CHAPTER 42

Turkey*

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SYNOPSIS

¶ 42.01 **Executive Summary of Turkish Law**

[1] **Civil Law Basis of the Turkish Legal System**

[2] **Enforcement of Debts Under Turkish Law (*İcra*)**

[3] **Bankruptcy (Liquidation) Under Turkish Law (*İflâs*)**

[4] **Composition Agreements Under Turkish Law (*Konkordato*)**

[5] **Composition by Way of Abandonment (*Malvarlığının Terki Suretiyle Konkordato*)**

[6] **Restructuring of Corporations and Cooperatives via Reconciliation (*Sermaye Şirketleri ve Kooperatiflerin Uzlaşma Yoluyla Yeniden Yapılandırılması*)**

¶ 42.02 **Turkish Business and Commercial Law**

[1] **Types of Business Organizations**

[a] **Audit of Joint Stock Companies**

[b] **Joint Stock Company's Duties upon Insolvency**

[2] **Special Laws Applicable to Merchants (*Tüccar*)**

[3] **Contract Law**

[4] **Creditors' Rights**

[a] **Unsecured Creditors**

[b] **Foreign Creditors**

[c] **Secured Creditors**

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[i] Real Property Mortgage Creditors
[ii] Business Enterprise Mortgage Creditors
[iii] Pledge Creditors
[d] Financial Lessors

¶ 42.03 Basic Features of Dispute Resolution Mechanism in Turkey

[1] Overview of Judicial System
[a] Court of First Instance
[b] Commercial Court
[c] Regional Courts of Appeal
[d] Court of Cassation

[2] Arbitration

¶ 42.04 Debt Enforcement Proceedings Under Turkish Law (*İcra*)

[1] Commencement of Debt Enforcement with the Debt Enforcement Office
[a] Payment Order
[i] Declaration of Assets
[b] Opposition to a Payment Order
[c] Judicial Lifting of Opposition to a Payment Order
[d] Insolvency Certificate

[2] Prejudgment Attachment

[3] Enforcement of Judgments and Judgment-Like Documents

[4] Secured Creditors' Debt Enforcement Rights

¶ 42.05 Bankruptcy (Liquidation) Under Turkish Law (*İflâs*)

[1] Applicable Law
[a] Organization of the Bankruptcy Courts, Related Offices and Administrative Entities

[2] Eligibility for Bankruptcy
[a] Voluntary and Mandatory Bankruptcy
[b] Postponement of Bankruptcy

[3] Types of Bankruptcy Under Turkish Law
[a] General Bankruptcy
[b] Bankruptcy Involving Negotiable Instruments
[c] Direct Bankruptcy
[i] Appeal of Judgment of Bankruptcy

[4] Creation and Administration of the Bankruptcy Estate
[a] Automatic Stay
[i] No Stay as to Secured Creditors
[b] Publication of Judgment of Bankruptcy
[c] Requirement of Notice to Specified Entities

[5] Determination of Method of Liquidation
[a] Suspension of Liquidation
[b] Simple Liquidation Procedure
[c] Regular Liquidation Procedure

[6] First Meeting of Creditors

[a] Selection of Board of Trustees
[7] Second Meeting of Creditors
[8] Final Report and Case Closing
[9] Rights of Creditors
[a] Notice to Creditors
[b] Time Limits for Submission of Claims
[c] Allowance of Claims
[d] Treatment of Secured Creditors
[e] Priority of Distribution
[i] First Rank
[ii] Second Rank
[iii] Third Rank
[iv] Fourth Rank
[f] Treatment of Administrative Creditors
[g] Interest on Claims
[h] Setoff
¶ 42.06 Avoidance and Recovery Actions in Turkey
[1] Avoidability of Gratuitous Transfers
[2] Avoidability of Certain Transfers Based upon Insolvency
[3] Other Avoidable Transfers
[4] Breach of Fiduciary Duty Claims
[a] General Provisions
[b] Special Provisions in Event of Bankruptcy
¶ 42.07 Composition Agreements Under Turkish Law (*Konkordato*)
[1] Simple Composition—Initiation; Offer of Composition by Debtor
[a] Review by Commercial Court
[2] Appointment of Composition Commissioner
[a] Meeting of Creditors
[3] Statutory Requirements for Approval of Composition
[4] Postponement of Realization upon Collateral by Secured Creditors
[5] Effect of Court Approved Composition
[a] Certain Creditors Not Bound by Composition
[6] Composition by Way of Abandonment and Other Types of Compositions
[a] Composition by Way of Abandonment
[b] Composition in Bankruptcy
¶ 42.08 Restructuring of Corporations and Cooperatives via Reconciliation Proceedings in Turkey
[1] Corporate Reorganization Provision Added to Turkish Bankruptcy Law
[2] Voting on Restructuring Plan
[3] Required Contents of a Plan of Restructuring
[4] Required Submissions in Connection with Restructuring Plan
[5] Interim Measures upon Application

[6] Financing Pending Reorganization
[7] Examination of the Restructuring Application
[8] Effect of Approval of a Restructuring Plan
[9] Modification of Confirmed Restructuring Plan
[10] Termination of Confirmed Restructuring Plan
¶ 42.09 Extraordinary Suspension of Payments Procedure in Turkey
¶ 42.10 Treatment of Cross-Border Insolvencies in Turkey
[1] Principle of Territoriality Applies
[2] International Law and Treaties

¶ 42.01 Executive Summary of Turkish Law

[1] Civil Law Basis of the Turkish Legal System

Turkey is a civil law country. Its law is based primarily upon codes adopted from existing European statutory codes beginning in the 1920's. In 1929, the Turkish Code of Enforcement of Debts and Bankruptcy (*İcra ve İflâs Kanunu*)[1] was enacted based substantially upon the Swiss Federal Act on Enforcement of Debts and Bankruptcy of April 11, 1889.[2] Substantial revisions were made to it in 1932, 1940, 1965, 1985, 1988, 2003, 2004 and 2018.[3] In 1926, the Turkish Civil Code (*Medenî Kanun*)[4] and Code of Obligations (*Borçlar Kanunu*),[5] which contain extensive provisions regarding commercial matters, were adopted from the Swiss Civil Code and Swiss Code of Obligations. In 2012, the current Turkish Commercial Code (*Türk Ticaret Kanunu*)[6] was adopted based in European law, replacing an earlier commercial code from 1926 and 1956.[7]

Similar to comparable provisions in the law of Switzerland and other civil law countries, the Turkish Commercial Code specifies the law applicable to merchants, commercial enterprises and persons performing commercial acts. Specific provisions of the Commercial Code specifying the duties of merchants are of particular relevance to Turkish bankruptcy law.

¶ 42.01

[1] Law No. (*Kanun*) 1424 (May 4, 1929, the date refers to date of publication in the Official Gazette (*Resmi Gazete*)).

[2] Bundesgesetz über Schuldbetreibung und Konkurs, Loi fédérale sur la poursuite pour dettes et la faillite.

[3] Law No. 2004 (June 9, 1932, as amended July 11, 1940, Mar. 6, 1965, June 15, 1985, Nov. 25, 1988, July 17, 2003, Feb. 12, 2004 and Mar. 15. 2018).

[4] Law No. 743 (Apr. 4, 1926).

[5] Law No. 818 (May 8, 1926).

[6] Law No. 6102 (Jan. 13, 2011).

[7] Law No. 6762 (July 7, 1956).

[2] Enforcement of Debts Under Turkish Law (*İcra*)

The Turkish Code of Enforcement of Debts and Bankruptcy (*İcra ve İflâs Kanunu*) ("IIK") deals with both enforcement of debts and bankruptcy. The Turkish legal system, like the Swiss legal system, provides for debt enforcement proceedings with the assistance of a quasi-judicial government office, the Debt Enforcement Office (*İcra Dairesi)*. Debt enforcement procedure (*İcra*) provides a summary process whereby a creditor can collect upon an undisputed debt with the assistance of the Debt Enforcement Office without the necessity of commencing an action in the Court of First Instance. For creditors acting individually, rather than collectively, in most instances it will be advantageous to initially pursue debt enforcement procedure rather than bankruptcy.

[3] Bankruptcy (Liquidation) Under Turkish Law (*İflâs*)

Similar to the laws of many civil law countries, bankruptcy (*iflâs*) under Turkish law implies liquidation. When a business or merchant has been determined to be a bankrupt (*müflis*), its assets will be liquidated and distributed to creditors in accordance with the priority scheme specified in the IIK. Turkish law provides for creditors to play an active supervisory role in the liquidation of a bankruptcy estate, under the supervision of the Bankruptcy Department (*İflâs Dairesi*).

[4] Composition Agreements Under Turkish Law (*Konkordato*)

A court approved composition agreement with creditors (*konkordato*) is an alternative to bankruptcy. The IIK sets forth the requirements for court approval of a composition. As a general rule, a composition requires the approval of a majority of a debtor's creditors whereby they agree to accept partial payment in satisfaction of the obligations owed to them.

[5] Composition by Way of Abandonment (*Malvarlığının Terki Suretiyle Konkordato*)

In 2003, a new provision was added to the IIK for composition by way of abandonment (*Malvarlığının Terki Suretiyle Konkordato*) which is a type of composition in which the debtor transfers its assets to its creditors or gives them authority to transfer such assets in whole or in part to a third party. This type of composition was adopted from Swiss law and does not involve an offer by the debtor to pay any specified proportion of its obligations, but rather involves a relinquishment of assets to creditors.

[6] Restructuring of Corporations and Cooperatives via Reconciliation (*Sermaye Şirketleri ve Kooperatiflerin Uzlaşma Yoluyla Yeniden Yapılandırılması*)

The need for reform of the IIK to include a reorganization provision was widely recognized by a number of observers, including the World Bank and International Monetary Fund. In 2004, a corporate restructuring provision was added to the IIK that built upon the Istanbul Approach to restructuring nonperforming loans in the financial sector adopted in 2002. This encourages prepackaged reorganization plans for

financially troubled joint stock companies and cooperatives as an alternative to liquidation and introduces greater flexibility and sophistication into Turkish insolvency and reorganization law.

¶ 42.02 Turkish Business and Commercial Law

[1] Types of Business Organizations

Turkish law recognizes various types of business organization. The simplest forms of business organization are sole proprietorships and simple partnerships (*âdi şirketler*) which have no legal personality separate from the partners and in which all partners have unlimited liability. Other types of partnerships are recognized, including general partnerships (*kollektif şirketler*) which have a legal personality and in which all partners have unlimited liability for partnership liabilities if the assets of the partnership are insufficient to satisfy such liabilities, and limited partnerships (*komandit şirketler*) in which limited or dormant partners (*komanditer ortaklar*) have limited liability to the extent of capital contributions and general or active partners (*komandite ortaklar*) have unlimited liability. Turkish law also recognizes limited liability companies (*limited şirketler*) which are viewed as a type of partnership in which the liability of the partners is limited to their capital contributions, and is in many respects similar to a corporation, but without ease of transferability of ownership interests. Finally, joint stock companies (*anonim şirketler*) are recognized under Turkish law and are essentially analogous to corporations.

[a] Audit of Joint Stock Companies

The new Turkish Commercial Code (*Türk Ticaret Kanunu*) provides that certain joint stock companies shall have their individual and consolidated financial statements prepared by independent auditors in line with Turkish Accounting Standards, which is compliant with International Auditing Standards.[1] Companies that meet at least two of the following three criteria on their own or together with their subsidiaries and affiliates are defined by the Council of Ministers as subject to an independent audit. These criteria are (1) total assets in the amount of TL 40 million or more, (2) annual net sales revenue in the amount of TL 80 million or more or (3) 200 or more employees.[2]

The Law No. 6455 dated April 11, 2013, has now introduced a provision whereby all joint stock companies—other than those which meet related criteria and are therefore subject to an independent audit—will be subject to an audit. General principles relating to audits, such as the qualification of the auditors, their functions, the rules on their appointments and the content of audit reports, are due to be determined by the Turkish Ministry of Customs and Trade and enacted by the Council of Ministers.

¶ 42.02

[1] *Türk Ticaret Kanunu* (hereinafter "TTK") art. 397.

[2] The Council of Ministers Decision No. 2016/8549 (Mar. 19, 2016).

[b] Joint Stock Company's Duties upon Insolvency

The Turkish Commercial Code (*Türk Ticaret Kanunu*) provides that if a Turkish joint stock company's most recent annual balance sheet shows that at least fifty percent of its share capital and legal reserves has been lost, then the board of directors must immediately advise the company's shareholders of such circumstances and offer appropriate remedial measures through a general assembly meeting.

If, based on the last annual balance sheet of the company, the value of the net assets falls below one-third of its share capital, then either the company must decrease its capital to one-third of its statutory capital (provided that the minimum capital requirements of the Commercial Code are satisfied) or the shareholders must contribute additional capital to the company to replenish the company's capital to the original level.

If there are indications that the company is insolvent, then the company's board of directors must prepare an interim balance sheet which reflects the current market value of the company's assets. According to this interim balance sheet, if the assets of the company are insufficient to pay creditors' claims, the board of directors is required to immediately notify the court of this situation and file for bankruptcy, unless certain company creditors agree in writing to subordinate their claims to those of all other company creditors to the extent of the capital deficit and that the validity of this declaration or contract is verified by experts assigned by the court.[3]

On application by the board of directors or by a creditor, the court may grant a stay of insolvency proceedings where there is a prospect of financial restructuring; in that event, the court orders measures to preserve the company's assets.[4] However, Turkey has tightened up the postponement of insolvency regime, taking into consideration the bad faith debtors.[5] The Law Regarding Amendment of Certain Laws for Improvement of Investment Environment entered into force on August 9, 2016, but will be applied only after the three-month state of emergency has been lifted.[6]

[2] Special Laws Applicable to Merchants (*Tüccar*)

The Commercial Code defines who is a merchant (*tacir*) and specifies rules applicable to merchants (*tüccar*). Generally, the definition of merchant encompasses individuals and legal entities involved in commercial activity. The Commercial Code draws a distinction between persons who earn a living wage through personal labor (e.g., carpenters, masons) and those who engage in the purchase and sale of goods.[7] Entities that are established for the goal of commercial activity are deemed to be merchants subject to the laws applicable to merchants.[8]

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[3] TTK art. 376.

[4] TTK art. 377.

[5] *See* ¶ 42.05[2] [b] *infra*.

[6] Law No. 6728 (Aug. 9, 2016).

[7] TTK art. 15.

[8] TTK art. 16.

Merchants are required to conduct all of their commercial activities to the standard of a prudent business person.[9]

The Commercial Code specifies that merchants are amenable to bankruptcy on account of all manner of obligations that they incur related to their business affairs.

All merchants and their branch offices are required to register in the commercial registry (*Ticaret Sicili)* maintained by the local Chamber of Commerce and Industry, or Commercial Registry Directorate in the absence of a Chamber of Commerce and Industry. Registration is generally a precondition to the valid creation of a business entity.[10] Merchants are required to register certain basic organizational information, such as trade-names, capital and principal offices. The law specifies fines and imprisonment for failure of a merchant to register or for making false statements in a registration. Commercial Registers are open to public inspection.

Every merchant is required to maintain, in Turkish, ledgers of its economic and financial situation with respect to the merchant's business, its assets and liabilities, and its year end results. The Commercial Code specifies the form and subject matter of the type of ledgers that a merchant must maintain, which for merchants that are legal entities include: a journal of daily transactions; a general ledger; a yearly inventory and balance sheet ledger; and a journal of resolutions enacted.

[3] Contract Law

The Code of Obligations (*Borçlar Kanunu*) governs general provisions concerning contract law. It sets forth rules of interpretation and construction regarding contract formation and breach of contract. Certain provisions are applicable only to contracts between merchants.[11]

[4] Creditors' Rights

[a] Unsecured Creditors

Unsecured creditors may pursue rights for debt enforcement through the Debt Enforcement Office and also, against merchants, may pursue commencement of bankruptcy.

[b] Foreign Creditors

Turkish law does not provide for discriminatory treatment of foreign creditors. Turkey, like many civil law countries, distinguishes between public international law, involving legal relations among nations, and private international law, involving legal relations among persons in an international sphere. To the extent that choice of law issues may affect the outcome of a given dispute, whether a Turkish court will apply

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[9] TTK art. 18, II.

[10] *See* ¶ 42.02[1] *supra*.

[11] TTK art. 23.

the law of a foreign jurisdiction in a commercial dispute will depend upon application of rules of Turkish private international law.[12]

[c] Secured Creditors

[i] Real Property Mortgage Creditors

A mortgage (*ipotek*) on real property is recognized under Turkish law. There must be a valid agreement between the debtor and creditor/mortgagee which creates the underlying obligation secured by the mortgage. To be enforceable, the mortgage must be registered with the Registry of Real Property Records (*Tapu Dairesi*). Foreclosure of a mortgage is accomplished by pursuing debt enforcement through the Debt Enforcement Office.[13] The Debt Enforcement Office will follow the statutory procedures specified in the IIK which result in sale of the mortgaged property and distribution of proceeds to secured creditors. A creditor secured by a mortgage cannot seek bankruptcy of the mortgagor debtor or pursue other debt enforcement procedures against the debtor. However, after foreclosure of its mortgage by the Debt Enforcement Office, if there is any remaining deficiency, the creditor/mortgagee can seek bankruptcy of the debtor/mortgagor or pursue other debt enforcement procedures to enforce its claim.

[ii] Business Enterprise Mortgage Creditors

Turkish law provides for a mortgage upon the commercial enterprise of a merchant.[14] A properly created and perfected business enterprise mortgage establishes a lien upon the following assets: (1) trade name and business enterprise name; (2) machinery, tools, and motor vehicles; and (3) "industrial rights" such as patents, trademarks, models, drawings and licenses. The mortgage agreement must be prepared by a notary in the district in which the business enterprise is situated. The mortgage agreement must then be registered in the commercial registry (*Ticaret Sicili*) in which the commercial enterprise is registered. The registration agent is required to give notice to any other relevant registries with respect to certain categories of mortgaged property identified in the mortgage agreement, such as the motor vehicle registry in the case of motor vehicles, the registry maintained by the Ministry of Industry in the case of "industrial rights" such as patents, trademarks, models, drawings and licenses, and the real property registry in the case of real property. More than one business enterprise mortgage can be granted upon a business and priority will be determined based upon time of registration. Enforcement of a business enterprise mortgage is made pursuant to the *icra* provisions of the IIK,[15] utilizing the provisions of the IIK applicable to enforcement of personal property pledges.

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[12] *See* ¶ 42.10[2] *infra*.

[13] *See* ¶ 42.04[1] *infra.*

[14] Business Enterprise Mortgage Law (*Ticari İşletme Rehni Kanunu*), Law No. 1447 (July 28, 1971).

[15] *See* ¶ 42.04 *infra*.

[iii] Pledge Creditors

Turkish law distinguishes between movable property (*taşınır mallar*, i.e., personal property) and immovable property (*gayrimenkul*, i.e., real property). Pledges on movable property require delivery of possession to the pledgee.[16]

[d] Financial Lessors

The Law Concerning Financial Leasing[17] provides protections for lessors from the lessee's creditors. The requirements for a financial leasing are set forth in the Law on Financial Leasing, Factoring and Financing Companies. A financial lease must be registered in the proper registry (land registry for real property, ship registry for ships, etc.). Under a financial leasing under Turkish law, title remains with the lessor. In the event of debt enforcement against the lessee, where an attachment or execution is sought against the leased goods, an official of the Debt Enforcement Office makes the decision that the goods are exempt from attachment or execution, which decision can be objected to within seven days. Similarly, in the event of the lessee's bankruptcy, an official of the Debt Enforcement Office makes the decision to segregate the leased goods from the debtor's bankruptcy estate. This permits the lessor to quickly regain the leased goods.

¶ 42.03 Basic Features of Dispute Resolution Mechanism in Turkey

[1] Overview of Judicial System

The Turkish judiciary is structured as a branch of government independent of both the executive and legislative branches. There are different courts having jurisdiction over the following types of cases: commercial, debt enforcement and bankruptcy, civil, criminal, labor, administrative, military and tax. There is a single Court of Cassation (*Yargıtay*) with different departments for civil and criminal matters. There is a separate appellate level court solely to determine claims of unconstitutionality of law. In addition, the Council of State (*Danıştay*) is the highest court of appeal for administrative law matters.

[a] Court of First Instance

Depending upon the amount in controversy, cases are properly commenced in either the Court of First Instance (*Asliye Mahkemesi*) or the Peace Court (*Sulh Mahkemesi*), which handles small claims (or minor offences in the case of the criminal Peace Courts).

[b] Commercial Court

The Commercial Court (*Ticaret Mahkemesi*) hears commercial matters and renders judgments relating to bankruptcy or composition agreements.[1]

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[16] Civil Code (*Medeni Kanun*) art. 939.

[17] Law on Financial Leasing, Factoring and Financing Companies (*Finansal Kiralama, Faktoring ve Finansman Şirketleri Kanunu*), Law No. 6361 (Dec. 13, 2012).

¶ 42.03

[1] IIK arts. 154, 155 and 296.

[c] Regional Courts of Appeal

In 2004, the legislature decided to create courts on the appellate level in order to decrease the Court of Appeals' workload.[2] Pursuant to a decision of the Ministry of Justice, which was published in the Official Gazette dated November 7, 2015, with No. 29525, the Regional Appeal Courts have begun to operate on July 20, 2016.

[d] Court of Cassation

The Court of Cassation (*Yargıtay*) for the 12th, 15th and 19th Departments hears appeals from the Commercial Court involving debt enforcement and bankruptcy matters.[3]

[2] Arbitration

Although the default method of resolving disputes is through a lawsuit in the court system, as a matter of Turkish contract law, submission of disputes to arbitration may be provided for by agreement, if arbitration is clearly and definitively specified as the exclusive method of dispute resolution among the parties.[4] The Turkish Code of Civil Procedure (*Hukuk Muhakemeleri Kanunu*)[5] contains provisions regarding arbitration. In 1992, Turkey acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Commercial Matters, done at New York, June 10, 1958, and ratified the European Convention on International Commercial Arbitration, done at Geneva, April 21, 1961.[6] Turkey also enacted legislation in 2001 regarding international arbitration, which was based substantially upon the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Arbitration.[7]

Furthermore, Turkey has made significant progress in becoming more arbitration friendly country with the foundation of Istanbul Arbitration Centre (ISTAC) under the Law No. 6570, which entered into force on January 1, 2015.

¶ 42.04 Debt Enforcement Proceedings Under Turkish Law (*İcra*)

[1] Commencement of Debt Enforcement with the Debt Enforcement Office

The Debt Enforcement Office is an independent, quasi-judicial government agency through which summary procedures may be pursued for enforcement of monetary debts. The Debt Enforcement Office is under the supervision of the Debt Enforcement Judge (*İcra Hakimi*), who hears complaints regarding the Debt Enforcement Office, requests to lift objections to payment orders, third party ownership claims to assets that have been levied upon or that have been brought into a bankruptcy estate, and enforces penalties for violation of the IIK.

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[2] Law No. 5236 (Oct. 7, 2004).

[3] IIK art. 364; Law Regarding the Court of Appeals (*Yargıtay Kanunu*) art. 13.

[4] Y.15.HD.15.5.1996, E.96/2706, K.96/2585-YARGI 1996, S.6, s.86.

[5] Turkish Code of Civil Procedure, Law No. 6100 (Feb. 4, 2011).

[6] Law No. 3730, 3731 (May 8, 1991).

[7] Law No. 4686 (July 5, 2001).

Debt enforcement begins by submitting a written debt enforcement request (*takip talebi*) to the Debt Enforcement Office having jurisdiction over the debtor (although oral and electronic requests are permitted), which will then issue a payment order (*ödeme emri*) to the debtor. A payment order can be obtained either based on a final judgment, or on a debt which has not been reduced to judgment. A debt enforcement request only requires summary information regarding the debt, its amount, the date of default, identity, address and Turkish identification number (*T.C. Kimlik Numarası*) or tax identification number of the debtor and the creditor, and their legal representatives. A creditor residing outside of Turkey is required to show a place of residence in Turkey, otherwise the location of the Debt Enforcement Office will be deemed such creditor's place of residence. If interest is sought, the rate of interest and date of commencement of interest must also be specified. The creditor is also required to deposit fees for statutory expenses, which are recoverable from the debtor. Although bankruptcy can only be filed by or against merchants, debt enforcement may be pursued against any real or legal person, regardless of whether or not such person is a merchant.[1]

[a] Payment Order

In response to a debt enforcement application, the Debt Enforcement Office prepares and serves a payment order (*ödeme emri*) upon the debtor. If the payment order is not objected to, or is objected to and such objection is overruled, the payment order becomes final. Once a payment order becomes final, upon the creditor's request, an official of the Debt Enforcement Office will levy upon the debtor's assets to enforce the payment order. A payment order is a signed and sealed document issued by the Debt Enforcement Office which contains all of the information contained in a debt enforcement request, plus statutory warnings advising the debtor to pay or contest the payment order within seven days of service, or provide a declaration of assets (*mal beyanı*).[2]

[i] Declaration of Assets

The purpose of a declaration of assets is to provide a creditor with information about assets against which it can enforce the obligation owed to it by a debtor. A declaration of assets is a written or oral statement by the debtor to the Debt Enforcement Office that identifies the debtor's assets (property, obligations owed to and rights of the debtor), whether in the possession of the debtor or third parties, of a sufficient sort, type and quality to satisfy the debt that is the subject of the payment order. The declaration of assets further identifies all sources of earnings and income that can serve as a source for payment of the debt.[3] The law provides for criminal punishment for

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¶ 42.04

[1] Certain procedural protections and exemptions apply in the case of debtors that are individuals rather than business entities, discussion of which is beyond the scope of this chapter.

[2] IIK art. 60.

[3] IIK art. 74.

failure to provide a declaration of assets, providing a false declaration, or failure to supplement it under certain circumstances.

[b] Opposition to a Payment Order

A debtor has seven days within which to pay or object to a payment order, otherwise it will become a final order. The law divides challenges to a payment order into two categories: challenge to a signature in a promissory note, or challenge of the underlying debt. A challenge can be made to the Debt Enforcement Office on any legal grounds contesting the validity of the debt, such as payment, settlement or statute of limitations. An action may also be commenced by the debtor before the Debt Enforcement Judge with respect to any complaints regarding the Debt Enforcement Office, such as failure to act in accordance with law in connection with the payment order.

[c] Judicial Lifting of Opposition to a Payment Order

If the creditor's claim against the debtor is not based on a promissory note or other documentary proof (discussed below), the creditor must commence an action (*itirazın iptali davası*) within one year of service of an objection to the payment order in the Court of First Instance to confirm the claim and have the debtor's objection set aside.

If the creditor's claim is based on an absolute and unconditional promissory note, an Insolvency Certificate,[4] or a notarized acknowledgement of the debtor's obligation to the creditor, the creditor may seek to have the debtor's objection set aside through summary proceedings by the Debt Enforcement Judge. Such documentary evidence can consist of more than one document if necessary to establish the claim, for example, a credit agreement and proof of loan disbursement to the debtor, or a sales agreement and proof of delivery of the goods to the debtor. The Debt Enforcement Judge's determination whether to set aside the objection is based solely upon his examination of the original documentary evidence, and no additional evidence from the creditor is accepted. If the debtor's objection is provisionally set aside, the debtor has to file, in the Court of First Instance, an action to set aside the debt (*borçtan kurtulma davası)* within seven days. In order to pursue such a lawsuit, the debtor has to deposit with the registry of the court fifteen percent of the debt as of the day of the first hearing.

If the Debt Enforcement Judge sustains a debtor's opposition to a payment order, a nonjudgment creditor may not then pursue further debt enforcement on its debt enforcement request, and must file an action against the debtor for a judgment on the debt. In the event the creditor successfully obtains a judgment, further debt enforcement may then be pursued on such judgment.

If the debtor does not file an objection to a payment order, or if the objection is set aside, the creditor can request continuation of the debt enforcement procedures.

[d] Insolvency Certificate

IIK article 143 provides that if a creditor does not receive payment in full pursuant to debt enforcement proceedings, such creditor is given an Insolvency Certificate (*aciz*

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[4] *See* ¶ 42.04[1][d] *infra*.

vesikası). Among other things, such a certificate (1) gives a creditor the right (IIK art. 277/1) to commence avoidance actions;[5] (2) for up to one year from the date of its issuance permits the creditor to levy upon a debtor's property without first having to have to serve a payment order; and (3) tolls the running of the statute of limitations for 20 years. The certificate of insolvency is exempt from all taxes and duties.

[2] Prejudgment Attachment

An unsecured creditor may obtain prejudgment attachment of a debtor's property to secure an unsecured claim where the debtor has no fixed domicile or is suspected of trying to evade its obligations by flight or removal of assets.

[3] Enforcement of Judgments and Judgment-Like Documents

Turkish Debt Enforcement Law provides a means for enforcement of monetary obligations. However, where a claim does not arise out of a monetary obligation, for instance a tort claim, a creditor must obtain a judgment before it can pursue debt enforcement. In addition, certain limited categories of documents, including, among others, settlement agreements, waivers and acceptances made in the presence of the court, and an instrument drawn by a notary public representing a creditor's absolute and unconditional obligation to pay, are treated under Turkish Debt Enforcement Law as equivalent to judgments.

[4] Secured Creditors' Debt Enforcement Rights

A creditor secured by a mortgage on collateral must first proceed against the collateral.[6] The procedure resembles debt enforcement in that the Debt Enforcement Office issues a payment order and the debtor has 15 days to pay and seven days to contest the payment order. The Debt Enforcement Office will sell the collateral and pay the proceeds to the secured creditor to satisfy the mortgage. If the proceeds are insufficient to satisfy the mortgage in full, the creditor can pursue debt enforcement for any deficiency.

However, if the creditor is secured by a negotiable instrument (check, draft or promissory note), such creditor is not required to first seek the liquidation of such negotiable instrument before directly pursuing debt enforcement against the debtor. Similarly, if the creditor has a mortgage to secure interest or installment payments, it may directly pursue debt enforcement.

¶ 42.05 Bankruptcy (Liquidation) Under Turkish Law (*İflâs*)

[1] Applicable Law

[a] Organization of the Bankruptcy Courts, Related Offices and Administrative Entities

The Bankruptcy Department is the principal office charged with bankruptcy matters. The Debt Enforcement Office and Debt Enforcement Judge also play a role in

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[5] *See* ¶ 42.06 *infra*.

[6] IIK art. 45.

bankruptcy matters. The Commercial Court is the primary judicial body charged with adjudicating bankruptcies and compositions, appeals from which are heard by the Court of Appeals. In bankruptcy proceedings, two important statutorily created administrative entities are the Meeting of Creditors, which plays a role in selecting the Board of Trustees,[1] and the Board of Trustees which determines the course of the liquidation under the supervision of the Debt Enforcement Judge. The Composition Commissioner plays an important administrative role in composition proceedings.

[2] Eligibility for Bankruptcy

Under Turkish law, a merchant[2] is amenable to bankruptcy.[3] Certain limited categories of nonmerchants are also eligible for bankruptcy: (1) a former merchant, who having formally abandoned its trade may file bankruptcy within one year of publication of a declaration of abandonment; (2) partners in a general partnership (*kollektif şirket*) or limited partnership (*komandit şirket*); and (3) with reference to banks, the managers and auditors, who by their decisions and actions contrary to law are the cause of their bank's bankruptcy, are themselves personally amenable to bankruptcy. Where any such decision or act have been made or taken in order to provide benefits to dominant partners of the bank, such dominant partners are—to the extent of the benefits so obtained—also personally amenable to bankruptcy.[4]

[a] Voluntary and Mandatory Bankruptcy

Under certain situations the law requires a debtor eligible for bankruptcy to request its own bankruptcy. If an execution (*haciz*) is made upon one-half of a bankruptcy eligible debtor's assets and the remaining half is insufficient for the debtor to pay currently due bills and those coming due within one year, the debtor must file for bankruptcy immediately.

We have seen above that the Commercial Code requires that a joint stock company file bankruptcy upon insolvency.[5] The IIK also specifies that those persons charged with the duty of administering or representing a joint stock company, limited company, or co-operative company, or such entity's liquidators (*tasfiye memurları*)[6] are subject to criminal liability if they fail to seek bankruptcy for such entity upon its insolvency and a creditor complains.[7] Creditors may also file an application with the court

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¶ 42.05

[1] *See* ¶ 42.05[6][a] *infra*.

[2] *See* ¶ 42.02[2] *supra*.

[3] IIK art. 43.

[4] Banking Law (*Bankacılık Kanunu*) Law No. 5411 (Nov. 1, 2005) art. 110.

[5] *See* ¶ 42.02[1][b] *supra*.

[6] The Commercial Code provides for liquidation procedures for business entities that are not insolvent. A liquidator is appointed by management and charged with liquidating assets and satisfying creditors claims. *See* Commercial Code arts. 536–548 (for limited partnerships and joint stock companies). However, in the case of insolvency the liquidator must immediately advise the court which will enter a judgment of bankruptcy. *See, e.g.*, Commercial Code art. 542, I c).

[7] IIK art. 345a.

requesting the bankruptcy of an insolvent joint stock company, limited company, or cooperative company, without having to first request a payment order from the Debt Enforcement Office.[8]

[b] Postponement of Bankruptcy

With the Law No. 7101 dated March 15, 2018, the bankruptcy postponement procedure has been entirely repealed.[9] The postponement procedure was heavily criticized on the basis that it was open to manipulation. Bankruptcy postponement was introduced to give debtors a final chance before being forced into bankruptcy, allowing them to put their business back on track without the pressure of collection proceedings. Statistically though, its success proved low as a majority of companies which postponed bankruptcy ultimately went bankrupt regardless, failing to successfully emerge from these circumstances. This process frustrated creditors because their likelihood and proportion of collection were negatively affected by this procedure. Also, the mechanism was not helpful for restructuring debts given that creditors piled up, operational income diminished, assets were relatively dissipated, and this hopeless process took years.

With the same Law No. 7101, the legislature introduced a new concordat (composition agreement) procedure, which actually existed in Turkish law before 2018. However, it had largely been ignored in practice for commercial reasons and due to its procedural complexity.[10]

[3] Types of Bankruptcy Under Turkish Law

[a] General Bankruptcy

General bankruptcy proceedings, like debt enforcement proceedings,[12] are commenced by requesting issuance of a payment order from the Debt Enforcement Office. If the debtor does not pay within seven days of service of the payment order, the creditor may apply to the Commercial Court for a judgment of bankruptcy. If the debtor pays its debt within the time period, there are no further proceedings.

Just as a debtor may raise an objection to a payment order in the case of debt enforcement proceedings,[13] a debtor may raise an objection, within seven days of service, to a payment order from the Debt Enforcement Office issued to initiate the bankruptcy process. Grounds for objection to such a payment order are that the debtor is not indebted to the creditor in question, or that the debtor is not eligible for

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[8] However, the court may defer a judgment of bankruptcy if it determines that improvement in the company's situation is possible. *See* ¶ 42.02[1][b] *supra*.

[9] Law No. 7101 (Mar. 15. 2018).

[10] *See* ¶ 42.07 *infra*.

[11] [Reserved]

[12] *See* ¶ 42.04[1] *supra*.

[13] *See* ¶ 42.04[1][b] *supra*.

bankruptcy (e.g., not a merchant, or a nonmerchant falling within the limited specified class of bankruptcy amenable persons).[14] This objection stops any further proceedings.

The commencement of bankruptcy proceedings under general bankruptcy is essentially a debt enforcement mechanism. It is a method by which an individual creditor can seek enforcement of its claim, which will not necessarily result in the liquidation of the debtor. Direct bankruptcy,[15] on the other hand, dispenses with the bankruptcy debt enforcement process (i.e., issuance of a payment order by the Debt Enforcement Office) and is a method to seek the liquidation of the debtor.

[b] Bankruptcy Involving Negotiable Instruments

Just as the IIK provides for special debt enforcement procedures for negotiable instruments,[16] it also provides for special bankruptcy procedures when negotiable instruments are involved. A creditor holding a negotiable instrument is not obligated to utilize these special procedures and may utilize the general bankruptcy procedures. The time for payment of the negotiable instrument must have become due to utilize the special bankruptcy procedures reserved for negotiable instruments. Essentially, there is no significant difference from the general bankruptcy procedures, except that rather than seven days, the debtor only has five days from the date of issuance of a payment order to contest its issuance. In addition, although secured creditors are usually first required to proceed against the collateral and only may seek bankruptcy against a debtor to the extent their secured claim remains unsatisfied after liquidation of the collateral, this requirement does not apply to creditors holding secured negotiable instruments, who may directly pursue the special bankruptcy procedures reserved for negotiable instruments.

[c] Direct Bankruptcy

A creditor may bypass the step of having the Debt Enforcement Office issue a payment order to the debtor, and may directly file a lawsuit in the Commercial Court seeking a judgment of bankruptcy in any of the following circumstances: (1) where the debtor's place of residence is unknown; (2) flight by the debtor for the purpose of evading creditors; (3) where the debtor commits, or attempts to commit, fraudulent acts in violation of the rights of its creditors; (4) the debtor hides property to evade execution against such property; (5) where the debtor fails to pay debts as they become due; (6) where a composition agreement is not confirmed or the stay of proceedings is annulled; and (7) failure to make payment on an order of execution.

An insolvent debtor that is eligible for bankruptcy may also file a lawsuit seeking a judgment of bankruptcy from the Commercial Court. The debtor must disclose all of its assets and liabilities and the names and addresses of its creditors in the application for bankruptcy.

Direct bankruptcy is only available under the specific circumstances specified in IIK article 177, one of which is insolvency.

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[14] *See* ¶ 42.05[2] *supra*.

[15] *See* ¶ 42.05[3][c] *infra.*

[16] *See* ¶ 42.04[4] *supra*.

[i] Appeal of Judgment of Bankruptcy

A debtor can appeal a bankruptcy judgment within 10 days of its issuance. However, appeal of a bankruptcy judgment does not prevent publication of notice of the debtor's bankruptcy or creation of a bankruptcy estate. The only effect an appeal of a bankruptcy judgment has upon the continuation of bankruptcy proceedings is that the Second Meeting of Creditors, and the sale of property of the bankruptcy estate connected with such meeting, cannot take place until the bankruptcy judgment becomes final. If the Court of Appeal reverses the bankruptcy judgment, the bankruptcy proceedings are terminated.

[4] Creation and Administration of the Bankruptcy Estate

A judgment of bankruptcy creates the bankruptcy estate (*iflas masası*), which arises by operation of law, comprised of all of the debtor's property which is amenable to execution, wherever located. The debtor's bankruptcy estate includes property located within and outside of Turkey. The Bankruptcy Department is required to prepare an inventory of all of the bankrupt's property and to take precautions to safeguard it. The bankruptcy estate includes goods upon which levy of execution has been placed which have not yet been sold and all obligations owed to the debtor. Legal obligations owed to the bankrupt must be paid to the bankruptcy estate and are not extinguished if paid

(Text continued on page 42-19)

to the debtor, regardless of knowledge (except if notice of bankruptcy has not yet been published and the payor lacked actual knowledge).

[a] Automatic Stay

A judgment of bankruptcy stays further proceedings to levy execution against the debtor's property on unsecured obligations.

A bankruptcy judgment also stays lawsuits commenced by or against the bankrupt until ten days after the Second Meeting of Creditors, when they may then proceed against the bankruptcy estate. There is an exception for lawsuits involving urgent circumstances, actions for compensation suffered as a result of tortious activity, lawsuits related to marriage, civil status, or alimony, and actions commenced to foreclose upon a security interest in pledged collateral.

[i] No Stay as to Secured Creditors

Secured creditors are not stayed from foreclosing upon collateral and may continue foreclosure against the bankruptcy estate, with any surplus reverting to the bankruptcy estate. Alternatively, a secured creditor can request that foreclosure proceedings commenced prior to the bankruptcy be discontinued and that the sale of such collateral be made by the Board of Trustees.

[b] Publication of Judgment of Bankruptcy

Immediately subsequent to the judgment of bankruptcy, the Bankruptcy Department publishes notice of the debtor's bankruptcy in one of the newspapers in national circulation with a circulation of over 50,000, as well as a newspaper located in the bankrupt's business center.[17]

[c] Requirement of Notice to Specified Entities

The Bankruptcy Department must give notice to the Postal and Customs administration and all banks and notaries within the district, advising them that any correspondence or parcels mailed to the bankrupt, telegraphs, money orders, postal money orders, postal wire transfers, packages, goods arriving at customs for import or export, deposits and security pledges located with banks or notaries, are not to be given to the bankrupt, but rather forwarded to the Bankruptcy Department. In addition, the Bankruptcy Department is required to give notice of the bankruptcy to the Registry of Real Property Records located within the district, the Directorate of Merchants' Registry, the Turkish Banks Union, the local Chamber of Commerce, the local Chamber of Industry, the Stock Exchange, the Capital Market Association, taxing authorities, the Ministry of Commerce, the Ship & Vessels Registry, the Directorate of Mining Registries, the Debt Enforcement Office, and the courts.

[5] Determination of Method of Liquidation

There are three possible choices regarding the manner of liquidation of the assets of the bankruptcy estate, which are made by the Bankruptcy Department prior to the First

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[17] IIK art. 166.

Meeting of Creditors: (1) a suspension of the bankruptcy liquidation if no property can be located which belongs to the estate; (2) if there is some property, but it is insufficient to cover the costs of "regular" liquidation, that "simple" liquidation procedures will be followed; or (3) where assets of the bankruptcy estate are sufficient to cover the expenses of regular liquidation, that regular liquidation procedures will be used.

[a] Suspension of Liquidation

If no property belonging to the bankruptcy estate can be located, the Bankruptcy Department declares and gives notice of a suspension of the bankruptcy liquidation. The notice states that the bankruptcy will be closed unless, within thirty days, creditors who wish to see the bankruptcy proceedings continue deposit a payment to cover the expenses associated with administration of the estate.

[b] Simple Liquidation Procedure

If there is some property in the bankruptcy estate, but it will not be sufficient to cover the expenses of liquidation, the Bankruptcy Department declares and gives notice that "simple" liquidation procedure will be used.[18] The notice states that simple liquidation procedure will be used unless, within thirty days, creditors who wish to see the bankruptcy proceedings continue deposit a payment to cover the expenses associated with administration of the estate. In the simple liquidation procedure, there is no meeting of creditors. The Bankruptcy Department may call the creditors if it is required.

[c] Regular Liquidation Procedure

If there are sufficient assets in the estate to cover the costs of "regular" liquidation, regular liquidation is used. Within ten days of the determination by the Bankruptcy Department to liquidate the estate pursuant to regular liquidation procedures, the Bankruptcy Department must publish notice of its decision in the same manner as it published notice of the commencement of the bankruptcy. Creditors and claimants then have one month from the date of publication within which to register their claims, together with supporting documentation.

[6] First Meeting of Creditors

[a] Selection of Board of Trustees

The Bankruptcy Department calls all of the bankrupt's creditors to the First Meeting of Creditors. The Meeting must be held within 10 days from the published notice of the commencement. According to the law, the Board of Trustees is comprised of three individuals. At the First Meeting of Creditors, six candidates are selected from those having sufficient knowledge and experience to serve on the Board of Trustees (the "Board") (*iflas idaresi*).[19] Four of these candidates are selected by creditors holding a majority of claims in value, and two of these candidates are selected by a majority of creditors regardless of the value of their claims. Out of the six candidates selected by

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[18] IIK art. 218.

[19] Literally, the "liquidation administration," but usually translated as the board of trustees.

the creditors, the Debt Enforcement Judge appoints to the Board of Trustees two appointees out of the four candidates selected by creditors holding a majority of claims in value, and one from those selected by the majority of creditors regardless of value. The Board functions under the supervision of the Debt Enforcement Judge.

The Board is the legal representative of the bankruptcy estate. It is charged with looking after the interests of the estate and overseeing its liquidation. Members of the Board receive compensation based on a small percentage of the amount paid to creditors out of the bankruptcy estate. All lawsuits and actions owned by the bankruptcy estate can only be pursued by the Board.

The Board is responsible for investigating creditors' claims, with the assistance of the bankrupt, and accepting or rejecting the claims of all of those who register claims against the estate.[20]

If the First Meeting of Creditors cannot be established or a minimum quorum is not attained, the Bankruptcy Department will administer the bankruptcy estate and begin liquidation of the estate until the Second Meeting of Creditors.

[7] Second Meeting of Creditors

The Board calls those creditors whose claims it has accepted to the Second Meeting of Creditors, the main purpose of which is to decide in what manner the property of the bankruptcy estate should be sold. As a rule, estate property is sold by auction. Generally, the procedures for auction of real and personal property used for execution sales in debt enforcement and enforcement of judgments apply in bankruptcy auctions. However, the creditors may decide at the Second Meeting that the property should be sold by negotiated sales.

In the case of property which is falling in value or which will cause the estate to incur expenses to safeguard it, the Bankruptcy Department is authorized to sell such property without delay prior to the Second Meeting. Securities whose value can be established by reference to an existing market (such as stocks, bonds, etc.) are to be sold immediately for cash. Those goods upon which there are secured encumbrances are sold by the Board in the quickest and most suitable manner with the proceeds paid to the secured creditor, after deducting the cost of safeguarding such property, and the cost of sale.

Subsequent to the Second Meeting, the Board sells the remaining property of the bankruptcy estate. The property of the bankruptcy estate must be liquidated within six months of the commencement of the bankruptcy. Distribution to the various classes of creditors is made from the proceeds of sale in accordance with the distribution scheme set forth in IIK article 206.[21]

If the Second Meeting of Creditors cannot be established or a minimum quorum is not attained, the Board will continue to administer the bankruptcy estate until the closing of the liquidation process.

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[20] *See* ¶ 42.05[9][c] *infra*.

[21] *See* ¶ 42.05[9][e] *infra*.

[8] Final Report and Case Closing

After completing the liquidation of the bankruptcy estate and distribution of the proceeds to creditors, the Board gives a final report to the Commercial Court which issued the judgment of bankruptcy. After the Commercial Court has completed its examination of the final report, if it determines that the liquidation of the bankrupt has been completed, it issues an order to close the bankruptcy proceeding. The Bankruptcy Department then publishes notice of the order closing the case (in the same manner as it did with the order commencing the case).

[9] Rights of Creditors

[a] Notice to Creditors

Creditors are not given individual notice of a bankruptcy filing by one of their debtors, although they are called to the First Meeting of Creditors by the Bankruptcy Department. Newspapers and public records can be monitored to track new bankruptcy filings. In the major cities, private companies may also provide such services for a fee.

[b] Time Limits for Submission of Claims

In the event that the Bankruptcy Department decides to use regular liquidation procedures,[22] creditors and claimants have one month from the date of publication of notice of regular liquidation procedures within which to register their claims, together with supporting documentation. The time period for registering claims may be extended for foreign creditors and those located at great distance from the court. No particular form of claim is required.

[c] Allowance of Claims

Within three months of its formation, the Board is required to prepare and provide to the Bankruptcy Department a schedule of creditors (detailing their claims and priorities in accordance with IIK articles 206 and 207), indicating which claims have been rejected by the Board and the reasons for such rejection. The Board also publishes a copy of the schedule of creditors in the same manner as notice of commencement of the bankruptcy is published. Creditors whose claims have been rejected by the Board may contest such rejection by commencing a lawsuit in the Commercial Court within fifteen days after such publication. In addition, creditors have the right to commence a lawsuit challenging the claims or priority of claims of other creditors whose claims have been accepted by the Board.

[d] Treatment of Secured Creditors

Secured claims are paid first to the extent of the collateral securing such claims, subject to the expense of administration and sale associated with liquidating such collateral.[23]

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[22] *See* ¶ 42.05[5][c] *supra.*

[23] Secured creditors, however, have the option of pursuing liquidation of collateral outside of the bankruptcy estate. *See* ¶ 42.05[4][a][i] *supra.*

[e] Priority of Distribution

IIK article 206 specifies the priority of claims for purposes of distribution. There are four ranks of unsecured creditors' claims. No lower ranked claims are paid unless higher ranked claims are paid in full. In the event that there are insufficient funds to pay a rank of claims in full, claims of such rank share pro rata.

[i] First Rank

The first rank includes three subcategories as follows: (1) employee claims incurred within one year prior to the bankruptcy and statutory severance pay related to seniority and termination without sufficient notice arising as a result of the termination of employment due to the debtor's bankruptcy; (2) obligations to worker related funds and other charitable organizations, for the establishment or continuation of such charitable establishments, and to legally established charitable foundations and organizations; and (3) alimony debts incurred in the year prior to bankruptcy.

[ii] Second Rank

The second rank includes obligations arising out of guardianship and trusteeship/executorship.

[iii] Third Rank

The third rank includes all other obligations that are not entitled to priority ahead of the third rank.

[iv] Fourth Rank

All other obligations.

[f] Treatment of Administrative Creditors

IIK article 248 provides that the necessary expenses of administration incurred by the Board in connection with the liquidation of the bankruptcy estate (for example, expenses of notice of sale) are paid ahead of creditors' claims specified in IIK article 206.

[g] Interest on Claims

For fixed-term interest-bearing obligations of the debtor, interest accruing to the date of bankruptcy, together with related costs, is added to the principal obligation. If such loans are interest free, they are treated as bearing yearly interest at the legal rate from the date of the bankruptcy judgment to the original due date of such obligation. Interest does not stop accruing on the interest-bearing obligations of the bankrupt with the commencement of bankruptcy. The interest rate for secured loans remains the agreed contractual rate of interest, while unsecured loans receive interest at the legal default rate. Payment of interest to creditors, however, is only made after payment in full of the principal amount owing to all creditors. Any potential prejudice to secured creditors is diminished by the fact that the debtor's bankruptcy does not prevent them

from realizing upon their collateral (i.e., foreclosure).[24]

[h] Setoff

A creditor's right of setoff is recognized under IIK article 200, provided that: (1) the creditor's claim does not arise after the debtor becomes bankrupt; (2) the creditor does not become a debtor to the bankrupt or the bankruptcy estate after the debtor becomes bankrupt; (3) the creditor does not seek setoff based on a bearer payable commercial instrument; or (4) the creditor does not seek to set off debts against a joint stock company, limited liability company or cooperative based upon shares where the creditor has not yet paid the purchase price of such shares or made an agreed-upon capital contribution.

¶ 42.06 Avoidance and Recovery Actions in Turkey

Outside of bankruptcy, individual creditors have the right to pursue avoidance actions if they have been given an Insolvency Certificate by the Debt Enforcement Office.[1] In bankruptcy, the Board makes the decision whether or not to pursue avoidance actions. Avoidance actions are commenced by the Board in courts of general jurisdiction (i.e., the relevant Court of First Instance). If the Board determines not to pursue avoidance actions, they may be transferred pursuant to IIK article 245 to an individual creditor or creditors to pursue. However, then any recovery in excess of the individual creditor's costs and claims against the debtor will inure to the benefit of the bankruptcy estate. The statute of limitations is five years from the date of the transfer.

[1] Avoidability of Gratuitous Transfers

IIK article 278 provides that with the exception of customary gifts,[2] all gifts and donative transfers that occur during the period commencing on any of the following dates are voidable: (1) the date of an execution, or (2) the date of issuance of an Insolvency Certificate, or (3) prior to the commencement of bankruptcy which is the cause of the issuance of an Insolvency Certificate, or (4) the date established for the oldest obligation of the debtor's creditors which has been accepted by the Board. However, the reach-back period for avoiding such transfers cannot extend more than two years prior to: the date of execution; the date of an Insolvency Certificate; or the date of the commencement of bankruptcy.

The statute provides the following non-exclusive examples of such transfers, all of which are characterized by placing the debtor's assets out of the reach of its creditors under suspect circumstances:

— uncompensated transfers to husbands, wives, relatives to the third degree, and adopted children;

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[24] *See* ¶ 42.05[4][a][i] *supra.*

¶ 42.06

[1] *See* ¶ 42.04[1][d] *supra.*

[2] In the context of the bankruptcy of a business entity merchant, this would depend upon the established practices of the company, but would be more limited than in a bankruptcy involving an individual nonbusiness entity merchant.

— at the time a contract is made, the debtor's accepting an unreasonably low price in relation to the value of the thing being given;

— agreements for the benefit of an individual debtor personally or for a third person's benefit which provide income for life, or that someone will be looked after for life.

[2] Avoidability of Certain Transfers Based upon Insolvency

IIK article 279 provides that the following transfers are avoidable if made up to one year prior to the date of occurrence of any of the following in the case of a debtor who is not paying its obligations: execution, or the issuance of an Insolvency Certificate, or the date of commencement of bankruptcy:

— A debtor's granting a security interest in collateral to secure an existing indebtedness, with the exception of those obligations as to which the debtor previously entered into an agreement to grant security.

— Payment made other than in the form of money or other customary means of payment (such as check, or wire transfer). An example of such an avoidable transfer would be disposing of part of the debtor's capital goods, such as machine tools in the case of a manufacturing company, in satisfaction of an outstanding debt.

— Payments which are made upon unmatured obligations. Payment made by an insolvent debtor upon a debt that is not matured is subject to avoidance if the debtor makes the transfer within one year of the date of occurrence of execution, issuance of an Insolvency Certificate, or the date of commencement of bankruptcy. The law views payment on an unmatured obligation by an insolvent debtor as a suspicious transfer that should be set aside. If the payee had no knowledge of the debtor's condition, however, it has a complete defense.

— Annotations made to title deeds in order to strengthen personal rights of the debtor against creditors. An example of such an avoidable transfer would be a factory owned by the debtor being leased to a lessee and the existence of the lease being noted on the title deed for the factory property thereby impairing its marketability and thus depriving the bankruptcy estate of a valuable asset.

However, if the person who benefited from the transfers can prove that it had no knowledge of the debtor's condition and financial situation, a lawsuit seeking to set aside such transfers must be dismissed.

[3] Other Avoidable Transfers

Transactions by an insolvent debtor committed with malicious intent to cause harm to creditors or to gain an unfair advantage vis-'a-vis other creditors are subject to avoidance from the time of the transaction where the other party knew or should have known of the debtor's financial condition based on the circumstances of the transaction. Such transfers may be avoided if they were made up to five years prior to

the date a creditor levied execution against the debtor or commenced bankruptcy proceedings against the debtor. However, where such transfers are made by a debtor with actual intent to cause harm to its creditors and where the third person (transferee) has actual knowledge of such intention on the part of the debtor, there is no limitation on the reach back period.

If the third person transferee does not fall within one of the foregoing categories, if it can prove that it had no knowledge of the debtor's condition and financial situation, a lawsuit seeking to set aside such transfers must be dismissed.

A third party to whom the merchandise (stock in trade) of a commercial enterprise or business is completely or in important part transferred or sold, or who acquires a portion of it and later occupies the debtor's former business premises, will be presumed to know that the debtor's creditors were willfully harmed and that the debtor in these circumstances acted with intent to harm its creditors. This presumption can be refuted only if the transferee can establish that the creditor who commences the avoidance action was informed in writing of the situation at least three months before the date of the transfer, sale, or abandonment, or a clearly visible notice was affixed in the debtor's place of business and notice was published in the Commercial Registry (*Ticaret Sicili*), or in the event that this was not possible, that notice was given to all of the debtor's creditors by the most suitable means.

[4] Breach of Fiduciary Duty Claims

[a] General Provisions

Under the old Commercial Code, the Members of a joint stock company's board of directors were jointly liable to the company's individual shareholders and creditors in the following circumstances:[3]

- if the payments made by shareholders on account of shares are not correct;
- if dividends are distributed and paid when there are no profits;
- if the ledgers required to be maintained by law[4] do not exist or have been maintained irregularly;
- if resolutions adopted at the general meeting of shareholders are not carried out without reason.
- if the other duties required of them by law or the joint stock company's articles of association are either intentionally or negligently not carried out.

The manager of a joint stock company were also similarly liable if such manager fails to comply with obligations incumbent upon such manager by law, the articles of association, or other provisions specifying the scope of the manager's engagement.

The new Commercial Code, which has been in force since July 1, 2012, distinguishes the legal liabilities from the criminal liabilities of the board of directors.

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[3] Old TTK art. 336.

[4] *See* ¶ 42.02[2] *supra.*

Article 553 enables individual shareholders and the creditors to bring claims against the members of the board of directors. Under this article, in the event that the founders, board members, managers and liquidation officers breach their liabilities defined by the law and articles of association due to their fault, they are deemed responsible for the loss they cause against the company, shareholders and company creditors.[5]

[b] Special Provisions in Event of Bankruptcy

In the event of bankruptcy of a joint stock company, members of its board are required to return to creditors any money received by them for their services which were in excess of a suitable remuneration and which should not have been paid if the balance sheet were prepared in a prudent manner.[6]

¶ 42.07 Composition Agreements Under Turkish Law (*Konkordato*)

Law No. 7101 introduced a new composition procedure, which actually existed in Turkish law before 2018. However, it had largely been ignored in practice for commercial reasons and due to its procedural complexity.

[1] Simple Composition—Initiation; Offer of Composition by Debtor

A debtor wishing to enter into a composition with creditors prepares a composition plan (*konkordato projesi*) and a detailed balance sheet, budget, list of creditors and financial ledgers required of merchants[1] for such plan and informs creditors what percentage of its obligations it can pay.

A creditor that is eligible to commence bankruptcy proceedings against a debtor may also petition the Commercial Court (*Ticaret Mahkemesi*) for the commencement of composition proceedings involving that debtor.

[a] Review by Commercial Court

Upon the submission of these documents below, the Commercial Court grants to the debtor a three-month temporary time period that can be extended for two additional months. During this temporary time period, debt enforcement proceedings may not be continued or commenced. Creditors secured by immovable real property (i.e., real estate and fixtures) or by a business enterprise mortgage can commence debt enforcement procedures to liquidate their collateral or continue previously commenced debt enforcement procedures; however, the collateral cannot be taken into custody or sold during this period. In addition, creditors listed in the First Rank[2] may continue to pursue execution remedies. Unless the composition provides to the contrary, interest ceases to accrue on unsecured obligations during the grace period.

The Commercial Court schedules an oral hearing and determines at that hearing whether to grant the application for composition after considering an application of a

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[5] TTK art. 553.

[6] TTK art. 513.

¶ 42.07

[1] *See* ¶ 42.02[2] *supra*.

[2] *See* ¶ 42.05[9][e] *supra*.

debtor or creditor for a composition proceeding and taking into account the debtor's situation, assets, income, and reasons for debtor's inability to meet its contractual obligations, the likelihood of the composition's success, and whether the composition offer was proposed by the debtor with the intent to cause harm to creditors.

In the event that it is concluded that the composition is likely to save the company from insolvency, the court grants a final grace period of one year, which can be extended for six additional months, and publishes notice of the composition offer in the Commercial Registry, as well as on the Press Release Institution's website and notifies the Debt Enforcement Office and Registry of Real Property Records.

Upon dismissal of a demand for composition, the debtor or the creditor seeking composition may appeal the decision of dismissal within 10 days following the date of pronouncement of the decision.

The debtor continues in possession of the debtor's business during the grace period, under the supervision of the Composition Commissioner (discussed below). The Commercial Court can decide that the debtor can engage in certain transactions on the basis of limited authority with the effectiveness of such transactions subject to the participation of the Composition Commissioner, or that the Composition Commissioner should continue the business activities of the debtor on its behalf.

Upon the commencement of the grace period, without the permission of the Commercial Court the debtor cannot mortgage its assets, guaranty any obligations, sell immovable real property, or engage in any donative transfers. If the debtor acts in a manner contrary to these requirements or the instructions of the Composition Commissioner or engages in transactions that are shown to lack good faith, the Commercial Court can terminate the debtor's ability to remain in possession of its assets or terminate the grace period.

[2] Appointment of Composition Commissioner

The Composition Commissioner (*Konkordato Komiseri*) is an individual appointed by the Debt Commercial Court. The Commercial Court can appoint more than one (or three, if the number of credıtors and the amount of the credits deem it necessary) individual to serve together as Composition Commissioner. To be appointed Composition Commissioner, a person must have sufficient relevant information and experience to capably carry out the duties of Composition Commissioner and be a Turkish citizen. The Composition Commissioner supervises the debtor's business, prepares an inventory of the debtor's property, and gives at least 15 days' notice to the debtor's creditors of a meeting to consider the debtor's composition offer. If deemed necessary based on the nature of the debtor's business, at the suggestion of the Composition Commissioner, and after taking into account the views of creditors, the grace period granted to the debtor may be extended for an additional period not exceeding six months. At the request of the Composition Commissioner, the grace period can be discontinued if necessary to preserve the debtor's assets or if it is readily apparent that the composition will be unable to be realized.

[a] Meeting of Creditors

Creditors will be invited to notify their receivables, and therefore assert a claim, within 15 days of an announcement made by the Composition Commissioner. If a creditor fails to notify within this period, they will not be able to participate in the negotiations, nor vote in the composition.

The Composition Commissioner presides over the meeting of creditors called to consider the debtor's composition offer and presents a report to creditors concerning the debtor's financial situation. At that meeting, a board of creditors may be established, provided that the board doesn't exceed seven creditors. This board may supervise the activities of the Commissioner and may present options to the court, if necessary.

The Composition Commissioner submits the creditors' decision concerning the debtor's composition offer to the Commercial Court together with a report concerning the composition and all relevant documentation. If the Commercial Court finds that the creditors' acceptance of the composition is in accordance with the provisions of law, it confirms the composition agreement.

[3] Statutory Requirements for Approval of Composition

The requirements for confirmation of a composition are as follows:

— *Composition offer proportionate to assets.* The debtor must offer to fund the composition with funds proportionate to its assets.

— *Ratification by the registered creditors.* At least one-half of creditors in number and in amount of indebtedness or and one-quarter of the creditors and two-thirds in amount of indebtedness must consent to the composition. Those amounts are of all creditors, not just those attending the creditors' meeting. Creditors entitled to priority of payment under law[3] and close relatives of the debtor (i.e., spouse, parents, and children) are not counted for purposes of voting, nor are their claims.

— *Recovery greater than bankruptcy.* In composition by way of abandonment of property (discussed below), the sum of money resulting from liquidation of assets or funds offered by a third party must be greater than the amount that would be recovered by liquidation in bankruptcy.

— *Adequate assurances of performance.* In the event that creditors do not compromise with respect to their claims, the debtor must demonstrate in advance of confirmation of the composition that it can bring about the realization of the transactions contemplated in the composition, pay creditors entitled to priority of payment in full, and satisfy all debts incurred during the grace period with the consent of the Composition Commissioner.

— *Deposit of court fees and expenses*. The debtor must deposit court fees and expenses with the court before confirmation of the composition.

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[3] *See* ¶ 42.05[9][e] *supra*.

If the judge of the Commercial Court determines that the provisions of the composition are insufficient, either of his own accord or upon application, he can correct them in such manner as deemed necessary.

If a composition is confirmed in error or as result of fraud by the debtor, and later annulled for failure to comply with one or more of the obligatory provisions, the Commercial Court may issue a bankruptcy judgment.

Within 10 days of pronouncement, a decision confirming a composition can be appealed by any creditor, and a decision annulling a composition can be appealed by a debtor. Once the decision of the Commercial Court becomes a final judgment, by the absence of an appeal within 10 days, notice is published in the Commercial Registry and on the Press Release Institution's website.

Payments by the debtor to any creditors contrary to the terms of the composition agreement are void. If the debtor provides treatment to a particular creditor or creditors contrary to the terms of the composition agreement, the debtor is subject to criminal prosecution. If a debtor fails to comply with a composition's terms, a creditor may request that the composition be annulled only as to that creditor. Such creditor would then be free to pursue its debt enforcement (i.e., *icra*) remedies against the debtor. Alternatively, a creditor may request that a composition be annulled as a whole if a debtor acted in bad faith in connection with the composition, for example, by paying certain creditors more than their allowed payments under the composition.

[4] Postponement of Realization upon Collateral by Secured Creditors

Upon application of the debtor, the judge that confirms the composition is authorized to postpone sale of collateral securing lien claims for one year, upon condition that interest will continue to accrue during the postponement period and such interest will be secured by collateral other than that already securing the lien claims. In order to receive such postponement, the debtor must have paid interest that accrued during the year prior to the composition and must prove convincingly that its property subject to such liens is necessary for the operation of its business and that liquidation of such liens would endanger its economic existence. The postponement decision is automatically annulled if the debtor sells the collateral or becomes a bankruptcy debtor. The judge that confirms the composition will annul the postponement in the event an affected creditor establishes by convincing proof any one of the following: (1) the postponement was granted based on incorrect information; (2) the debtor's assets and income have increased and the liens can be paid without jeopardizing the debtor's economic existence, or (3) liquidation of the liens would not endanger the debtor's economic existence.[4]

[5] Effect of Court Approved Composition

With the exception of certain limited classes of creditors discussed below, a confirmed composition binds all of a debtor's creditors, whether they consent or not.

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[4] IIK art. 307.

[a] Certain Creditors Not Bound by Composition

The following creditors are not bound by the provisions of a confirmed composition:

— *Secured creditors.* Unless a postponement order is granted, the provisions of a confirmed composition agreement are not binding upon a secured creditor. Such a creditor receives distribution from the debtor to the extent of the value of the collateral securing the claim.

— *Public creditors.* Debts to the government or any of its departments or offices in the First Rank[5] are not subject to a composition.

— *Creditors with claims against guarantors.* Creditors who have not agreed to a composition retain all of their rights to pursue guarantors and co-debtors of the debtor's obligations for the entire amount of the guaranteed debt.

[6] Composition by Way of Abandonment and Other Types of Compositions

In addition to the simple or "straight" composition discussed above, there are other types of composition agreements that a debtor can enter into, as follows:

[a] Composition by Way of Abandonment

The IIK also provides a procedure known as "composition by way of abandonment,"[6] which is similar to an assignment for the benefit of creditors found in certain common law jurisdictions. In the composition by way of abandonment, the debtor transfers its assets to its creditors or gives them authority to transfer such assets in whole or in part to a third party. The creditors' rights are enforced by composition liquidation officials (i.e., liquidators) and a committee of creditors. The liquidators are selected by the creditors that voted on the composition proposal and are subject to their supervision and oversight.

The composition by way of abandonment addresses:

— whether or not creditors will waive claims that are not satisfied by the liquidation of the debtor's assets or their transfer to a third person, and in the event creditors will not waive their claims the amount of remaining liability;

— specification of the liquidators and the committee of creditors and their authority;

— in the event not specified by law, the method of liquidation that will be utilized and if the debtor's goods will be transferred to a third person, the method and financial assurances associated with such transfer;

— that all notices relevant for the creditors will be published in the Commercial Registry, as well as on the Press Release Institution's website; and

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[5] *See* ¶ 42.05[9][e] *supra*.

[6] *Malvarlığının Terki Suretiyle Konkordato*, art. 84 in *İcra ve İflas Kanununda Değişiklik Yapılmasına Dair Kanun*, Law No. 4949 (July 17, 2003).

— whether there are any goods of the debtor that are not dealt with in the composition.

The composition by way of abandonment is otherwise procedurally similar to a simple composition. Once a composition by way of abandonment has been approved, the debtor loses its control of its properties and no longer has the right to dispose of such property.

[b] Composition in Bankruptcy

A debtor that is a bankrupt in a pending bankruptcy proceeding may also offer its creditors a composition to escape the provisions of bankruptcy. The offer is made to creditors at the Second Meeting of Creditors.[7] There are the same requirements as for a general composition outside of bankruptcy. If the agreement is accepted by creditors and approved by the Court, the composition is binding. In the case of composition agreements in bankruptcy, there is no grace period and no Composition Commissioner. The Board undertakes the duties of the Composition Commissioner. If a composition is accepted by the debtor's creditors during a pending bankruptcy, the Commercial Court lifts the bankruptcy. This period can not be more than six months.

¶ 42.08 Restructuring of Corporations and Cooperatives via Reconciliation Proceedings in Turkey

[1] Corporate Reorganization Provision Added to Turkish Bankruptcy Law

In 2004, a corporate restructuring provision was added to the IIK entitled Restructuring of Corporations and Cooperatives via Reconciliation.[1] This encourages prepackaged reorganizations of financially troubled joint stock companies and cooperatives as an alternative to liquidation. Joint stock companies and cooperatives that are unable to pay their matured monetary debts, or whose assets and receivables do not cover their liabilities, or face imminent risk of one of these situations, are eligible to file an application with the Commercial Court for restructuring via reconciliation proceedings, provided that a restructuring plan has been previously accepted and negotiated by the requisite majority of affected creditors. Banks and insurance companies are not eligible to apply as debtors for restructuring via reconciliation.

[2] Voting on Restructuring Plan

Prior to submission to the Commercial Court, a restructuring plan[2] must have been previously negotiated and approved by the requisite majority of creditors whose claims, rights or interests will be restructured by the restructuring plan. The statute

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[7] *See* ¶ 42.05[7] *supra*.

¶ 42.08

[1] *Sermaye Şirketleri ve Kooperatiflerin Uzlaşma Yoluyla Yeniden Yapılandırması*, art. 8 in *İcra veİflas Kanununda Değişiklik Yapılmasina Dair Kanun*, Law No. 5092 (Feb. 12, 2004).

[2] *Yeniden yapılandırma projesi*.

defines "requisite majority" to mean that the plan must be approved by in excess of half in number of creditors affected by the restructuring plan who actually vote and at least two-thirds in amount of claims of creditors who actually vote. If the plan has more than one class of creditors, each class of creditors must accept the plan by the requisite majority.

[3] Required Contents of a Plan of Restructuring

The restructuring plan is required to specify the following provisions:[3]

- the treatment of creditors that are affected by the plan and specify how equality of treatment of creditors holding similar claims will be ensured;
- the plan's effect on contracts to which the debtor is a party;
- the plan's effect on the debtor's right to dispose of its assets;
- if financing is necessary to the debtor's restructuring, specify whether or not the debtor will apply for credit from financing sources;
- provide the means for the implementation of the plan, which may include the possibility of sale of all or any part of the debtor's business, merger of the debtor with one or more entities, changes in the capital structure of the debtor's business and/or the amendment of the debtor's charter; identification of those responsible for future management of the company; extension of maturity, change in the interest rate or issuance of any securities of the debtor;
- specify how and by whom implementation of the plan will be supervised after its approval;
- provide the same treatment to creditors rejecting the plan as creditors holding similar claims, unless a creditor has agreed to accept less favorable treatment than the other creditors in the same class; and
- place creditors holding similar claims into the same class, although the plan may provide for more than one class of creditors.

[4] Required Submissions in Connection with Restructuring Plan

The debtor is required to submit the following documents together with its application:[4]

- the restructuring plan;
- documents showing the debtor's financial condition, including, among other things, the balance sheet, table of income, table indicating the status of the books and records, and other appropriate records and information disclosing the debtor's financial condition;
- documents demonstrating that the plan will enable the debtor to become

[3] IIK art. 309/n.

[4] IIK art. 309/o.

financially solvent and viable, that the plan will enable the debtor to repay its matured debts according to its proposed payment plan, and that the debtor's cash flow will be maintained;

— a list of all affected and unaffected creditors and a statement of their claims;

— a description of the out-of-court negotiation process including evidence that adequate information was given to affected creditors via appropriate means such as registered mail with proof of delivery or notarized written notice that would enable them to make a reasonable decision about the plan and evidence that proper notice was provided;

— a notarized and dated certificate signed by the affected creditors that have accepted the plan;

— documents detailing the treatment afforded creditors by the plan as compared to the possible amount they would receive in bankruptcy proceedings (i.e., liquidation);

— a table showing the majority requirement has been satisfied both in number and in amount; and

— a financial analysis prepared by a duly qualified independent audit firm demonstrating that the plan will enable the debtor to become financially solvent and viable and that there is a reasonable likelihood that the debtor will be able to comply with the terms of the plan.

[5] Interim Measures upon Application

A hearing is to be held on the plan of restructuring via reconciliation within 30 days of the debtor's application to the court. Upon the request of the debtor or any of its creditors, the court shall take immediately take all interim measures it deems necessary to protect the assets of the business and the activities of the debtor until judgment is rendered on the restructuring application. The court may hold an initial hearing before the hearing on the restructuring plan application and appoint one or more interim supervisors jointly selected by the debtor and creditors among Turkish citizens having requisite knowledge and experience who will personally carry out or supervise the business activities of the debtor from the time of appointment until judgment regarding the restructuring plan. If the debtor and creditors have not provided for or are unable to agree on an interim supervisor, the court may appoint one or more qualified interim supervisors.

During the interim period, the court may suspend debt enforcement actions and lawsuits—including the actions and lawsuits according to the law on the procedure for the collection of public receivables—against the debtor by affected creditors, may forbid the commencement of new proceedings and stay enforcement of preliminary injunctions and attachment judgments, in which case the statute of limitations and statute of repose will not run.[5]

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[5] IIK art. 309/ö.

[6] Financing Pending Reorganization

The debtor may obtain interim financing, such as obtaining loans before the approval of the plan, for the continued operation or survival of the business or the preservation or enhancement of the value of the assets of the estate. If security is required for financing, it will first be obtained from unencumbered assets. The statute provides that the term "financing" includes services and goods such as raw materials needed for the activities of the debtor.

[7] Examination of the Restructuring Application

At the hearing on the application for the plan, the court shall hear from the interim supervisor, representatives of the debtor's enterprise and creditors. If the court determines that the plan has been proposed in good faith, satisfies the conditions in terms of contents and required submissions,[6] and that that any affected creditors rejecting the plan will receive at least as much as they would receive in a bankruptcy proceeding, it shall make a determination within 30 days approving or denying the application.

In any order approving the plan, after taking into account the views of creditors, the court may appoint one or more plan supervisors who will be solely authorized to supervise the implementation of the plan and to give periodic reports to creditors. Where the debtor and creditors have not provided for or do not agree on a plan supervisor, the court may appoint one having the necessary qualifications. The courts order approving or rejecting the plan may be appealed within 10 days from its pronouncement by the debtor and creditors who opposed the plan at the confirmation hearing. The appeal will be handled in an expedited manner.

[8] Effect of Approval of a Restructuring Plan

The reorganization plan will become effective when the court renders its judgment approving the plan. The terms of the plan will take precedence over all agreements with the affected creditors. If the Court of Appeals reverses the confirmation of a plan, the implementation of the approved plan will be suspended. However, all transactions until the reversal decision will be upheld.

Terms in any agreement of the debtor, whether or not such agreement is affected by the plan, that would allow or result in the modification, termination, or default or breach of such agreement solely as a result of the application for or commencement of a restructuring via reconciliation proceeding shall be unenforceable.

[9] Modification of Confirmed Restructuring Plan

Where a breach of certain provisions of a plan only affects some of the creditors, and in the event that the affected creditors have reached agreement with the debtor to modify the plan, the modified plan will be submitted to the court for approval. If the modification is essential to render the plan feasible and the modified plan will not result in better treatment for those creditors whose rights are affected by the breach

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[6] *See* ¶ 42.08[4] *supra*.

than other creditors, the court will approve the modified plan. The procedure to obtain approval of a plan modification is identical to that to obtain approval of a restructuring plan.

[10] Termination of Confirmed Restructuring Plan

Where the debtor cannot timely fulfill its obligations set by the plan in whole or in part, the plan supervisor, the debtor or creditors will notify the court that confirmed the plan. The same remedy is available for a creditor that provided the debtor with secured or unsecured financing before approval of the plan and has not received satisfaction of its claim in whole or in part. Upon such notification, the court will take effective measures to protect the debtor's assets, including measures to limit the debtor's ability to dispose of assets, and will set a hearing date. After hearing objections from creditors that are affected by the plan or not affected by the plan, and upon determining that the debtor has failed to carry out its obligations under the plan in whole or in part and that modification of the plan is not feasible, or upon the creditor providing financing to the debtor in connection with the restructuring establishing that it has not been paid in whole or in part, the court will immediately rule on the debtor's bankruptcy.

¶ 42.09 Extraordinary Suspension of Payments Procedure in Turkey

Based upon the Swiss sources from which the IIK was adapted, the IIK contains provisions for extraordinary suspension of payments and suspension of enforcement of debts due to public calamity.[1] However, as these have, to date, never been utilized despite their many years of existence, they warrant little discussion beyond noting the existence of such laws. The Council of Ministers (i.e., Cabinet) may declare an Extraordinary Suspension of Payment on the basis of continuous economic crisis applicable to debtors within an affected region.[2] Debtors may then petition to the Debt Enforcement Office for a suspension of debts not exceeding six months,[3] which may be extended for an additional four months upon the debtor's petition.[4] The Council of Ministers may also declare a general suspension of debt enforcement procedure (*icra*) due to epidemic, public calamity or war. Although these laws exist on the books, they have never been utilized, despite periods of economic crisis and public calamity, and are generally not viewed as significant to modern IIK practice by Turkish authorities on Debt Enforcement and Bankruptcy.[5]

¶ 42.09

[1] IIK arts. 317–330.

[2] IIK art. 317.

[3] IIK art. 318.

[4] IIK art. 327.

[5] *See, e.g.*, Baki Kuru *et al.*, *İcra ve İflas Hukuku Ders Kitabı* (Enforcement of Debts and Bankruptcy Law Course Book), Türkmen Kitabevi, 2006 (topic not covered in comprehensive analysis of IIK).

¶ 42.10 Treatment of Cross-Border Insolvencies in Turkey

[1] Principle of Territoriality Applies

The IIK does not contain any specific provisions regarding cross-border insolvencies or recognition of foreign bankruptcy or insolvency proceedings. Turkish law applies the principle of territoriality, which permits commencement of a bankruptcy against a bankruptcy-amenable debtor in the district in Turkey in which the debtor has its business center.[1] The location of a joint stock company's business center is specified in its articles of incorporation.[2] A foreign corporation is amenable to bankruptcy in Turkey in the district in which it has a branch office, or if it has more than one Turkish branch office, the location of its main branch office. The bankruptcy of a foreign branch of a bank located in Turkey may be obtained under the Banking Law.[3] The bankruptcy estate of a Turkish bankrupt is comprised of all of the bankrupt's property wherever located in the world.

[2] International Law and Treaties

The Law Regarding International Private Law and Procedure (*Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun*) ("MÖHUK")[4] specifies certain procedural rules regarding application of international law. A final and non-appealable foreign bankruptcy judgment, like any other foreign judgment, will only be recognized in Turkey if it is granted exequatur by a Turkish court. Exequatur is sought by petition, which will only be granted if the judgment satisfies the following conditions:[5]

- Reciprocity with the foreign state from which the judgment issued, either pursuant to treaty, or a judgment of a Turkish court would be recognized and enforceable in the foreign state, due to the existence of a provision of law providing for such enforcement or de facto recognition of judgments of Turkish courts;
- The judgment does not concern a subject which is restricted to the exclusive jurisdiction of Turkish courts (such as determination of rights in immovable property in Turkey);
- The judgment is not in obvious conflict with Turkish public policy; and
- The legal person against whom exequatur is sought does not protest to the Turkish court that, according to the laws of the state from which the judgment issued, it did not receive proper notice, was not represented in court, or the foreign court issued a default judgment contrary to laws of such foreign state.

Whether a foreign bankruptcy decree, or foreign bankruptcy representative, would be recognized by a Turkish court would be determined on a case by case basis by

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¶ 42.10

[1] IIK art. 154.

[2] TK art. 339/2, a.

[3] Banking Law (*Bankacılık Kanunu*) Law No. 5411 (Nov. 1, 2005) art. 12/3.

[4] Law No. 5718 (Jan. 12, 2007).

[5] MÖHUK art. 54.

application of the foregoing standards. In a case decided in 2000, the *Yargıtay* case reversed a decision of the Istanbul Commercial Court[6] that failed to grant exequatur to an Italian bankruptcy judgment and recognize the "bankruptcy administrator" appointed in an Italian bankruptcy proceeding. The *Yargıtay* court found that since no treaty governing the matter existed between Italy and Turkey and the European Convention on Certain International Aspects of Bankruptcy, done at Istanbul on June 5, 1990, had not come into force, a foreign bankruptcy trustee could not engage in activity in Turkey. Thus, the *Yargıtay* court reasoned, there was no basis to recognize the authority of the Italian "bankruptcy administrator" to act in Turkey under a power of attorney. However, the *Yargıtay* opinion reversed the Commercial Court's decision to not grant exequatur to the Italian bankruptcy judgment on the grounds that a foreign bankruptcy decision can either be recognized based on the existence of a treaty between Turkey and the foreign country, or under the provisions of MÖHUK.[7] In another case decided in 1988,[8] the *Yargıtay* has enabled the recognition of a German bankruptcy decision and created a "de facto" reciprocity between two countries.

Turkey did not officially participate in the drafting of the UNCITRAL Model Law on Cross-Border Insolvency[9] and appears unlikely to adopt it in the immediate future. Turkey participated in the drafting of the European Convention on Certain International Aspects of Bankruptcy, done at Istanbul on June 5, 1990. However, that Convention has not been ratified by the requisite number of member states of the Council of Europe and has not come into force.

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[6] *Istanbul 6. Asliye Ticaret Mahkemesi.*

[7] Y.19.HD.9.2.2000, E.00/6226, K.01/1617.

[8] Y. 11.HD 23.9.1988, E.5601, K. 5205.

[9] G.A. Res. 52/158, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/158 (1997), *reprinted in* App. A *supra*; *see also* ¶ 9.06 *supra*.