

Introduction to Turkish Law

Exam Questions and Solution Outline

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1. Question (25 points)

Give a brief evaluation of the Turkish legislation (Turkish Consumer Protection Act and Turkish Code of Obligations) on “unfair contract terms / general conditions of business” with special focus on the “dual legislation” and the choice of the legislator in the Code of Obligations to protect also businesses and professionals.

Turkish law regulates the “unfair contract terms” (= unilaterally prepared contract provisions in order to be used in a large number of future similar contracts) in two different legal sources: The (Turkish) Code of Obligations (CO) and the (Turkish) Consumer Protection Act. Both provide that non-negotiated contract terms detrimental to the consumer or the contracting party of the drafter shall not be binding on them. If a term becomes a part of the contract, its content can be controlled by the judiciary if it creates an imbalance between the drafter and his contractual partner. The ambiguous terms shall be interpreted against the drafter (business).

The problems created by the dual legislation:

- One legal text would suffice since with two different texts we have overlaps and partly different solutions.
- As the choice of the Turkish CO is to protect the contract partner of the drafter even where he is not a consumer (as everybody is protected equally), rules in the Consumer Protection Act have become superfluous.

2. Question (25 points)

Comment briefly on the Turkish legal solution for employer’s liability.

The Turkish legal solution for employer’s liability is similar to the Swiss legal solution. However, the new Turkish CO contains some new elements.

The employer's liability is a no-fault liability based on the breach of the objectivized duty of care. The employer is liable for damages caused by the employee while accomplishing his task. It is not required that the employee be at fault. The employer can escape liability by proving that

- he acted diligently
 - o in the choice of the employee
 - o in supervising the employee
 - o in giving instructions to the employee
- or (in the absence of diligent conduct) that the damage would have occurred even if he had acted diligently (no causal link between the lack of diligence on the part of the employer and the damage).

The Turkish CO enumerates the points in respect of which the employer must evidence his due diligence (choice, instruction and supervision of the employee).

One of the (additional) rulings of the Turkish CO relates to the organizational defect: The employer must prove also that the organization of the work at his premises is so that it is suitable for preventing third parties' damages.

3. Question (25 points)

The Turkish Court of Cassation has ruled that the motor vehicle owner who took out "liability insurance" could claim from the liability insurer indemnity for the death of his wife in an accident he unilaterally and negligently caused.

Comment briefly on this ruling.

The basic principle in liability insurances is that the liability insurer will not be required to pay more than the insured's liability. Therefore, the first thing to do to determine to what extent the liability insurer will be required to pay is to determine the amount that the insured is liable to pay to the victim.

The ruling of the Turkish Court of Cassation allows the motor vehicle owner (the policyholder whose liability is covered) to claim indemnity from his liability insurer.

To be able to allow such a claim it is necessary to admit that the motor vehicle owner has incurred liability. At this point the question to know "towards whom" this liability is incurred must be raised. A motor vehicle owner cannot be liable towards himself. The motor vehicle owner who negligently killed his wife in an accident can be liable to others who suffered losses as a result of this loss of life (for example towards the children of the deceased mother). But that person cannot claim his own losses from himself.

4. Question (25 points)

Turkish Court of Cassation has ruled that “Disputes between an insurer and a consumer arising from the insurance contract regulated in the Turkish Code of Commerce must be decided by Commercial Courts competent in all matters dealt with in the Turkish Code of Commerce and not by the Consumer Courts; the legal provisions of the Turkish Code of Commerce have priority over the provisions in the Consumer Protection Act because they are *lex specialis vis-à-vis* the consumer legislation”.

What are your thoughts about this decision?

The ruling of the Turkish Court of Cassation is based on the assumption that the provisions of the Turkish Code of Commerce about the competence of the commercial courts in matters dealt with in the code are special rules excluding the competence of consumer courts. This ruling does not appear to be accurate because the basic requirements for admitting the existence of a “*lex specialis*” are not fulfilled in casu. The aim of the legislator is certainly not to deprive the consumer of the possibility of applying to consumer courts especially created for the protection of the consumer rights. Also, it would be paradoxical to accept that commercial provisions should prevail over the consumer provisions. Indeed, the provisions of the consumer legislation are aimed at limiting the commercial sphere thus having (necessarily) priority over commercial rules. It is true that commercial courts are much more experienced in insurance law matters. But it is also true that consumer courts are better placed to apply the rules ensuring the protection of the consumers.

Total 100 Points