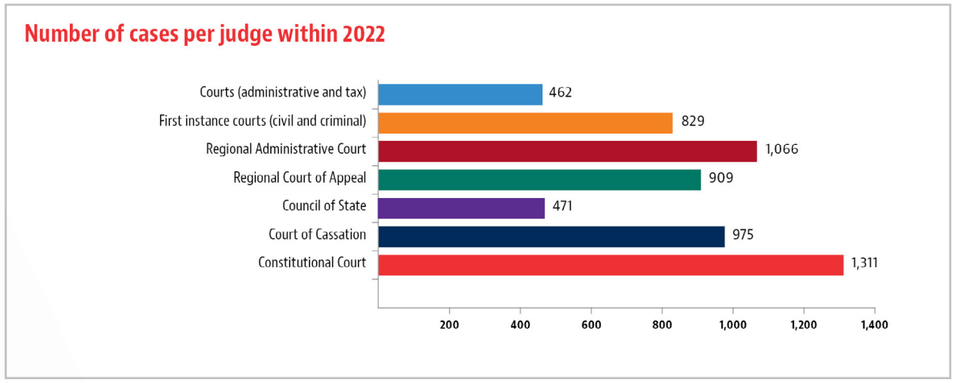
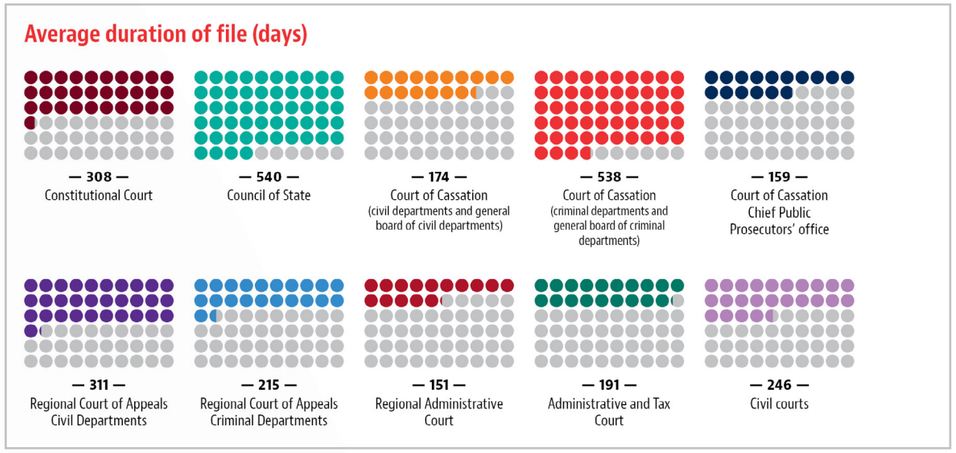
13 You may access the statistics here.

(iii) Cases per judges within 2022: The graph below shows the amount of cases each judge is averagely responsible for. As can be seen, the number of files per judge is quite high. However, the voluntary and mandatory mediation institution introduced with the 7th Judicial Package, which will be explained below, may help to reduce the high number of files per judge, as it encourages the settlement.



(iv) Average duration of a file (days): In these years, the trend of using alternative dispute resolution has increased in past few years due to the long duration of court proceedings in Türkiye. Therefore, we also examined the average resolution time per file for litigation:



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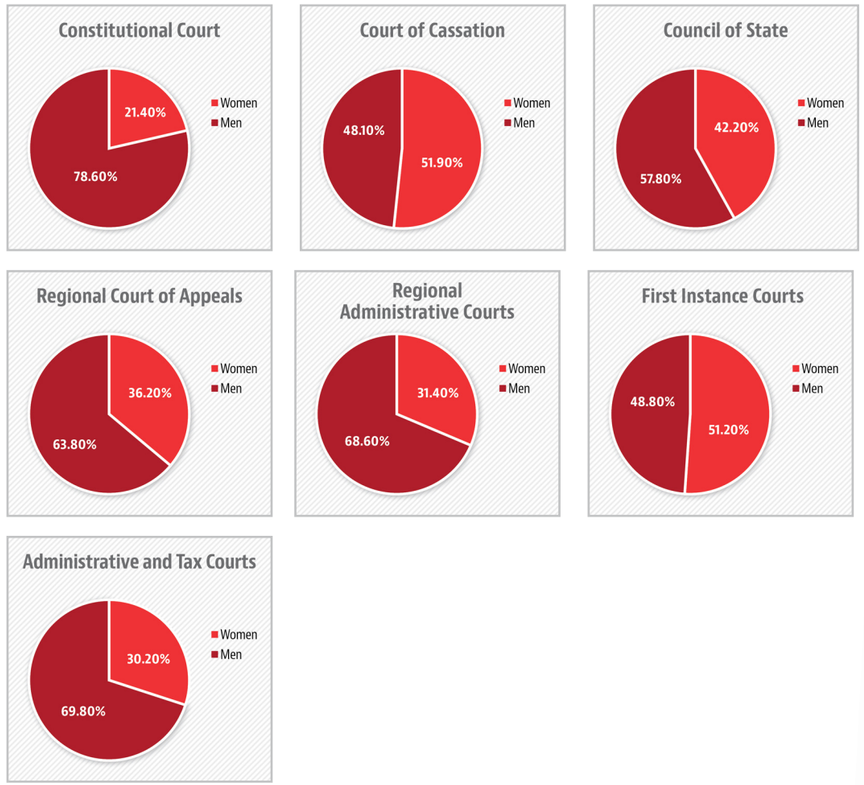
14 You may access the statistics here.

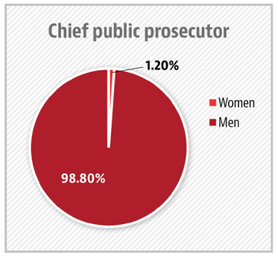
(b) Diversity in judiciary in Türkiye

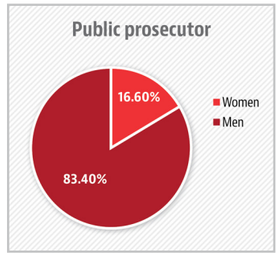
While gender equality is and should always be an important issue all over the world, this subject also has an important place in the judiciary. In October 2022, Att. Filiz Saraç was elected as the new president of the Istanbul Bar Association. Saraç is the first woman to preside over the association in its 144-year history. In light of this news, Türkiye has been reminded of the importance of the balance between women and men in the judiciary system — and the lack of such. Let's take a closer look at the statistics of women and men in the judiciary in light of the data published by the Ministry of Justice:[14]

(i) Male-female ratio of the judges: The graphs below show the distribution of women and men among judges in different types of courts. It is interesting to see that the amount of women is relatively low in the constitutional court compared to other courts.

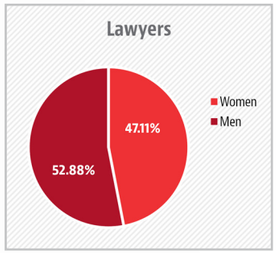


(ii) Male-female ratio of prosecutors: The graphs below show the distribution of women and men among prosecutors. The amount of women among prosecutors is quite low. Particularly, the amount of female chief public prosecutors is incredibly low.





(iii) Male-female ratio of lawyers: The graph below shows the distribution of women and men among lawyers. It is possible to say that the balance between men and women is relatively better among lawyers.



2.2 Other news concerning litigation

(a) Law No. 7445 on the Amendment of the Enforcement and Bankruptcy Law and Certain Laws Constituting the 7th Judicial Package was published in the Official Gazette on 5 April 2023.

Law No. 7445 on the Amendment of the Enforcement and Bankruptcy Law and Certain Laws ("Law No. 7445"), also known as the 7th Judicial Package, was published in the Official Gazette dated 5 April 2023 and numbered 32154.[15]

Law No. 7445 introduced certain substantial amendments to various laws:

i. Amendments to the Enforcement and Bankruptcy Law

- Pursuant to Article 79/a of Enforcement and Bankruptcy Law No. 2004 (EBL), to be able to conduct an attachment on a residence, the bailiff must first apply to the execution court and obtain the judge's approval confirming that the place subject to the attachment is a residence. This approval will not be required in the event of a precautionary attachment.
- Pursuant to Article 82/1-p.3 of the EBL, personal belongings of family members and all household goods for common use of family members are included in the scope of goods that cannot be attached.
- Pursuant to Article 85/1 of the EBL, attachment beyond the amount of the receivable subject to the enforcement proceedings (i.e., excessive attachment) is prohibited. As there are various misapplications in practice, we believe that this amendment will provide guidance.
- Pursuant to Article 88/a of the EBL, goods that no longer need to be preserved will be liquidated ex officio if they are still in the custody of a trustee (yediemin). The relevant enforcement office is obliged to first notify the debtor that it can retrieve the goods subject to the trustee fee, and, otherwise, that the goods will be liquidated. If the debtor does not receive the goods from the trustee, the owner of the pledge right placed on the good will be invited to exercise its rights arising from the pledge. If this right is not exercised, the good will be put up for auction.

The amendments to the EBL entered into force on 5 April 2023.

ii. Amendments to the Attorneyship Act

- Pursuant to Article 43 of Attorneyship Act No. 1136 ("**Attorneyship Act**"), financial support will be provided to cover the expenses incurred by attorneys to establish their own law firm.
- Pursuant to Article 65 of the Attorneyship Act, to financially support attorneys who are new to the legal profession, the bar association fee will not be collected from them for the first five years of their practice.
- To strengthen the judicial assistance system in accordance with Article 180 of the Attorneyship Act, the rate of fees and fines, which are among the judicial assistance bureau's revenues, will be increased to 3%.

The amendments to the Attorneyship Act entered into force on 5 April 2023.

iii. Amendments to the Law on the Establishment, Duties and Authorities of the Civil Courts of First Instance and Regional Courts

- Pursuant to Article 5 of Law on the Establishment, Duties and Authorities of the Civil Courts of First Instance and Regional Courts No. 5235, the monetary limit for cases that the commercial courts of first instance will hear as a committee is TRY 1 million. The monetary limit will be adjusted every year in line with the revaluation rate.

The amendments to the Law on the Establishment, Duties and Authorities of the Civil Courts of First Instance and Regional Courts entered into force on 5 April 2023.

iv. Amendments to the Code of Criminal Procedure

- The amended Article 193/2 of Code of Criminal Procedure No. 5271 (CCP) stipulates that the case may be decided in the defendant's absence, even if the defendant has not been interrogated, if it is concluded that, according to the evidence collected, the court should render a decision other than conviction, lack of grounds for imposing a penalty (*ceza verilmesine yer olmadığı)* or security measures.
- The amended Article 231/12 of the CCP provides that an objection can be made to the decision to defer the announcement of the verdict (*hükmün açıklanmasının geriye bırakılması*). Accordingly, the manner in which the relevant authority is presented with the objection will also be regulated.
- With the amendment made to Article 308/A of the CCP, the authority of the public prosecutor's office to object to the regional court's decisions has been revised.

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15 You may access Law No. 7445 here.

The amendments to the CCP entered into force on 5 April 2023.

v. Amendments to the Law on Misdemeanors

- With the amendments made to Article 43/A of Law on Misdemeanors No. 5326 (*Kabahatler Kanunu*), the term "a private law legal entity" in the first paragraph of the article regulating the liability of legal entities has been changed to "a legal entity."

The amendments to the Law on Misdemeanors entered into force on 5 April 2023.

vi. Amendments to the Turkish Commercial Code

- Pursuant to Article 4 of Turkish Commercial Code No. 6102 (TCC), commercial disputes with an amount or value less than TRY 1 million will be resolved before a single judge and through a simple trial procedure. The monetary limit will be adjusted annually in line with the revaluation rate.
- Annulment of objection and restitution lawsuits and negative declaratory actions that fall within the scope of Article 5/A of the TCC are subject to mandatory mediation.

While the amendment to Article 5/A of the TCC will enter into force on 1 September 2023, the remaining amendments entered into force on 5 April 2023.

vii. Amendments to the Mediation Act

- With the addition to Article 17 of Act on Mediation in Civil Disputes No. 6325 ("**Mediation Act**"), the mediator shall inform the parties that are not present at the mediation about the minutes issued at the end of the mediation activity and its results using all means of communication.
- Article 17/A of the Mediation Act aims to harmonize with the Singapore Convention ("**Convention**"), which entered into force on 11 April 2022. According to this provision, for a settlement agreement subject to the Convention to be enforceable in Türkiye, a certificate of enforceability must be obtained from the commercial court of first instance. The court will examine the matter of issuing a certificate of enforceability in accordance with the provisions of the Convention and Article 18 of the Mediation Act.
- Pursuant to Article 17/B of the Mediation Act, disputes regarding the transfer of an immovable or the establishment of limited rights in rem on an immovable are now eligible for voluntary mediation. This amendment will enter into force on 1 September 2023.
- Pursuant to Article 18/4 of the Mediation Act, the settlement agreement jointly signed by the attorneys and the mediator for commercial disputes will be deemed to have the nature of a court judgment without the need for a certificate of enforceability. In this regard, the parties' signatures are not required.
- Pursuant to Article 18/A/7 of the Mediation Act, the mediator is obliged to inform the party itself about the mediation process, even if the party is represented by an attorney. This amendment will enter into force on 1 September 2023.
- Pursuant to Article 18/A/16 of the Mediation Act, if an enforcement proceeding is initiated against the applicant regarding the mediation subject after the application to the mediation office, the applicant (plaintiff) will be entitled to file a negative declaratory action against the proceedings pursuant to Article 72 of the EBL within two weeks from the date the final report is issued and benefit from the opportunities set forth in Article 72/2 of the EBL if requested. The amendment will enter into force on 1 September 2023.
- Pursuant to Article 18/B of the Mediation Act, it is necessary to apply for a mandatory mediation before filing a lawsuit in the following disputes: disputes arising from a lease relationship (except for provisions regarding the evacuation of leased immovables through an execution proceeding without judgment according to the EBL), the allocation of movables and immovables and the elimination of joint ownership and disputes arising from Condominium Law No. 634, and the neighboring rights regulated under Turkish Civil Code No. 4721. The amendment will enter into force on 1 September 2023.

Except for the amendments that will enter into force on 1 September 2023, the amendments to the Mediation Act entered into force on 5 April 2023.

viii. Amendments to the Labor Courts Act

- Annulment of objection and restitution lawsuits and negative declaratory actions falling within the scope of Article 3 of Labor Courts Act No. 7036 are subject to mandatory mediation.

In addition to the above-mentioned amendments, Law No. 7445 also provided various amendments to Act on the Suppression of Narcotic Drugs No. 2313, Act on Firearms and Knives and Other Weaponry No. 6136, Anti-Terrorism Act No. 3713, Turkish Civil Code No. 4721, Turkish Penal Code No. 5237, Act on the Execution of Sentences and Security Measures No. 5275, Act on Probation Services No. 5402, Anti-Smuggling Act No. 5607, and Act on the Settlement of Certain Applications to the European Court of Human Rights by Payment of Compensation No. 6384.

(b) The German Federal Ministry of Justice published guidelines for strengthening the courts in commercial disputes as well as introducing English-speaking commercial courts.

Germany is taking solid steps to be able to compete with recognized foreign commercial courts. One of its solid steps is proposing to increase the use of English in commercial litigation.

In January 2023, the German Federal Ministry of Justice published guidelines for strengthening the courts in commercial disputes and for introducing English-speaking commercial courts ("**Guidelines**").[16]

It is currently possible in German commercial courts to conduct proceedings in English with certain limitations. If the parties and the court agree, the hearings can be held in English without the need for an interpreter; however, all written submissions to the court, the hearing minutes and court decisions must be in German.

With the Guidelines, the Ministry of Justice proposes further and more substantial changes, including but not limited to allowing commercial litigation exceeding a certain threshold to be conducted entirely in English before selected district courts. The Guidelines suggest that the prerequisites will be (i) the parties agree on English as the language of the litigation and (ii) there is an objective reason for choosing this language. The Guidelines also suggest that all judgments written in English may be translated into German and published so that they can be enforced in Germany.

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16 You may access the Guidelines in German here.

If adopted, this proposal would make German courts an attractive venue for international commercial disputes.[17]

(c) The gigantic restaurant food distributor Sysco filed a lawsuit against subsidiaries of the biggest litigation funder in the world, Burford Capital.

A dispute between Sysco, an American multinational company operating in marketing and distributing food products and other industries, and the major litigation funding company Burford Capital ("**Burford**") has arisen.

To support Sysco's antitrust litigation against suppliers of chicken, beef and pork, Burford advanced the business millions of dollars in 2019 (approximately USD 140 million as claimed by Burford). Subsequently, Sysco settled with several of the defendants. However, Burford obtained an arbitration ruling in New York, blocking Sysco from closing deals to resolve price-fixing lawsuits against suppliers. In response to the arbitration ruling obtained by Burford, Sysco filed a new lawsuit before the Chicago federal courts to overturn the temporary restraining order imposed by the arbitration tribunal that accepted Burford's offer to stop Sysco's business dealings with the suppliers. Basically, Sysco is accusing Burford of continuing litigation that is not really necessary. Burford, on the other hand, is separately suing Sysco in New York to confirm the arbitration panel's award regarding blocking Sysco from closing deals.[18]

(d) Manchester-based regional litigation funder Thaxted Capital has lifted its GBP 1 million cap.

Thaxted Capital, backed by Sandton Capital Partners in the US, will now also take on commercial cases requiring financing of more than GBP 1 million. The funder is currently funding cases in the North East, North West, Yorkshire and the Midlands.[19]

(e) A new body to fund legal actions for wider social change "Law for Change" has been established.

Law for Change is a new English litigation funding agency that aims to increase access to justice, represent underrepresented groups and contribute to changing laws for the wider public interest. The organization was founded by Stephan Kinsella from the Laura Kinsella Foundation, David Graham from Changing Ideas and Charles Keidan, a law reform advocate. The organization is willing to support claimants who are not able to cover their own expenses and do not receive financial support. The main objective of the organization is not to win or lose the case, but to properly conduct the case and ultimately change the law that will benefit society.[20]

(f) The European Court of Human Rights heard two landmark climate change cases.

The European Court of Human Rights (ECHR) is hearing two climate change cases against Switzerland and France.[21] The applicants against Switzerland are a group of elderly women from the verein KlimaSeniorinnen Schweiz, 33% of whom are over 75 years old, who claim that their living conditions and health have been adversely affected by global warming. The applicant against France, Mr. Damien Careme, a former mayor of France, claims that his home is in danger of flooding and that he is unable to plan his life peacefully. In both cases, the applicants accuse countries of failing to take adequate measures against global warming. The Swiss and French governments argue that they are not and will not be solely responsible for climate change. The ECHR is expected to rule on both countries in 2024.

(g) The Swiss Parliament has approved the revision to facilitate the enforcement of the Swiss Civil Procedure Code.

Important amendments to the Swiss Civil Procedure Code that aim to facilitate access to Swiss courts were adopted by the parliament on 3 April 2023.[22]

- Firstly, the amendments provide for in-house legal counsel to benefit from legal privileges under certain conditions. Unlike external legal counsel, in-house legal counsel do not enjoy legal privileges under the current Swiss regulation. With this amendment, protection has also been introduced for the in-house counsel of Swiss companies.
- The second important change is the possibility for cantons to establish an international commercial court, which is also being discussed in Germany as noted above. Thus, in commercial cases with a value exceeding CHF 100,000, if the parties agree on the jurisdiction of the commercial court and at least one of the parties is resident abroad at the time of this agreement, the dispute can be heard in an international commercial court. In addition, the proceedings in these courts may be conducted in a different language, which may be a different official language of Switzerland. Provided that the court hearing the dispute is an international commercial court, the parties may decide on English as the language of the proceedings. In such case, applications to the Federal Supreme Court will also be made in English.
- Thirdly, electronic transmission of audio and video recordings during hearings is provided for, if the parties consent.
- Finally, with the goal of lowering the cost barriers for claimants and to facilitate access to the courts, certain modifications have been made regarding court costs. Currently, the claimant must pay an advance on costs for all anticipated court fees when bringing a claim; otherwise, the court will dismiss the claim on procedural grounds. Unlike the current regulation, with the amendment, the courts will, as a rule, request an advance payment of only half of the total court costs subject to exemptions.[23]

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17 You may find more details here.
18 You may find more details here and here.
19 You may find more details here.
20 You may find more details here and here.
21 You may access the details of the case here.
22 You may access the amendments in German here.
23 You may access more details of the amendments here.

Conclusion

As we can see, the first months of the year was very busy in terms of litigation. The conclusion we can draw from all the above developments is that the trend in litigation is toward globalization and making litigation a more international practice and there is an ongoing effect everywhere to reduce the workloads of the courts and to come up with more efficient systems. For instance, there have been attempts in Türkiye to reduce the burden on the judiciary, notably through the promotion of mediation and the introduction of mandatory mediation in new areas with the 7th Judicial Package. In addition, issues such as environmental awareness and gender equality, which are also on the agenda around the world, have taken their place in litigation. With the next Esin Litigation Quarterly series, we will continue to report on these issues and keep you informed about the developments in the litigation world.

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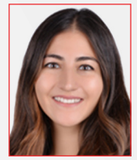

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