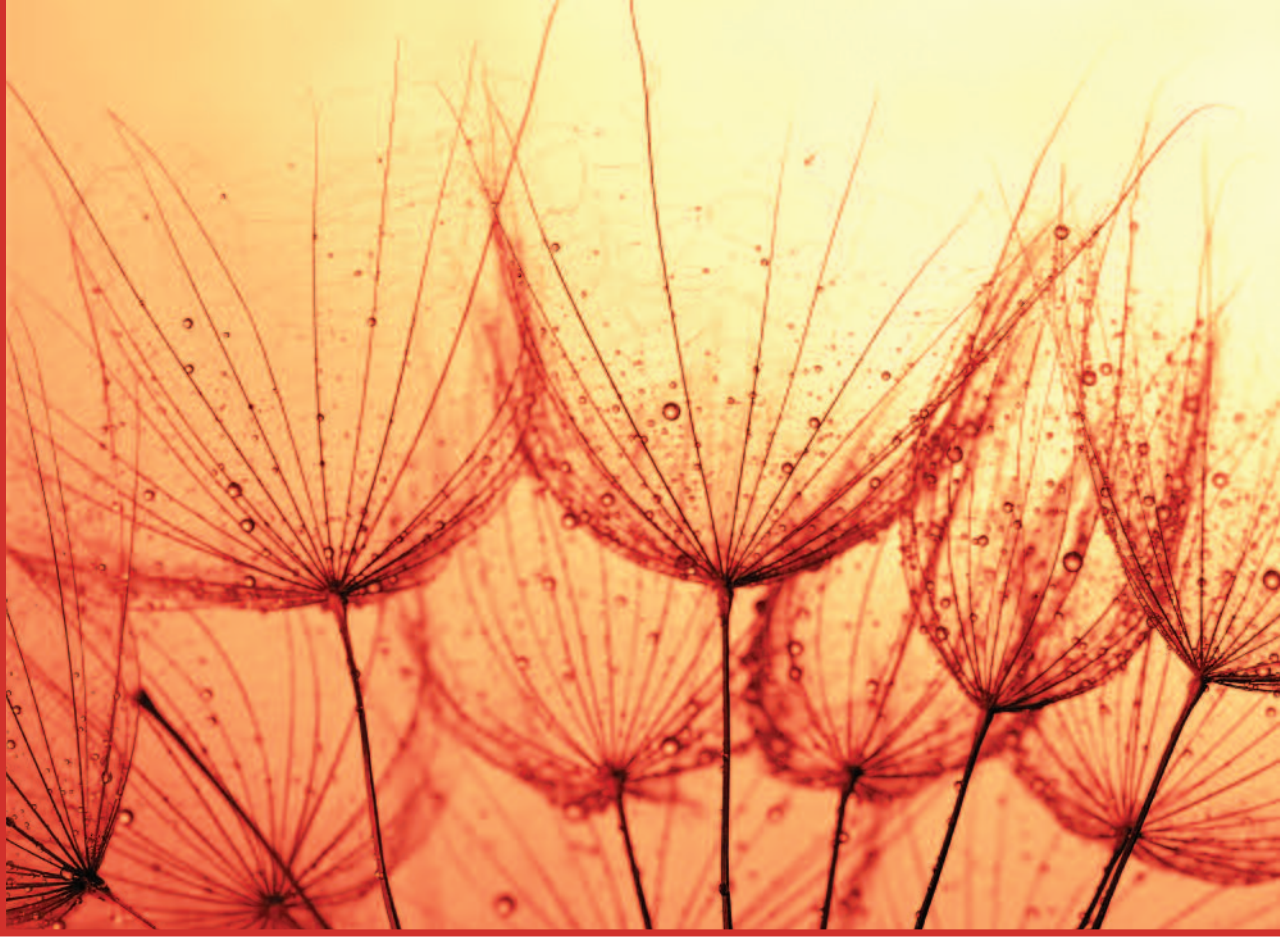

# Dispute Resolution Guide **2015**

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# Collecting the evidence

**Pelin Baysal** and **Ilgaz Önder** of **Gün + Partners** consider whether Turkish courts are efficiently enforcing the collection of evidence in dispute proceedings

An effective and fair judicial system is indispensable for a developed country welcoming foreign investors. The Turkish judicial system, however, has not yet achieved this. This is mainly due to the lack of efficient tools for collecting evidence which would help parties to provide sufficient information in a dispute to prepare themselves and the court at the outset of a civil proceeding. Without such preparations, the proceedings become long and complex, leading both national and foreign investors to doubt the accuracy of court judgments and efficiency of the Turkish courts. That is why foreign investors particularly tend to prefer arbitration or choose foreign jurisdictions to settle their disputes with Turkish parties.

Unlike in criminal proceedings, parties to a civil law dispute are responsible for the determination of the facts and collection of evidence. It means that a party making a claim must also provide the court with sufficient evidence to prove its claim. Yet, although it is the plaintiff who bears the burden of proof, it does not possess the necessary power to collect all evidence to this purpose. It is mainly the court that can collect evidence upon the request of the plaintiff, particularly for evidence held by the counterparty. Therefore, the plaintiff is merely expected to set out the importance and relevance of the evidence not in their possession.

> The extent of the disclosure obligation towards a counterparty's lawyer bears special importance

Under Turkish law, the parties of a civil case should list and submit all their evidence or at least information on evidence that is not in their possession during the exchange of petitions. After the completion of exchange of petitions, there is a preparatory phase called preliminary examination where the court and the parties seek clarification regarding the factual basis of the case. This enhanced involvement of the court helps to determine, locate and collect the evidence. However, even if the civil law judge is involved in the collection of evidence, it does not necessarily ensure the collection of evidence in full, as there is no comprehensive disclosure duty.

Although the Code of Civil Procedure (6100) dated October 1 2011 (CCP) explicitly imposes an obligation of honesty on the parties and their lawyers, it has had little impact on the submission of documents to the court by the counterparty. As also understood from the preamble of the CCP, the obligation of honesty merely ensures that the parties and their lawyers tell the truth when submitting a claim and explanation. In other words, this obligation should not be subject to a broad interpretation which forces a party to reveal all the documents at hand and hampers its chance of success. Under the CCP, the parties are not expected to submit unfavourable evidence under their control; it primarily foresees that the parties will only disclose favourable evidence while remaining silent with respect to unfavourable evidence under the duty of honesty.

However, it should be noted that there are remedies introduced under Turkish law forcing the counterparty to disclose and to submit the information and evidence in their possession in order to unveil the disputed facts.

To expedite proceedings, article 2 paragraph III of the Attorney's Act (1136) April 7 1969 was amended in 2001 to improve a lawyer's role in collecting evidence. With this amendment, lawyers are provided with the power to gather information and evidence from public and private bodies that may be either a counterparty or a third party in the disputed matter.

The motivation behind the amendment to the Attorney's Act, which constitutes an example of the convergence between common law and civil law models, is to provide a concentrated evidentiary hearing by means of effective preparation at the beginning of a proceeding. The parties' efforts in gathering evidence will improve both the speed and cost of the proceedings.

**Collection of evidence under the Code of Civil Procedure**

Under Turkish law as well as other civil law jurisdictions, there is no discovery and disclosure procedure as in the common law system. Instead, the collection of evidence is monitored and executed by the court during examination by its own motion or the request of the parties.

As a notable development in this respect, the newly-enacted CCP introduces a preparatory stage in order to achieve a well-founded examination. As a result, judges can proceed with the examination related to the merits only if all documentary evidence regarding the disputed matter is collected. According to this procedural structure, the court, at the preparatory stage, will invite the parties to deliver all the evidence enumerated in the pleadings and to make necessary explanations regarding the evidence requested by the court.

Regardless of whether the collection of evidence is ordered at the request of a party or on the court's own motion, the counterparty is principally obliged to disclose all of the requested documents to the court. For their convenience, the CCP provides that parties may submit just relevant parts of large documents used on a daily basis, such as commercial books.

Other than this, if the documents are not eligible to be physically brought to the court, the judge may examine the evidence on site or may appoint an expert panel to do so. If the respondent tries to avoid such examination, the court is entitled to execute the proceeding by force and sentence the respondent to an administrative fine in addition to compensation to cover court expenses.

However, if the court order is not for an examination on site, but only for submission of the documents, execution of this order by force is not possible. In this case (if the respondent does not submit the documents in due time granted by the court) then the court exercises its discretionary power as to the sanction to be applied. Accordingly, the court is entitled to accept the allegation of the other party as undisputed fact so that the respondent who did not obey the court order is no longer allowed to bring any other evidence.

Despite the court's power granted during the preparatory stage and following trial stage, it has not yet yielded the intended effect in terms of collecting evidence in the hands of the counterparty. In most cases, due to their workload, the judge has been unable to chase the counterparty for documents when they have not been submitted properly or on time. Moreover, the sanctions do not appear to affect the course of the case in material aspects, but only cause the court further expense, to be borne by the party who does comply with the court order to submit evidence. Meanwhile, judges, unable to collect and examine the evidence in detail, still tend to appoint several hearings with long interludes in between. After the evidence is finally all collected, it is common practice to conduct an expert examination, even if it does not require any technical knowledge.

A clear indication of the lack of proper preparation and examination of the evidence is this standard phrase still uttered by the Court of Appeals when reversing the decisions of local courts: 'decision rendered with inadequate examination is unlawful thus it needs to be reversed'.

**Right to collect evidence under Attorney's Act**

Article 2 of the Attorney's Act, as amended in 2001, provides a tool for lawyers to bring before the court evidence which would otherwise be collected by the court at a later stage. Accordingly, judicial bodies, security directorates, other public bodies and institutions (including public economic enterprises, private and public banks, public notaries, insurance companies and foundations) are obliged to provide assistance to lawyers in the line of such duty. Save for exceptions provided under law, these institutions and bodies should submit the required information and documents for review by the lawyer. Lawyers who obtain power of attorney for a client are entitled to a copy of these documents.

Under this provision, public entities and other bodies face an obligation based on public law, constituting a significant right for lawyers to be exercised against the counterparty or third party before or during a proceeding. The law provides no other regulations, so the scope of the practice is untried. The issue is left to be evaluated by scholars and court precedent on a case-by-case basis.

> **As the civil law model leaves applicants helpless, criminal investigation appears to be the best option**

Considering that there can be cases where the entities or bodies enumerated under article 2 of the Attorney's Act are party to a dispute, the extent of the disclosure obligation towards a counterparty's lawyer bears special importance. In comparison with a case where the respondent entities or bodies are mere third party to the dispute, the protection for those who are party to the dispute is weak. In this respect, these entities or bodies can avoid disclosing the requested documents only if the documents contain their trade secrets. It is also worth noting that, according to the Council of State, the lawyers' right to review and produce documents cannot be entirely denied by relying on the fact that the requested documents contain trade secrets. As a matter of fact, the scope of trade secrets should be understood to only cover trade secrets which contain the scientific data, financial condition and marketing techniques of an entity. Any other interpretation means a violation of the right to legal remedies.

On the other hand, the protection granted to the entities or bodies who are a third party to the dispute is broader. These can avoid disclosing information not only if the requested documents contain trade secrets, but also if the disclosure could cause a risk of investigation on them or loss of reputation.

Another point to be considered is the lack of any sanctions to apply in case the respondent does not comply with its duty to disclose. In this case, the requesting party has no choice, but to file a law suit to force, by court order, the party holding the evidence to submit the requested documents to the court.

In this case, even though there is no practice, the courts are entitled to issue a pre-trial writ of execution before commencing the preliminary execution ordering the respondent to submit the requested documents to the court. For this purpose, the court can also authorise the requesting party to obtain this evidence and submit it to the court. To obtain such an order, the plaintiff must convince the court by explaining the relevance of the requested documents to the merits of the dispute and describing the content of the documents. Even so, non-compliance with the court's pre-trial writ has no sanction affecting the course of the proceeding, such as changing the side of the burden of proof. Instead, the court can charge the respondent with court expenses and attorney fees which are accrued because of the procrastination. Another sanction which has no practice is to sentence the respondent to an administrative fine as regulated under the Misdemeanour Law (5326) of March 30 2005; however, the amount of the fine is far from being a deterrent.

In the absence of any concrete regulation regarding practice and sanctions, a lawyer's right to access documents under the possession of a counterparty as well as any third party as provided under article 2 of the Attorney's Act, has not yielded the intended effect until now. Due to the nature of the civil law system and therefore the established practice of a court oriented proceeding, this effect can only be realised during a trial with the exercise of the court's imperative power supplemented by applicable sanctions.

**Bill to perpetuate evidence**

It is also possible to initiate a precautionary measure called perpetuation (determination) of evidence, by which parties can achieve a result similar to that of a pre-trial disclosure under the common law systems. In particular, having resorted to this measure, it is possible to preserve evidence which may deteriorate either over time or because of the counterparty's activities, before the court starts to examine the evidence at the main proceeding.

The pleading submitted to initiate this proceeding should contain sufficient explanation stating that the evidence in question concerns a law suit where the court has not yet started to examine this evidence, or a law suit which will be filed by the applicant. Another condition that the court should be satisfied with is the urgency of the proceeding. The applicant should clearly indicate that the evidence will be otherwise unreliable or inaccessible.

The court, after determining that the conditions are satisfied, should notify the counterparty on the method (such as a witness statement, site investigation or expert examination), date and place of the execution. However, the court can decide to conduct the examination without notification if such notification would hamper the benefit expected from the examination. If notified, the counterparty may be present at the specified place and follow up the proceeding.

This distinctive protective measure is mostly applied in disputes arising out of tortuous acts, lease agreements, construction agreements, trade mark and unjust competition matters. Under this measure, the courts prefer to appoint experts to observe the status and scope of the loss of a tort or contractual breach, to examine the commercial books of the counterparty and take testimonies from their executives if necessary.

**Investigation based on criminal law principles**

The remedies for the collection of evidence provided under Turkish civil law are not satisfactory, due to the lack of comprehensive provisions and deterrent sanctions. Besides, the conditions required for the court's involvement in the discovery, especially if it is before any law suit is filed, hinder the accessibility of this power. Particularly, the court may not be

convinced about the urgency of the discovery and therefore may require detailed information on the whereabouts and context of the evidence in question.

Problems arise when even the requesting party does not have access to such information before a proper discovery proceeding is exercised. As the civil law model leaves applicants helpless in such cases, criminal investigation appears to be the best option. Civil law disputes that also cause criminal liability such as unfair competition, white collar crimes or tortuous liability (such as car accidents) also concern public interest. Therefore, the public prosecutor is likely to see itself responsible for initiating an investigation on its own motion or by a complaint filed by the applicant.

Due to the public interest element of criminal investigations, the principle of ex officio examination prevails over individual-oriented civil law principles. Therefore, the public prosecutor must take the initiative to investigate and discover the evidence through the police force and in cooperation with governmental authorities such as the Financial Crimes Investigation Board.

The evidence discovered through the criminal investigation is used to establish the foundation of civil law suits, as civil courts are bound by the material facts determined by the criminal courts. Based on this and also in line with the precedents of the Court of Appeals, if there is a pending criminal investigation along with a civil law suit, the civil law judge will adjourn the proceeding until the criminal case is finalised. This practice is criticised by some scholars for giving rise to halting and long proceedings, emphasising that civil courts are not bound by the decisions of the criminal court, but only with the material facts determined by the criminal proceeding. For this reason, scholars concerned with the balance between accurate decisions and timely proceedings, are of the opinion that the civil courts should not adjourn the hearing until the finalisation of the criminal proceeding but only until the criminal court collects enough evidence so that the civil court is able to reach a conclusion regarding the civil liability of the parties.

### Compromising rights

The discovery and collection of evidence is one of the most controversial issues in Turkish civil law. The matter remains to be resolved by the contribution of criminal courts and prosecutors as well as the efforts of the parties to a civil law dispute and their lawyers. Endeavours in Turkish Law to enhance the lawyers' contribution in this respect have been unsatisfactory until now, as the related provisions remain mere principles and fail to provide concrete regulations. Therefore, parties inevitably resorting to criminal investigation have had to sacrifice their right to a hearing within a reasonable time for the cause of a fair decision based on material facts.

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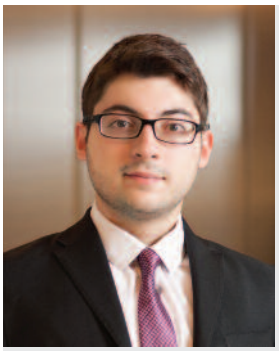
Baysal concentrates on commercial and corporate law matters with a special focus on dispute resolution and arbitration, in addition to insurance and mergers acquisitions. She has advised on large-scale arbitration matters and represented many international and local clients on high-value commercial disputes. She has represented several clients in both civil and administrative jurisdictions in relation to different court cases including shareholder and partnership disputes, contractual claims, insurance, unfair competition, professional negligence and regulatory affairs.

Baysal is recommended for commercial litigation, insurance and reinsurance in Turkey by several global publications and directories.



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