

Turkey

Baspinar & Partners Law Firm

Gokmen Baspinar, Ali Ceylan, Ceylan Kuscu

1. THE BASIS OF CIVIL FRAUD OBLIGATIONS UNDER TURKISH LAW

Turkey is a civil law jurisdiction based on the Swiss and German model. As a consequence the Turkish legal system is governed by, and based on, statute law. Additionally, the High Court of Appeal decisions provide guidelines for the lawyers and judges to interpret the legislation.

Unlike some other countries, there is no specific provision defining civil fraud or specifically dealing with civil fraud in the Turkish legislation. Fraud, however, is mentioned in a wide variety of contexts in the Turkish legal system, including:

- rules under the Code of Obligations (CO) Law No: 6098, which came into force on 1 July 2012, relating to parties entering into contracts as a result of being fraudulently misled;
- rules concerning fraud on the part of a seller to a consumer under consumer protection law and commercial law;
- rules relating to a 'tortious act' under the CO, where the misled party and the misleading party are not in a contractual relationship.

There are also relevant provisions in the Turkish Commercial Code concerning unfair competition.

2. THE MAIN ELEMENTS OF A CAUSE OF ACTION IN TURKEY BASED ON CIVIL FRAUD

The main elements of civil fraud actions depend on whether there is a contractual relationship or not.

Fraud in a contractual context

To be actionable, the fraud must take place in the context of a contractual relationship. The fraud must contain the following elements (*Article 36, CO*):

- one of the parties must be misled into entering into an agreement, through the misrepresentation or concealment of a material fact even where the misleading is not substantial. In such a case, the misleading party is acting against the general principle of good faith;
- the misleading action must be made intentionally. If the misleading party is aware of the fact that his actions will mislead the other party, that action is considered to be intentional. In other words, there should be intent to induce the other party to rely on the misrepresentation;
- the agreement must be made as a result of this fraudulent action. The fraudulent action must be the main reason why the misled party entered into the agreement;

- in order to be able to claim damages, damage must have been caused. If no damage has been caused, the misled party can cancel the agreement even if the misleading is not substantial (*see below, section 3*); and
- if the action which misled one of the parties was committed by a third party, the misled party will be bound by the agreement unless the other party to the agreement has, or should have had, knowledge of the third party's misleading actions.

Fraud in a tortious context

Where there is no contractual relationship between the innocent party and the misleading party, or a party to a contract was not aware of a third party's misleading actions, it may be possible to claim damages if there has been a 'tortious act', ie where a third party has caused damage through an unlawful or negligent act. The following rules apply to the tortious act (*Article 49, CO*):

- there must be an unlawful act: In Article 36 there is no definition of the term unlawful, which is defined by the local court cases and High Court of Appeal on a case-by-case basis. However a general principle set out by the courts is that an unlawful act is an action against the individual's assets and/or personal rights which are under the protection of the legal system;
- there must have been fault: the CO contains the concept of 'liability against fault'. Compensation can be claimed if there has been fault, either caused intentionally or through negligence. If the misleading party causes damage with awareness and willingness then intention is present. There are two forms of negligence: '*gross negligence*' and '*slight negligence*'. There are no definitions for these terms provided under any written regulation. In each case, the judge decides the degree of the negligence by considering the facts and merits of the case;
- there must be causation in fact: in other words, to claim damages, there must be a causal relation between the unlawful act and the damage. Otherwise the misleading party is not liable to compensate;
- types of loss that may be claimed: two types of loss may be claimed to have resulted from a tortious act:
 - actual damage. This means that a person has actually suffered a direct loss in his available assets or an increase in debts;
 - loss of profit.

Consumer protection and commercial law

Fraud also arises in the context of consumer protection law. Although it is not specifically defined, fraud on the part of a commercial seller affects the sale agreement, particularly in relation to the limitation period, for example, where the seller conceals a deficiency on goods in relation to a sale of goods (*see below, section 7.3*).

3. REMEDIES AVAILABLE UNDER TURKISH LAW IN RELATION TO CIVIL FRAUD

Contractual fraud

If there is a contractual relationship between the parties, the misled party may:

- cancel the agreement by sending a notice to the other party; or
- claim compensation in damages under the principle of fault in conclusion of a contract (*culpa in contrahendo*). Note that the innocent party may still demand compensation without cancelling the agreement.

If the misled party cancels the agreement, both of the parties should return their benefits arising from the cancelled agreement. For example, where a title deed is registered in the name of the buyer under a real estate sale agreement and then cancelled because of the fraudulent act of the buyer, the title deed should be registered again in the name of the seller and the seller should repay the purchase price to the buyer. This is the equivalent of the common law remedy of restitution.

Tortious act

If there is no contractual relationship between the parties, the misled party can claim for any loss or damage suffered by reason of a tortious act.

4. DAMAGES; BASIS OF CALCULATION

Contractual relationship

There are two types of damages in the context of a contractual relationship between the misled party and the misleading party:

- Negative damage (*Vertrauensschaden*). This is damage arising from relying on an agreement believed to be duly executed or valid. Therefore, this is damage that would not have come into existence if the agreement were not concluded. This damage includes:
 - wasted expenses incurred when entering into the agreement (such as notary expenses, title deed office expenses and transport expenses);
 - wasted expenses incurred when carrying out the agreement (such as delivery expenses);
- Positive damage (*Erfüllungsschaden*). The positive damages are the damages caused as a result of failure to perform the agreement. These damages include, but are not limited to, the loss of profit and the actual damages.

In Turkey, the general rule is that a party can claim either negative damages or positive damages, but not both at the same time. According to the most widely held view of Turkish academics, however, in cases of fraud a misled party can only claim negative damages. There is a minority view that positive damages can be claimed.

No contractual relationship between the parties

The distinction between negative damage and positive damage does not apply. In this case, the misled party can claim for pecuniary and non-pecuniary damages. The non-pecuniary damages include both actual damages and loss of profit.

5. AVAILABLE INTERIM RELIEF

In the Turkish legal system, there are no specific interim relief provisions for civil fraud cases. The general rules concerning interim relief under the Civil Procedure Law, no: 6100 (CPL) apply.

Types of relief

The court can provide any kind of interim relief that has the effect of preventing the claimant incurring damage before resolution of his claim, such as:

- protecting or securing goods or rights;
- ordering the defendant to do, or not to do, an action (for example, annotation to the title deed preventing its transfer, prohibiting the transfer of shares of a company, and so on).

Procedure

The claimant can ask for the interim relief before or after filing a case. If the interim relief is ordered before filing a case, the party obtaining the interim relief must file his case within two weeks after implementation of the interim relief. Otherwise the interim relief order becomes automatically invalid.

The party claiming for an interim relief order must:

- file a petition explaining the reasons for the application, detailing the kind of interim relief demanded, providing significant proof that the party's case on the merits of the claim is strong;
- provide security, in the amount ordered by the court, against possible damages that may be suffered by the other party and third parties if the interim relief turns out to be have been wrongly granted. If the request is based on an official document (or similar evidence) or if the situation or conditions require this, the court may rule (giving an explicit reason) that security not be provided. Persons benefiting from free legal aid are not required to provide collateral.

The security is returned if:

- there is no claim for compensation (if the claimant loses its case, the counter-party can claim compensation for the damages arising as a result of the implementation of the interim relief);
- the claim is not filed within one month following the final ruling on the main case; or
- the interim relief is revoked;
- request implementation of the interim relief within one week following the ruling (this time limit is imposed to give the party against whom the interim relief has been ordered an opportunity to object to the decision before the interim relief has been implemented). Otherwise, the interim relief decision becomes automatically invalid, even if the lawsuit is filed within the legal period. The implementation of the interim relief must be requested from the authorised:
 - execution office in the jurisdiction of the court that ordered the interim relief; or
 - execution office where the assets (or the right subject to the interim relief) are (is) located.

If not stated otherwise in the decision of the local court at the end of the case, the interim relief decision stays in force until the local court decision becomes final (for example, if one of the parties appeal, until the decision of the appeal court).

6. BARS TO RELIEF FOR CIVIL FRAUD

6.1 Delay

There is no concept of delay in the Turkish legal system. As long as the claim is made within the relevant limitation period, a defendant cannot assert delay as a defence (*see below, section 6.3*).

6.2 (Lack of) good faith

Under the Turkish Civil Code (TCC) (the TCC was enacted in 2001 and came into force on 1 January 2004), all persons must act in good faith while exercising their rights and performing their obligations. The law does not protect the abuse of a right.

The TCC presumes that all persons act in good faith, unless proven otherwise. In the case of contractual fraud, intention is one of the elements of a fraudulent action (*see above, section 2*). In the case of a tortious act, the misleading party must act with fault (*see section 2*). Generally, the misleading person will be held not to have acted in good faith in the case of contractual fault (although it is possible for a fraud to be committed negligently and in good faith in the case of tortious fault).

If, however, the misled party enters into an agreement while being aware of the fraudulent action, that party cannot cancel the agreement or claim compensation for damages, as that party would not be acting in good faith.

6.3 Applicable limitation periods

Unless otherwise stated by law, each claim is subject to a 10-year limitation period (*Article 146, CO*). However, there are specific limitation periods for fraudulent actions:

- contractual relationship between the parties: the misled party must cancel the agreement within one year after finding out that there has been a fraudulent action (*Article 39, CO*);
- tortious act: the misled party must claim compensation within the earlier of (*Article 72, CO*):
 - two years after finding out the fraudulent action;
 - 10 years following the occurrence of the tortious act.

If the action is also forbidden in criminal law, the limitation period regulated under criminal law will be applied to any civil law claim (*Article 72, CO*). The limitation periods in the criminal law depend on the type of the crime and are generally longer than the limitations under the CC.

There are certain circumstances suspending the limitation period, for example where (*Article 154, CO*):

- the debtor acknowledges its debt, makes a partial payment, or pays the interest of a debt;
- the claimant files a case in court, or starts an arbitration process or executive proceedings.

The limitations are classified into two types:

- limitation periods which the judges should take into consideration during the judicial process, by virtue of their office (*ex officio*). This can also be claimed by the relevant party at any time during the trial if the

- judge fails to take the limitation period into consideration;
- limitation periods where the party that seeks to rely on the limitation period must claim the limitation period in the relevant party's response to the statement of claim. The judge must not take into consideration, or suggest by any means to the relevant party, the second type of limitation during the trial period.

6.4 Position of good faith purchaser for value without notice (innocent third parties)

Under the CC, good faith may affect the law, in some circumstances, under the 'numerous clauses' principle. One of the most common examples is where a party acting in good faith buys real estate relying on the title deed records. In this case, even if the previous sale agreement is invalid because of the fraudulent action, the third party will be protected and will keep the real estate.

7. ASPECTS OF PLEADING FRAUD IN TURKEY

7.1 Lifting the corporate veil

If a legal person acts fraudulently, a compensation claim can be made. The board members or the manager of a legal entity benefiting from the fraud would, depending on the type of the legal entity, not be liable for damages caused by third parties. If the fraudulent action is deemed a crime, however, the board members or the manager would be held responsible for the consequences of the crime.

7.2 Settlements/exclusion clauses

Exclusion clauses may apply when the parties are in a contractual relationship. Exclusion of liability clauses are regulated under the CO, which provides that they are invalid where the person seeking to rely on the clause is culpable of 'gross fault'. These provisions are applicable if there is an agreement between two (or more) parties and one of them does not perform its obligations with gross fault.

7.3 Extension of limitation

The limitation periods vary case-by-case (see section 6). The general periods usually apply. However, there are some exceptions in commercial law and consumer protection law, including where the seller conceals deficiency in goods sold to the buyer. In that case, no limitation period applies to the buyer in exercising its legal rights. The limitation periods cannot be shortened or extended by agreement between the parties.

7.4 Punitive damages

In Turkey the compensation cannot cause the damaged person to be richer, which means that the compensation cannot be more than the damages caused by a fraudulent action.

7.5 Standard of proof

There is not a higher standard of proof for civil fraud cases. In general each party to the case must prove its own claims under the requirements of the relevant provisions (*see section 2*).

7.6 Lawyers' duties when pleading fraud

In Turkey, the legal proceedings are regulated under the CPL. These provisions apply to all types of court case, and there is not a higher duty for cases involving civil fraud (*see section 8*).

8. BASIC REQUIREMENTS IN RELATION TO ISSUING PROCEEDINGS; APPLYING FOR INJUNCTIVE OR INTERIM RELIEF; OR SERVING PROCEEDINGS ABROAD

Pleadings and applications

All civil legal proceedings in Turkey are regulated by the Code of Turkish Civil Procedure (CPL). These provisions are applicable to all kinds of civil court cases.

All claims commence with the claimant submitting a statement of claim to the court. The statement must include:

- the names and addresses of both parties;
- (if relevant) the Turkish ID number of the claimant (if any);
- the attorney's name and address (if any);
- a summary of the material facts;
- the evidence list regarding the material facts.

After receipt of delivery of the statement of claim, the defendant submits his response petition to the statement of claim within 14 days. The defendant can request extra time for the response petition and the judge can extend this time limit by up to one extra month. The response petition must include the same elements as the statement of the claim.

The claimant then has 14 days to serve its response, and the defendant is then given an opportunity to serve a 're-response' (also within 14 days), so that in total, there are usually two exchanges of pleadings.

During the course of the proceedings, the parties are free to make other applications and submit petitions based on the developments and issues that arise during the course of the case.

Expertise evaluation

In almost every case the court will appoint an expert or a committee of experts to examine and evaluate the case file and evidence. The committee is most likely to consist of a legal expert, a technical expert and a financial expert. This is up to the judge's discretion and will depend on the nature of the claim.

Once the expert committee submits its report to the court, the court will grant the parties two weeks in which to provide their comments on the report. The parties can wholly or partially object and/or wholly or partially approve the expert report. If the judge does not find the report satisfactory, the judge can send the report back to the committee, ordering any unclear or additional issues (depending on the judge or parties' objections) to be

explained. This step is entirely up to the judge's discretion. The judge can always appoint a new expert or expert committee if he is not satisfied with the expert(s), which is generally the case.

If a party states that he or she wants witnesses to appear, the court sends them a notice indicating them to be ready on the hearing. Firstly the judge will ask the witnesses questions and then the parties have the right to ask questions to the witnesses directly. The parties can also submit an expert's opinion to the court (which was allowed under new Procedural Code which came into force on 1 October 2011). It is very rare for experts to appear at the hearing.

Court decision

After the evaluation of all claims, evidence and expert reports, the court will give a decision in respect of the dispute and issue an appropriate order.

Appeals

Any party can take the decision of the court to the Court of Appeal. A chamber of the Court of Appeal will examine the decision and may approve or dismiss the first instance court's decision. If the first instance court's decision is dismissed, the first instance court will either deal with the case by taking the Court of Appeal's comments into consideration or insist on maintaining their decision. If the latter applies, the Assembly of the Court of Appeal's Chambers will gather to give its final decision about the dispute.

Length of proceedings

The civil procedure process usually takes two to three years, including the appeal stage.

Expenses

The court fees and expenses are as follows:

- court application fee: this is 6.831 per cent of the amount of the compensation claim (there is no maximum). A quarter of this amount is paid at the commencement stage; this is a pre-condition for the claim to be filed. The remaining amount is paid at the end of the case.
To reduce the application expenses, the claimant can claim a lower amount at the application stage. Once the expert report is finalised and it is in the claimant's favour, the claimant can alter its claim amount according to the compensation amount stated in the expert committee's report. This method applies only to pecuniary damages. The claim amount for non-pecuniary damages cannot be altered;
- expert committee expenses: the court will determine the number of experts who will constitute the expert committee and the amount to be paid to each expert. Under general court practice the expert committee is likely be composed of three experts (see above). The expert fees are from EUR 200 to EUR 1000 for each expert, depending on the type and complexity of the case, although it is rare to pay more than EUR 1000. The expert fees are determined by the judge as a specific sum (not an

- hourly rate), taking into consideration the scope of the work undertaken;
- miscellaneous expenses: there are also miscellaneous expenses which amount to about EUR 500, such as serving expenses and witness expenses.

The expenses should be deposited while filing the case, including the proportion of the application fee and an advance on expenses, including the minimum expert committee fee tariff, witness fee etc. If the judge subsequently determines a higher expert committee fee, the difference must be paid. If the claimant party does not deposit the expenses at the beginning, the judge grants two weeks to deposit the expenses. If the expenses are not deposited within the specified time, the judge will dismiss the case.

Serving claim abroad

Turkey is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, and judicial and extrajudicial documents are served abroad under this Convention.

9. PROCEDURE AND REQUIREMENTS FOR ENFORCING INTERIM INJUNCTIONS FROM ABROAD IN TURKEY

Turkey has recently carried out a number of significant amendments and enacted new legislation concerning the fundamental rules of the Turkish legal structure, including the International Private and Civil Procedure Law, which deals with recognition, enforcement of foreign final and/or interim judgments, and which came into force on 27 November 2007.

For a foreign judgment to be enforced in Turkey, it must comply with certain recognition or enforcement procedures (*Articles 50 to 63, Code of Procedural Private International Law, law no: 5718*). One of those, however, is that the court decision must be a 'final decision'. Because of this requirement, interim relief cannot be subject to the recognition or enforcement procedure. It can, however, be submitted as evidence to apply to a court to obtain interim relief in Turkey (see above, section 5). Therefore, for example, a foreign freezing order cannot be recognised, but could be used to support an application for a similar interim order from a Turkish court.

