

Recent Amendments to the Enforcement and Bankruptcy Law and to Certain Other Laws

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The Law No. 7101¹ Amending the Enforcement and Bankruptcy Law² and Certain Other Laws (the “Amending Law”) was published in the Official Gazette No. 30361 dated 15 March 2018. The Amending Law targets mainly the Enforcement and Bankruptcy Law but it also introduced, among others, certain amendments to the Notification Law³, the Law on International Arbitration⁴, and the Commercial Code⁵. This Client Alert summarizes the material novelties introduced by the Amending Law (the “Amendments”).

1. Amendments to the Enforcement and Bankruptcy Law

a. Abolition of the “postponement of bankruptcy” procedure

The major change introduced by the Amending Law is the abolition of the postponement of bankruptcy procedure, which was first introduced in 2003. The postponement of bankruptcy procedure was actually abolished back in July 2016 with the Statutory Decree No. 669⁶ that was adopted under the state of emergency. With the publication of the Amending Law, Article 4 of Decree No. 669 now has legislative force.

In the preamble⁷ of the Amending Law, the rationale beyond this Amendment is explained as the dysfunction of the postponement of bankruptcy procedure, contrary to the expectations of the legislator, and the lack of proper participation by the creditors in the process. Therefore, a procedure in which the creditors and debtors reach an understanding to be approved by a court in a system known as a *concordatum*⁸ was seen as the best option both commercially and socially.

¹ Published in the Official Gazette No. 30361, dated 15 March 2018.

² Published in the Official Gazette No. 2128, dated 19 June 1932.

³ Published in the Official Gazette No. 10139, dated 11 February 1959.

⁴ Published in the Official Gazette No. 24453, dated 21 July 2001.

⁵ Published in the Official Gazette No. 27846, dated 13 January 2011.

⁶ Published in the Official Gazette No. 29787, dated 31 July 2016.

⁷ Please see <<https://www.tbmm.gov.tr/sirasayi/donem26/yil01/ss518.pdf>> for the rationale of the Amending Law (accessed 22 March 2018).

⁸ A concordatum is a type of agreement executed among the debtor and its creditors, aiming to recover the debtor’s financial status (or to save the debtor from bankruptcy by restructuring its debts, if the debtor is subject to bankruptcy) and to ensure that the creditor receives its due with a certain reduction or within a certain term.

With the entry into force of the Amendments, the equity companies and cooperatives (*i.e.* the debtors) who run the risk of going bankrupt due to their inability to pay their debts when they have become due, or there is a risk that they will not be able to pay their debts once due, must now apply for a concordatum instead of the postponement of bankruptcy. A creditor who is eligible to demand the company's bankruptcy can also apply to the commercial court of first instance for the company to be subject to a concordatum.

b. Grant of Priority to the Credits Secured by a Pledge

The Amending Law grants to the creditors who have their credit secured by a pledge a right of priority over the money obtained from the sale of the pledged assets during the bankruptcy proceedings. As opposed to the previous version of the Enforcement and Bankruptcy Law, this right of the creditors is prioritized over the public receivables such as custom duties and real estate related taxes.

c. Termination of Bilateral Contracts

The Amending Law introduces important provisions concerning the bilateral contracts to which the debtor subject to a concordatum is a party to:

- If such a contract is considered important for the continuation of the operations of the debtor's enterprise, any provision stating that the request of concordatum by a party shall be considered (i) a breach of the contract, (ii) a cause for rightful termination, or (iii) an event for the debts to become due, shall not be enforced; and
- If such a contract creates continuous obligations between the parties (*i.e.* a lease agreement, long term supply contract, etc.) that prevents the concordatum to achieve its purpose, the contract may be terminated upon the request of the debtor and the approval of the court. The compensation for termination of the contract shall be added to the scope of the concordatum project.

d. Prevention of Application for Judicial Remedies

The Amending Law eliminates the possibility of appeal against decisions concerning (i) the grant of a temporary grace period⁹ (*geçici mühlet*), (ii) the extension of the temporary grace period, (iii) the rejection of a temporary grace period to be terminated, or (iv) the appointment of a temporary commissioner.

e. Involvement of the Creditors in the Process

The Amending Law introduces several provisions allowing the creditors to be more involved in the bankruptcy process. One of these Amendments requires the bankruptcy administration to provide information on the planning and general outcomes of the bankruptcy liquidation procedure upon the request of creditors who have been accepted to form a part of the bankruptcy estate. Prior to this Amendment, creditors could apply to the bankruptcy administration to request information; however, because the law did not contain an express obligation to provide information, the creditors were generally dissatisfied by the responses provided. We believe that this Amendment aims to solve this problem.

2. Amendments to Certain Other Legislation

a. The Law on International Arbitration

The determination of the competent court for actions to annul an arbitral award was a point of discussion in Turkish doctrine. Although the unclarity was resolved in favor of the civil courts of first instance by the Supreme Court¹⁰, the Amendments may render the Supreme Court's interpretation inapplicable. Under the Amendments, the competent court for the annulment of an arbitral award is the regional court of

⁹ The provisional grace period is a new feature set out by the Amending Law, and is a three-month time period, which can be further extended by two months, in which the court will decide whether the concordatum project is feasible. Upon the report of the commissioner, the court will decide within this period whether to accept the concordatum application and grant a one-year grace period.

¹⁰ Supreme Court 15th Civil Chamber E.2017/1666, K.2017/2907, dated 20 April 2017.

justice that has jurisdiction for the area where the civil court of first instance has jurisdiction pursuant to Article 3 of the Law on International Arbitration¹¹.

b. The Commercial Code

In accordance with the Amendments, the submission of evidence in commercial lawsuits will be subject to the provisions of the Civil Procedure Law¹² regarding the submission of evidence procedures. However, commercial disputes that involve claims of less than TL 100,000 will be subject to the simplified judicial procedure (*basit yargılama usulü*). With this Amendment, disputes that involve claims of less than TL 100,000 are expected to be resolved quickly. In addition, the Commercial Code has been amended to replace references to the postponement of bankruptcy procedure with references to the concordatum procedure.

c. The Notification Law

The Amending Law has made it obligatory for the notifications subject to the Notification Law (e.g. notifications made by courts, tax authorities etc.) addressed to certain public and private real and legal persons to be made electronically. Among these addressees are local administrations, public economic enterprises, public notaries, all kinds of private companies, and lawyers who are registered to the bar. The Amending Law provides for how such an electronic notification address is to be formed. The Amending Law states that electronic notification is considered made at the end of fifth day after the e-mail arrives at the notification address of the addressee. This amendment is significant for the determination of the official notification date. These Amendments will be applicable as of 1 January 2019.

3. Effective Date of the Amendments

Articles 48 and 49 (concerning electronic notifications as stated above) of the Amending Law will come into force on 1 January 2019. All other provisions of the Amending Law became effective as of 15 March 2018.

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¹¹ Pursuant to Article 3 of the International Arbitration Law, the civil court of first instance at (i) the place of residence, (ii) the ordinary place of habitation, or (iii) the workplace of the defendant is competent for the procedures to be undertaken before courts. If the defendant does not have a place of residence, habitation or workplace in Turkey, the Istanbul civil courts of first instance are competent. The Amending Law provides an additional provision that states that the competences provided for the civil court of first instance within the International Arbitration Law will be applied by the commercial courts of first instance depending on the subject matter of the dispute.

¹² Published in the Official Gazette No. 27836, dated 4 February 2011.