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**COST AND FEE ALLOCATION IN CIVIL PROCEDURE
In TURKEY**

**Country Reporter
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Introduction

The following report is intended to cover civil procedure only, i.e., cases brought under private and commercial law. It does not intend to address criminal, constitutional, administrative proceedings, and arbitration. It consists of 25 questions organized under seven main headings and the information is based on the latest data collected in September 2009.

I. The Basic Rules: Who Pays?

- 1. What is the basic rule of cost and fee allocation - that each party bears its own or that the loser pays all? Are attorneys' fees and court costs treated differently? What is the principal justification for this rule?**

To begin with it is worthwhile to mention that Turkey is a civil law country in a sense that its primary source of law is predominantly codes and statutes. Under this general approach the court costs are regulated by parliamentary legislation, and administrative acts (such as circulars on court fees or tariffs) which are permitted if only they are referred in the main legislative acts.

Therefore the court costs are governed by the Turkish Code of Civil Procedure between Articles 413-426. The current Code was adopted in 1927 and was modeled on a code of Neuchatel, Switzerland. Since then it has been subjected to more than 30 amendments and recently a totally new code has been prepared and its promulgation is expected at the beginning of 2010. As to the rules of court costs, the Draft Code regulates this issue in Articles 327-343,

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and one can admit that there seems no important deviation from the current principles. Nevertheless the language update and clarification is the most striking feature of the new Draft on court costs. Bearing in mind the Draft's coming into force soon, the relevant Articles and differences of both Codes have been reflected in the relevant part of this report.(The Draft envisages the procedure before the Courts of Appeal which are already introduced as a first tier in the current Code but is expected their to be active, hopefully in 2010.)

The second important legislative document is the Law on Charges No 492 (the charge referred in this Law has been collected as a levy, from the direct beneficiaries of certain public services by certain public authorities such as notaries, land registry offices, courts etc.)The Law on Charges is framework legislation inter alia about the court charges also and regulates their types, exceptions and immunities, criteria for fixed court charges, rates, and also makes reference to court charge circulars based on yearly tariffs issued by the governments.

As to the attorney fees as part of the court costs, the Attorneyship Law No.5754 deserves to mention here as further legislative act. This Law forms the legal base of the schedule on the yearly attorney fee tariffs issued by the Union of Turkish Bar Associations ¹(in cooperation with the Ministry of Justice).

Within the light of abovementioned legislation the basic rule in contentious matters is that in principle, the losing party has to pay all the court costs, which comprise the winning party's attorney's fees as well. When both parties win partially, the court may charge both of them with costs equally or divide the costs between them in its discretion².In case of partial success the Draft Code eliminates the current discretionary power of the judge and obliges him to allocate the costs in line with their success rate³.

The court costs as a general concept comprise the litigation expenses, and certain court charges and attorney fees fixed and announced officially in a yearly basis in the charge and fee tariff schedules mentioned above.

1.1- Litigation Expenses

The travel, lodging expenses of witnesses and of other persons required to be present at court, expenses of visits to premises, expenses for seizures, expenses for service of documents and other mail expenses, payments made (under stamp duty, tax etc.) for collecting, certification, authentication of documents from public officials fall within the group of litigation expenses which are not fixed in a court litigation schedule.

1.2- Fixed Charges and Fees

The fixed charges and attorney fee tariffs on the other hand are announced in two separate schedules: the yearly circular about court charges and the yearly tariff on attorneys' fees. They are both issued based on two different statutes. The court charge circular has been regulated by the government based on the competence given by The Law on Charges No. 492. The latter, the tariffs on attorney fees were issued by the Union of Turkish Bar Associations, in accordance with the Attorneyship Law No.5754.

¹ English version of the Attorney Law, Legal aid By-Law, Tariff Schedule of the Attorney fee see http://www.barobirlik.org.tr/mevzuat/avukata_ozel/avukatlik_kanunu/attorneyship_law.aspx

² Current Code of Civil Procedure (CCP) Art. 417, Draft Code of Civil Procedure (DCCP) Art. 330(1): 'Except where otherwise provided by law, court costs shall be paid by the losing party.' This is in line with the principle of 'The costs follow the event' as it expressed in English speaking countries.

³ DCCP Art. 330/2.

The most significant part of the court costs comprise those two group of charges and fees scheduled officially .

1.2.1-Court Charges(levies)

The court charges comprise four type of levies⁴: application charge⁵, charge for sittings(charged from the party caused the adjournment of the sittings)⁶, charge for decision and also for copies of decision⁷ and appeal charges⁸. The charges for judgement and writ can be assessed either in fixed terms-as lump sum for non monetary disputes⁹, or based on certain rates calculated over the nominal value of the dispute¹⁰.

1.2.2-Attorney Fee

The losing party not only has to pay all the court charges but also the winning party's attorney fees. This has been fixed in accordance with the yearly tariff schedule mentioned above¹¹. Since it is part of the court costs, it is paid directly to the successful party, not to

⁴ CCP Art. 423, DCCP Art. 327, the Law on Charges Art. 2 and its Annex (1) on fee tariffs. Introduction of charges and fees by a law rather than an administrative decision is a reflection of a prime understanding stipulated in Turkish Constitution; it was held in Article 73/3-4 that 'Taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law. The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law.' Upon the general principle held in the Constitution, two legislations regulate the court charges and attorney fees in The Law on Charges and The Attorneyship Law. Consequently those two legislations have recognized the legal mandate for the government and for the Union to update the yearly rate of charges and fees in their administrative schedules issued respectively.

⁵ For the year 2009 it is 7.30 TL (approx. 4.8 USD. Currently 1.5 TL= 1 USD.) before civil magistrate courts, 15.60 TL (approx. 10.4 USD) in general civil courts, and 23.90 TL (approx. 16 USD) before the Court of Cassation (for the cases that may be brought before the Court of Cassation as first instance).

⁶ For the year 2009 it is % 01.8 over value of the nominal disputes, and 9 TL (approx. 6 USD) for the non monetary disputes.

⁷ One fourth of the charge for decision and also for copies of decision must be paid during the initiation of the action, and the remaining is charged in two months following the decision. The party shall not be submitted the copy of the decision unless he pays this charge. Failure to meet this requirement prevents to carry out further transaction including the enforcement, and is to be considered ex officio by the public authorities. The Law on Charges, Art. 28 and 32.

⁸ Appeal charge was introduced in 6.6. 2008 by Law 5766 (see O.J. 6.6.2008, No. 26898) as a type and part of the court charges through the amendment of the Law of Charges No 492 and its Annex 1 in relation to court charges.

⁹ In accordance with 2009 Circular for Court Charges, Charges for Judgement and writ is 15.60 Turkish Lira (approx. 10.4 USD) in general before the first level courts, 32.50 TL (approx. 21.6 USD) before the Court of Cassation.

¹⁰ While it is % 054 in general and calculated over the concluded sum of disputed value, it is % 03.6 for division of real estates among the share holders. Nevertheless the end charge calculated through those rates can not be less than 15.60 TL (approx. 10.4 USD) under the said Circular for the year 2009. Currently the appeal charge to the Court of Cassation is 67.20 TL (approx. 44.8 USD).

¹¹ For the non monetary disputes the attorney fees fixed in the Attorney Fee schedule are the following for the year 2009:

-310 TL(approx. 206 USD) in cases before the civil magistrate courts,

-575 TL (approx. 383 USD) in general civil courts,

-250 TL (approx. 166 USD) in the Consumer Courts,

-1350TL (approx. 900 USD) in the Intellectual Property Courts,

-625 TL (approx. 416 USD) in the Court of Cassation where the appeal is dealt with in a hearing.

For the monetary disputes the following rates are applicable in 2009 through the disputed value indicated by the claimant:

- for the first 20.000TL (approx. 13.333 USD) it is % 12,

his/her lawyer¹². Furthermore the court is obliged to render an *ex officio* decision on this matter. Nevertheless bearing in mind the work and labor of the lawyer, the nature of the work and also duration of the trial, the judge has a discretion to triple the amount scheduled in the tariff. In cases where the winning party has more than one lawyer, the court can not award more than one attorney fee.

Although court charges and attorney fees are part of court costs, they are treated differently. The court charges are the contribution to the judicial service carried out by the courts, and are paid by their beneficiaries. They are part of the general budget and may be re-allocated to judiciary later on. Advocate fee on the other hand is paid to the winning party not to the general budget. It will be wise to recall that the attorney fee mentioned here as part of the court costs is different from the lawyer fee determined in a contract between the losing party and his/her lawyer. In principle the relationship between lawyers and their clients is governed by the ordinary rules.¹³ Consequently the losing party has to pay his own lawyer.

2. If the loser pays all, are all of the winner's costs and fees reimbursed or just a part (e.g., a reasonable amount)?

However there are certain situations determined in the Law¹⁴ that a successful party may be awarded less than the fixed costs for unreasonable or improper behavior during the trial.

Under the current legislation the court takes into account the misconduct of the winner in the following circumstances: if without justification, he lengthened the procedure, if he occasioned the unnecessary expense, and if he fails to submit the decisive documents to his opponents. In such cases the court has discretion to deprive the winner of his court costs partly or wholly¹⁵. Nevertheless in the Draft Code it has been stipulated that even in such circumstances deprivation can not comprise the charges for judgment and writ¹⁶. During the appropriation of misconduct the court take into account conduct before, as well as during the proceedings.

3. Are there special rules for appeals? How are the additional costs and fees allocated?

The rules and principles on court costs are applicable for appeals as mentioned above. The only important issue deserves to mention is the introduction of appeal charge in 2008. Appeal charge was introduced in 6. 6. 2008 as a type and part of the court charges through the amendment of the Law of Charges No 492 and its Annex 1 in relation to court charges. (Please see footnotes 6-9.) The additional appeal costs and fees are regulated by the court whose decision is subject to appeal.

-the following 30.000TL (approx. 20.000 USD), it is % 10,
-the following 50.000 TL (approx. 33.333 USD) it is % 8,
- the following 150.000 TL (approx. 100.000 USD) it is % 6,
- the following 400.000 TL (approx. 266.000 USD) it is % 4,
- the following 600.000 TL (approx. 400.000 USD) it is % 2,
- the following 1.000.000 TL (approx. 666.700 USD) it is % 1,
-over the 2.250.000 TL (approx. 1.500.000 USD) it is % 01.

¹² CCP Art. 424, DCCP Art. 343.

¹³ CCP Art. 424.

¹⁴ Further examples of exceptions and immunities have been remarked under II/1 below.

¹⁵ CCP. Art. 418.

¹⁶ DCCP. Art 331/1.

4. Who pays for the taking of evidence, especially the costs of (expert and other) witnesses? Are such costs a significant factor in the overall costs of litigation?

Those costs fall under the group of litigation costs and each party deposit the expenses of visits to premises, witness fees, and fees for expert surveys when they request them from the court. Where there appears a further related expense incurred in connection with procedures carried out under their requests, then each party is expected to pay those expenses as well. When both party claims the same evidence, then they are supposed to share its costs by depositing it in the clerk's office. Where a party fails to pay such deposit within the period given by the court, he is deemed to withdraw his request in relation to very evidence and the procedure to obtain it.

For the ex officio expenses deemed necessary by the court, the judge may order both parties or only one of them to deposit the amount within the time determined (this period is fixed as seven days in the Draft)by him. If the party or parties fail to do so, the judge may determine that the State shall advance the necessary amount to cover such expenses subject to later reimbursement by the unsuccessful party.

Reimbursement of the litigation costs of the part who deposited them shall be made by the losing party¹⁷.

One may conclude that the expenses of visits to premises, and fees for expert surveys have a significant share in the overall court costs.

5. How are costs and fees typically allocated if the parties settle their dispute? (and what percentage of civil suits is typically settled?)

The court costs may be allocated by agreement of the parties, but if such agreement does not exist, then the above mentioned rules and principles are applicable by the court.

The statistics have shown that settlements in courts are not very popular in Turkey .In the last ten years the average yearly percentage was between 0.8-0.3. Among those only in the year1988 the average yearly rate reached relatively higher level with %1.2. In 2007, 4299 civil disputes (which represent an average of %0.3) out of total 1497250 cases before whole civil courts in Turkey were concluded by settlements of the parties. Furthermore in accordance with the same year statistics, the settlement correlation among the various civil courts reveals that the percentage is higher in Intellectual Property (IP) Courts (%1.2) and Labor Courts (%1.4)¹⁸.

¹⁷ CCP Art. 414,415,416, and DCCP Art.328 and 329.

¹⁸ http://www.adli-sicil.gov.tr/istatistik_2007/hukuk/hukuk6-2007.pdf

The correlation rate for the court settlements in the year 2007 among the all type of civil courts are the following:

Commercial Courts: %0.3,

General Civil C.: %0.2

Labor C : %1.4

Civil Peace(Magistrate) C: %0.1

Land Registry C : %0.5

Consumer C: %0.2

Family C : %0.2

IP Courts: % 1.2

Nevertheless there is a legal policy approach to encourage out of court settlements, and a new draft about conciliation and mediation have been prepared and send to the Parliament in mid 2008¹⁹.

II. Exceptions and Modifications

1. Are there (statutory or other) exceptions to the basic rule (e.g., for specific kinds of situations, cases or parties)?

Yes, 'the loser pays' rule has statutory exceptions introduced either in the Code of Civil Procedure or in other Laws.

1.1-Exceptions Referred in the Code of Civil Procedure

In the following statutory circumstances 'the loser pays rule' may have no implementation within the discretionary power of the court:

a- Where the successful party without justification, lengthened the procedure, where he occasioned the unnecessary expense, and where he fails to submit the decisive documents to his opponents²⁰.

b- A party who desists (abandons his own contentions) or acquiesces (concurrs in the other party's contentions) will be held liable for all expenses and fees as if he had lost the case. Nevertheless, if a defendant acquiesces during the first hearing may not be held liable for expenses if there appears no justified reason of being sued²¹. But even in this case acquiescing defendant will be charged half of attorney fee²².

c- Where a relief²³ is granted, the costs arising from relief shall be charged to the applicant of this request²⁴.

d- A summoned witness who fails (without good reason) to appear²⁵ or refrain to Testify²⁶ before the court is himself liable the cost caused by a delay in the trial. The same principle applies to default experts whose technical knowledge is required to reach a conclusion in the trial²⁷.(In such cases the court may determine a fine as well.)

e- In Turkish legal system, legal transactions over-approx. 500 TL (334 USD) must be proved by deeds. In such cases if the judge determines that the deed belongs to one denying it, he will be charged to reimburse the other party for losses due to delay of the procedure²⁸.(In such case the court may determine a fine as well.)

¹⁹ Under this draft it is discretionary for the parties to try conciliation and mediation before or during the court trial. See <http://www.kgm.adalet.gov.tr/tbmmkom/arabuluculuk.pdf> (5September 2009).

²⁰ CCP Art.418. For the detailed information about the misconduct of the winner see I/2 above.

²¹ CCP Art. 94 , DCCP Art. 316.

²² Attorney Tariff Schedule 2009 Art. 6.

²³ Under the relief procedure, a party who loses a procedural right by expiration of time (fixed by law or by judge) may request and regain it if it is granted by the court. A relief may be granted if a party shows that he or his attorney was prevented from complying through causes beyond his control, or it was legally impossible for him to comply.

²⁴ CCP Art. 173, DCCP Art. 107.

²⁵ CCP Art. 253, DCCP Art. 248.

²⁶ CCP Art. 271, DCCP Art. 256.

²⁷ CCP Art. 278/3, DCCP Art. 273.

²⁸ CCP Art.313, DCCP Art. 217/1. The Draft refers only the payment of charges for every postponed sittings (and some fines as well).

f- Furthermore the court may require the frivolous litigant or the one who proceeds in bad faith to pay court expenses (and also all or part of the actual attorney fees²⁹ of his opponents in addition to fines fixed in the Code)³⁰.

1.2- Exceptions and Immunities Introduced by Other Legislation

Some of those exceptions and immunities were introduced by the Law on Charges No 492 such as dispute which its value less than 50 TL (the limit is 100 TL for alimony case). Soldiers, other lower rank military personnel whose living expenses subsidized by the State are immune from judicial charges³¹. The workers (whose wages are equal or less than of the 16 years old worker) are also immune from charges³². The minimum wage for this age group has been raised twice a year and it is 693 TL (approx. 462 USD) for the second half of the 2009. The diplomatic personnel in Turkey are also immune from judicial charges where reciprocity applies³³.

Some other legislation has also introduced exceptions and immunities for certain issues and persons. The most important one worth to mention is The Law on Consumer Protection which recognizes immunity for consumers for the action brought under this Law.

2. Are there any mandatory pre-litigation procedures (e.g., mandatory mediation) with an impact on cost and fee allocation?

There is no statutory requirement prior a court action. Nevertheless a new Draft Law on Mediation for Civil Disputes is before the Parliamentary Committee since 3.6.2008. But it must be underlined that the draft does not envisage any mandatory pre-litigation phase. The primary goal of the Draft is to reduce the number of trials before the courts by encouraging society to try other alternative out of court settlements³⁴.

²⁹ The attorney fee referred here is the fee contracted freely between the lawyer and his client, not the fee yearly fixed in tariff schedules and considered as part of the court costs so far.

³⁰ CCP Art. 422, DCCP Art. 333.

³¹ The Law on Charges No 492, Art. 13 and 14.

³² The Law on Charges No 492, Art. 123/2.

³³ The Law on Charges No 492, Art. 124.

³⁴ See the details under footnote 18.

3. Are party agreements (in a contract) allocating costs and fees in case of litigation common? To what extent are such agreements enforceable (e.g., even against consumers)?

Turkish Contract Law upholds the maximum the principle of party freedom in Article 19 and 20 in the Law of Obligations. A contract is null and void if its content is impossible, illegal or violates public morality. Consequently either party may at free discretion to establish the conditions of the contract. That discretion comprises the freedom to establish the content of the contractual provisions in relation to cost and fee allocation in case of a likely litigation. Although such a clause is perfectly enforceable, its insertion in a contract is not very common in Turkey. Nevertheless such an allocation in a consumer contract shall constitute an unfair contract clause, and Article 6 of the Law of Consumer Protection stipulates that consumers are not bound by the unfair contract clauses.

4. Are parties allowed to represent themselves? If yes, in all cases or only in some? How common is self-representation?

In Turkey there is no mandatory requirement for a person to be legally represented in court. This approach applies to Court of Cassation as well. In Article 59 of the Code of Civil Procedure it was held that any person entitled to sue or defend may do so personally or through an attorney of his choice. (Nevertheless the judge shall compel a party to designate an attorney in two cases: firstly if he persistently behaves improperly during the hearings, and secondly if he is unable to defend his own case in the prescribed manner and with sufficient clarity³⁵.)

III. Encouragement or Discouragement of Litigation

1. Are the rules governing cost and fee allocation designed to encourage or to discourage litigation
- in general?
- in particular kinds of cases?

The following answer to this question is not based on a field survey on the matter since there is none. Nevertheless it is believed that requiring the loser to pay the court costs helps to discourage low probability suits, encourage litigation for meritorious claims, and also create an incentive to engage in efficient primary substantive behavior. This approach has been supported by disciplinary fines provisions, as indicated above³⁶ for frivolous litigant and defendant, and default witness and experts. Furthermore it is kept in the new Draft Code as well. So this rule appears to be part of the efficiency of the legal system.

2. How much do parties (especially plaintiffs) typically have to pay up front, e.g., in the form of
- court costs (into court)
- attorneys fees (retainer)
- costs of taking evidence
Do up-front payment requirements have a deterrent effect on potential litigants?

³⁵ CCP Art. 70 and 71.

³⁶ See under II. 1.1-Exceptions Referred in the Code of Civil Procedure.

Advanced, initial payments at the beginning of trial is applicable to application(filing) charges, service expenses of petition and writ of summons, and decision charges at the minimum level.

The total advanced payment for a non monetary dispute before a general civil court is the following:

-Application charge is 15.60 TL (approx. 10.4 USD) in general civil courts for the year 2009,

- Charges for judgment and writ is also 15.60 TL (approx. 10.4 USD),

-Plus service expenses approx. 30 TL(20 USD) .

Total amount is 40.8 USD.

Where if it is a compensation trial before a general civil court,about i.e a value of 100.000 TL, (approx.666.660 USD) the advanced payment requirement will be higher:

-Application charge: 15.60 TL (approx. 10.4 USD),

-Charges for judgment and writ: % 054 of the disputed value = 5400(approx. 3600 USD). Since one fourth of this charge must be paid during the initiation of the action, (the remaining will be charged in two months following the decision), up-front payment is 1350 TL (approx. 900 USD.)

- Plus service expenses approx. 30 TL(20 USD) .

The total up front sum will be 930.4 USD.

As a conclusion the level of both sums, in principle difficult to create a deterrent effect alone at the initial stage³⁷. This is a reflection of policy adopted and expressed in Article 141/5 of the Turkish Constitution. There it was referred to the duty of the judiciary inter alia, to complete the trial at minimum cost. Nevertheless bearing in mind the certain low level income groups i.e. workers, it would be wise to refer the criticism (about the rate of the decision charge and up front payment of its one forth) made by the workers (and /or their family) in compensation actions brought i.e following a labor accident. The legal policy, on the other hand adopted for the consumer actions are much more generous than of the workers. The consumers are exempted from up front payments.

IV. The Determination of Costs and Fees

1. What determines the amount of court costs - the type of court? The amount in controversy? Other factors?

As the foregoing paragraphs reveal that both the type of the courts and the type of disputes (their having a monetary value or not) have an important impact over the determination of the court costs. Furthermore other litigation expenses like the travel, lodging expenses of witnesses and of other persons required to be present at court, expenses of visits to premises, expenses for seizures, expenses for service of documents and other mail expenses, payments made (under stamp duty, tax etc.) for collecting, certification, authentication of documents from public officials are other determining factors of the amount of total court costs.

2. How are lawyers' fees determined? By statute (schedule), and if so, are the rates binding or can clients and their attorneys agree to in- or decrease them? By the market? What are the main criteria?

³⁷ In Turkish system lengthy period before courts creates much more concern than of the amount of initial payments.

The lawyer's fee outside the scope of court costs (please see the first group mentioned above under I.1.2.2) is determined according the contract between lawyer and client .The basic principle about this contract is regulated in Articles 163 and 164 of the Attorneyship Law.

The Law prohibits pro bono legal service in Art.163. On the other hand bearing in mind the ceiling introduced in Article 164, they can agree on any amount. Thus the attorney's fee can not exceed %25 of the disputed value. And the minimum level of the fee is determined in accordance with the tariffs fixed in the Attorney Fee Schedule mentioned previously in this report. That minimum fee in the schedule is binding. The tariffs fixed in this schedule are also applicable for the non monetary disputes where there is no concluded fee among the lawyer and his client.

In cases where there is no written contract, or non existence of a fee in the contract, the fee is determined between %10 - %20 of the already adjudicated monetary value of the dispute.

Consequently the client and attorney can agree on any fee but the winner can recover only the fee fixed in the yearly tariff schedule.

3. Who finally determines the concrete amount to be awarded to the party/parties?

Does the decision maker have discretion? What form does the decision take (integral to the judgment, separate court order, etc.)?

The court costs are determined by the court, and the judge has discretion on the issues mentioned in the foregoing paragraphs. The decision rendered by the court about the cost is integral part of the judgment.

V. Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance

1. Are success-oriented fees allowed? In particular

- contingency fees (a percentage of the sum won)?
- no win-no fee arrangements?
- success premiums (higher fees in case of a victory)?
- other fees depending on the outcome of the litigation?

If yes,

- are such fees a recent development (since when)?
- are they regulated by law (e.g., capped)?
- does the loser have to pay the enhanced (success) fee?

Are such fees allowed or common across the board or in particular cases only?

The success oriented fees are not permitted in Turkish legal system in accordance with Articles 163 and 164 of the Attorneyship Law³⁸ summarized above. Furthermore Article 47 of the

³⁸ **Article 163** – <Amended as per Article 4667/76 dated 2 May 2001> The attorneyship contract is drawn up at liberty. The attorneyship contract must cover a specific legal service and an amount or a value. Unwritten contracts will be proven in accordance with general provisions. Conditional contracts are valid provided that the conditions are not in contradiction of the law. Contracts in excess of the attorneyship fee ceiling are valid at the ceiling value. Invalidity may not be claimed for a contract that has been carried out. The invalidity of an article will not invalidate the entire attorneyship contract.

Attorneyship Law prohibits attorneys from acquiring or mediating in the acquisition of contested rights. This prohibition even remains effective for one year after the termination of the service. The said provision comprises the attorney's partners as well. The Law goes further and stipulates imprisonment (in Art. 48) for the persons who mediate in soliciting commission for an attorney. The same imprisonment is applicable for the attorney who resorts to the services of an agent.

2. Is it allowed to sell claims for purposes of litigation? (i.e., can a plaintiff subrogate his claim to an attorney, a law firm, or an entrepreneur who finances the litigation and thus assumes the litigation risk?)

The interpretation derived from Art. 163 and 164 of the CCP (mentioned above) does not permit a plaintiff to sell his claims for purposes of litigation.

3. Are there special rules for class actions, group litigation or other types of lawsuits (e.g., actions brought by consumer organizations)?

The class action or collective law suits in the sense of US law are alien concepts in Turkey. Nevertheless several persons may sue as 'co-plaintiffs' or being sued as 'co-defendant' where they have the same or joint rights or obligations, or if their case arises from the same reason. They are expected to proceed jointly³⁹ but if one of them has special claim or defense, he may use it separately. Consequently where several losing parties are required to pay costs, the amount is divided among them according to the extent of their respective interests in the litigation⁴⁰.

Under the Law of Consumer Protection, consumer associations (or the Ministry of Industry and Commerce) can file claims in general against corporations, to obtain judicial orders to prevent the production or marketing of a defective product. It is not a claim submitted on behalf of an individual consumer or consumers. In case of injury only the related consumer has the right to sue the corporation for injury or damage, not the associations⁴¹.

Article 164 – <Amended in 2001 and 2004> The attorneyship fee represents the amount or value that the legal service is worth. The attorneyship fee may be agreed as a certain percentage of the entity or money to be litigated or adjudicated, not to exceed 25 percent.

Contracts to be made in accordance with the second paragraph may not bear any terms to the effect that part of the non-monetary property and rights under litigation will be owned in kind by the attorney.

No agency fee may be agreed below the minimum attorneyship fee tariff. Cases of accepting a commission free of charge will be reported to the board of directors of the bar association. The minimum attorneyship fee tariff will be applied in lawsuits and cases for which an attorneyship fee has not been agreed and of which the value cannot be measured in terms of money. An amount from 10 to 20 percent of the value of the suit on the date of the dispute over the attorneyship fee, depending on the outcome of the suit and the amount of work put in by the attorney, will be adjudged as the attorneyship fee by an authority having the power to review objections to fees in lawsuits and cases the value of which can be measured in terms of money, the fee thus determined not being less than the minimum attorneyship fee tariff.

The attorneyship fee to be imposed on the opposite party at the end of the suit depending on the decision and the tariff belongs to the attorney. This fee may not be traded or deducted due to the client being in debt; nor may it be attached.

See http://www.barobirlik.org.tr/mevzuat/avukata_ozel/avukatlik_kanunu/attorneyship_law.doc (27.9.2009).

³⁹ CCP Art. 43,44, DCCP Art. 62,63.

⁴⁰ CCP Art. 419, DCCP Art 330.

⁴¹ The Law Of Consumer Protection Art. 23

The recently prepared draft to amend the Law of Consumer Protection proposes to extend the scope of action to sue in favor of Consumer Associations. Nevertheless the extension comprises only the injunction measures and does not introduce a class action⁴².

4. Can one insure against the costs (including fees) of litigation? By buying specific litigation insurance? By buying coverage in other policies (e.g., automobile liability or homeowners insurance)? Is such insurance common? How does it work in practice?

Insurance is a newly developed concept in Turkey and regulation of the sector is governed by the Insurance Law No 5684 passed in mid 2007. The court costs are not exempted and may fall within the scope of insurance. Nevertheless specific litigation insurance is extremely rare. Most of the time it is under the coverage of a main insurance contract; i.e. a rent insurance may guaranty all court cost for a homeowner in case of any failure to collect his rents. Nevertheless it is too early to refer a common practice even for these forms.

VI. Legal Aid

1. Is there a publicly funded legal aid system? If yes, roughly how does it work (through financial support, court appointed counsel, or otherwise)?

The legal aid, as a part of the guarantee of access to justice principle is governed by two legislation; in Article 465-472 of the Code of Civil Procedure⁴³ and 176-181 of the Attorneyship Law and in its implementing By- Law⁴⁴. The Code regulates the procedure before the court, and the expenses are funded by the general budget saved for the judiciary. The Attorneyship Law and its implementing regulation on the other hand govern a parallel route under independent budget in each local bar⁴⁵. The procedures envisaged in the Code and in the Law may be complimentary each other most of the time. Nevertheless sometimes it may be possible to receive legal aid from the local bar where the court refused the waiver of the litigation expenses and court charges.

Under the procedure of the Code, the court⁴⁶ must receive an application from the party, accompanied by certified proofs of his adverse circumstances that he can not afford court costs (court charges, litigation expenses and attorney fee), and also his meritorious claims or defenses. The court may accept the claim and waive the court charges and litigation expenses temporarily (if he loses the case he is obliged to pay), and inform the local Bar for the appointment of an attorney. On this point the Legal Aid Office of the local bar appoints a lawyer.

Under the Law of Attorneyship the person may directly apply to the Legal Aid Office of the local Bar. The same eligibility criteria adopted in the Code are valid for this procedure as

⁴² See the reasoning and Art. 23 of the draft amending law <http://www.tobb.org.tr/haber2.php?haberid=1798> (5 September 2009).

⁴³ The counterpart Articles in the draft CCP 338-344.

⁴⁴ http://www.barobirlik.org.tr/mevzuat/avukata_ozel/avukatlik_kanunu/attorneyship_law.aspx (5 September 2009)

⁴⁵ The general legal aid budget of the bars comprises the amount send by the Ministry of Finance and the amount of the Union's (the Union of Turkish Bar Association) own resources. The Union later distributes this amount to each local bar according to the number of attorneys registered there and the population of the area. In 2009 the total legal aid budget (for civil cases) for 77 bars all over Turkey is approximately 86.500.000 TL of which 25.000.000 was send by the Ministry of Finance.

See http://www.barobirlik.org.tr/tbb/baro_gonderimleri/adli_yardim/adli_yardim_gonderim.htm (27.9.2009)

⁴⁶ Current Code regulates legal aid only before inferior courts. The Draft extended the procedure to the Courts of Appeal and the Court of Cassation in Art. 340.

well. If the situation is favorable, the Office primarily consider granting legal representation and legal advice, and subsequently appointed lawyer may apply to the Court for the temporary waiver of litigation and court charges. In case of refusal of this demand by the Court, the Office may consider to grant legal aid for those expenses out of Bar Legal Aid budget. As the aforementioned procedure shows, the grant of legal aid by the Bar, may not always automatically amount to entitlement of charges and litigation expenses in the initial stage. Additionally those require the approval of the Administrative Board of the Bar.

2. Is there privately organized help for indigent or other clients (e.g., through pro bono work)?

The charity organizations sometimes may cover this pro bono if it is part of their objective to help i.e. to females.

3. Is legal aid generally available to all parties in need or is it rather awarded/ available selectively?

It is generally applicable within the light of above mentioned two eligibility criteria⁴⁷. Firstly the person is expected to certify the proofs of his adverse circumstances that he can not afford court costs (court charges, litigation expenses and attorney fee), and secondly his meritorious claims or defenses. The first condition does not necessarily refer the poverty: a married two children worker with minimum wage) may perfectly meet the first criterion if he certifies his adverse circumstances (i.e. monthly rent he pays, no additional income, unemployed wife etc.)that prevents him to afford court costs.

4. Are litigation costs and fees considered a serious barrier excluding certain parties from access to justice?

The most severe criticism about the level of the charges for judgment and writ, and some litigation costs (for example fees for expert surveys) comes in the labor trials brought by workers (and/or their families) for i.e. action for damages as a result of labor accidents. This criticism addresses not only up-front payments at the initial stage of the trial but also the practice after the judgment, which prevents successful party to bring enforcement proceedings to get the judgment executed when the loser fails to pay court costs(primarily the remaining charges for judgment and writ which are the %054 of the disputed amount). Access to justice is such a concept that it does refer not only accessibility to but also efficiency and effectiveness of the judicial system which comprise inter alia effective enforcement of the judgements. This problem and its solution have been evaluated in the conclusion part of this report.

5. Are litigation costs a barrier to bringing certain kinds of cases, e.g., because the amount in controversy is too low to make litigation economically feasible?

Where the dispute is 500 TL (approx. 333 USD) the following court cost may be awarded:- 15.60 TL Decision Charge, - 60 TL Attorney fee,- 30 TL service fee, as a sum of 105.60 TL (approx. 70 USD). In this calculation no expert survey is assumed (otherwise 300 TL=200 USD must be added to total sum). In such a case it is much more economically feasible

⁴⁷ The figures are not announced publicly by the State; nevertheless 2006 figures reveal that in 2006, 9703 person received legal aid. See *European Judicial Systems, Efficiency and Quality of Justice, European Commission for Efficiency and Quality of Justice, Edition 2008, Council of Europe, CEPEJ Studies No 11, p. 50.*

for the debtor to reach an out of court settlement. Subsequently low amount is not a barrier for the litigant but a convincing deterrent for the debtor to avoid further accumulation over the disputed value.

VII. Examples*

1. Please state, or provide a good faith estimate of, the sum total (i.e., for both sides) of costs and fees of litigating to final judgment in the first instance a routine private or commercial (e.g., contract, tort, or property)

- small claim, e.g., (the equivalent of) \$ 1,000:

-13.5 USD (¼ of) the charges for judgment and writ

-10.4 USD Application (filing) Charge,

-1.6 USD Proxy Charge (if the filing made by an attorney)

TOTAL Court Cost: 25.5 USD

Additionally the plaintiff should save at least 120 USD fee for his own lawyer (minimum amount fixed in the schedule, nevertheless this pose no concern for the court between plaintiff and defendant.)

)

- small to medium claim, e.g., \$ 10,000:

-135 USD (¼ of) the charges for judgment and write,

-10.4 USD Application (filing) Charge,

-1.6 USD Proxy Charge (if the filing made by an attorney),

-6.6 USD Service expense (it is 3.3USD for each plaintiff and defender)

TOTAL Court Cost: 153.6 USD

Additionally the plaintiff should save at least 1200 USD fee for his own lawyer (minimum amount fixed in the schedule, nevertheless this pose no concern for the court between plaintiff and defendant.)

)

- medium to large claim, i.e., \$ 100,000:

-1350 USD (¼ of) the charges for judgment and writ ,

-10.4 USD Application (filing) Charge,

-1.6 USD Proxy Charge (if the filing made by an attorney)

-6.6 USD Service expense (it is 3.3USD for each plaintiff and defender)

TOTAL Court Cost: 1368.6 USD

Additionally the plaintiff should save at least 8266 USD fee for his own lawyer (minimum amount fixed in the schedule, nevertheless this pose no concern for the court between plaintiff and defendant.)

* The author is grateful to Justice Mr. **Ugur COLAK** (Istanbul Intellectual Property Civil Court Judge) for his valuable contribution to this part. The calculation is made primarily in Turkish currency then it was transformed to USD (1.5 TL=1 USD). For the rates and fixed charges and attorney fees taken as a base in this calculation, please see 2009 tariff schedules mentioned in footnotes 9-11 above.

- **large claim, e.g., \$ 1,000,000:**

-13500 USD (*1/4 of the charges for judgment and writ,*

-10.4 USD *Application (filing) Charge,*

-1.6 USD *Proxy Charge (if the filing made by an attorney)*

-6.6 USD *Service expense (it is 3.3USD for each plaintiff and defender)*

TOTAL Court Cost: 13518.6 USD

Additionally the plaintiff should save at least 32.333 USD fee for his own lawyer (minimum amount fixed in the schedule, nevertheless this pose no concern for the court between plaintiff and defendant.)

2. If a plaintiff lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?

(Assumptions: correspondence expenses, expert opinion of 3 experts)

- 8266.6 USD *Attorney fee for the defendant*⁴⁸,

-26.6 USD *Correspondence expenses,*

-2000 USD *Expert Opinion expenses.*

ADDITIONAL TOTAL: 10293 USD

SUM TOTAL: 10293 + 1368.6 (Initial Court Cost) + 4050 (the remaining 3/4 of the charges for judgment and writ) = 15711.6 USD

3. If a defendant lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?

(Assumptions: correspondence expenses, expert opinion of 3 experts)

-5400 USD *the charges for judgment and writ*⁴⁹,

-8266.6 USD *Attorney fee of the plaintiff*⁵⁰,

-26.6 USD *Correspondence expenses,*

-2000 USD *Expert Opinion expenses.*

ADDITIONAL TOTAL: 15693.2 USD

SUM TOTAL: 15693.2 + 28.6 (Initial Court Cost) = 15711.6 USD

⁴⁸ The court has no concern about the plaintiff's fee responsibility to his own lawyer.

⁴⁹ In practice, this amount is charged from the plaintiff despite his success when he seeks a copy of the decision for the enforcement ! For the criticism and a decision of the European Court of Human Rights rendered in 2007 in the case *Ulger v. Turkey* please see the Conclusion part below.

⁵⁰ The court has no concern about the defendant's fee responsibility to his own lawyer.

Conclusion

The cost and fee allocation rules shall remain same apart from some minor changes introduced in the new Draft Code of Civil Procedure when it came into force most probably in late 2010, as referred above.

In principle lump some court charges⁵¹ (application charge, charge for sittings, and charges for judgment and writ, and appeal charge) for non monetary disputes never constitute a barrier excluding the parties from access to justice. Quite contrary their low level receives considerable criticism⁵² as representing the other end of the pendulum far from being what is called as 'reasonable' charge.

When it comes to monetary disputes, the charge related question arises in the phase of the enforcement of the judgment. The main reason of the question is some particular rules in the Law on Charges (Law no. 492) and its implementation in practice. As it is recalled the Law requires pre-payment of the one fourth of the charges for judgment and writ, and the rest is paid in two months following the judgment. Otherwise a writ will never be served⁵³. In further Article⁵⁴ the Law regulates the result of the non-payment which conveys the non execution of the subsequent proceedings, in other words not to be able to initiate and commence the enforcement of the judgment!

The main concern about those provisions is that; firstly, those rules oblige the winner to pay the charges in advance, which should have been by the losing party. Secondly they prevent the winner (who come from very low income groups⁵⁵ from the society) from having the judgment in his favor served on him, therefore, prevent him from being able to initiate the enforcement procedure. Subsequently 'loser pays' rule introduced in the Code of Civil Procedure has in practice been withdrawn by the said rules in the Law on Charges.

*This issue was brought before the European Court of Justice in *Ulger v. Turkey*⁵⁶ case, and the Court held that the execution of a judgment should be regarded as an integral part of the 'trial', and consequently it is part of 'the right to a court' guaranteed in Article 6 § 1 of the Convention. For that reason 'the right to a court' equally protects the right of access to enforcement proceedings⁵⁷. Furthermore the Court also stipulated that '... holding the applicant responsible for the payment of the charges before he could receive a copy of the judgment imposed an excessive burden on him and restricted his right of access to a court to such an extent as to impair the very essence of that right.'⁵⁸, and found Turkey in infringement of 'fair trial' regulated in Article 6 § 1 of the Convention.*

*It is widely believed that the possible urgent solution to this question is the amendment to the Law on Charges, especially through the modifications in Articles 28 and 32 in line with the *Ulger v. Turkey* decision of the European Court of Justice.*

⁵¹ For the current amounts see footnote 5.

⁵² Especially for some of the non monetary disputes before the Intellectual Property Courts.

⁵³ **Art. 28:** (a) One quarter of the charges for the judgment and the writ shall be paid beforehand and the rest shall be paid within two months of the judgment's delivery. The writ shall not be served on the party concerned unless the charges for the judgment and a writ of execution are paid...."

⁵⁴ **Art. 32:** "As long as the relevant charges for the judicial processes are not paid, the subsequent processes shall not be executed. If the charges which were not paid by the party concerned are paid by the other party, the process shall be continued and the amount shall be taken into consideration in the judgment without the need for any request to this effect."

⁵⁵ Mainly workers in labor actions.

⁵⁶ Case No 25321/02, 26.June 2007.

⁵⁷ Par. 38 and 39.

⁵⁸ Par. 45.

