

## REDEVELOPMENT OF THE TURKISH CONSTITUTION

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The Turkish constitution is undergoing a period of intense upheaval as the country prepares for accession to the European Union. Mehtap Yildirim-Ozturk and Cagdas Evrim Ergun look at provisions currently under discussion that have serious implications for overseas investors.

On 22 May, 2004, Law No 5170, which amends 10 articles of the Turkish constitution, came into force. These amendments have chiefly been made in reaction to Turkey's new international commitments and its efforts towards accession to the European Union. The law provides, among other things, for the removal of the expression of "death sentence" from the constitution, the abolition of the State Security Courts, an expression regarding gender equality and the inspection of the accounts of the Turkish Military Forces. From the perspective of business law, however, the most important amendment made relates to the position of international agreements vis-a-vis domestic laws.

Article 90 of the Constitution, entitled "*Ratification of International Treaties*", provides that "*international agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional.*" The new law added a new sentence to Article 90 of the Constitution which ensures that, in the case of contradiction between the provisions of the duly ratified international agreements on fundamental rights and freedoms and the provisions of domestic laws, the former shall prevail, and that the judiciary will consequently refer to the provisions of such international agreements directly by ignoring the provisions of domestic laws.

Before that amendment, the question of superiority between international agreements and domestic laws was the subject of much discussion among the academics and legal practitioners. Subsequent to its adoption, the question of superiority between international agreements on fundamental rights and freedoms and domestic laws has been resolved, but a further question mark remains over international agreements on subjects other than fundamental rights and freedoms. This question was also discussed before the Law. Among academics, there are basically two approaches: the dualist and the monist. According to the dualists, the provisions of international agreements may not be applied by the domestic judges unless they are adopted in domestic law through new legislation. According to the monists, however, the international agreements are superior to the domestic laws, and in the case of a conflict between an international agreement and a domestic law, the former prevails.

The Turkish courts interpret Article 90 as closer to the dualist than the monist approach.<sup>1</sup> Therefore, pursuant to the precedents of Turkish courts, the Constitution is superior to existing international agreements and, in the case of a conflict between these two instruments, the former prevails. The Turkish courts, however, consider the international agreements to be at the same level as domestic laws and in the case of a conflict between the provisions of an international agreement and a domestic law, the same

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<sup>1</sup> See e.g. Turkish High Court of Appeal (Yargitay) Civil General Assembly Decision No. E. 2001/10-232 K. 2001/272 dated 21 March 2001.

principles as those that are applied in determining the superiority between two domestic laws apply in order to determine which one prevails. These criteria are that: the specific provision prevails over the general one; the newer provision prevails over the older one; and the explicit provision prevails over the implicit one. The Turkish Supreme Court, for example, held that the provisions of an international agreement must be applied by the judge when they are more specific than the provisions of a domestic law that is contrary to that international agreement.<sup>2</sup>

Following the passage of the new law, as the reference is only made to international agreements on fundamental rights and freedoms, it may be argued *argumentum a contrario* that international agreements other than those concerning fundamental rights and freedoms shall not prevail to the domestic laws. Such an argument would be a dangerous one, as it would result in the violation of the international commitments of Turkey under international agreements, such as bilateral investment treaties, by domestic courts. However, we believe that the question of superiority between international agreements on subjects other than the fundamental rights and freedoms and domestic laws still remains. It is most likely that the Turkish courts will continue to apply the same principles as stated above when determining superiority.

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<sup>2</sup> Turkish High Court of Appeal (Yargıtay) 21<sup>st</sup> Civil Chamber Decision dated 18 November 1996 No. E. 1996/2261 K. 1996/5790.