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Turkish Supreme Court (*Yargıtay*)

Tort Law – Contract Law – Statute of Limitations

3 February 2005

(2004/7039E, 2005/746K – Kazancı case-law database)

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a) Brief Summary of the Facts

On 17 August 1999, a strong earthquake struck north-western Turkey killing more than 17,000 people and leaving half a million people homeless. After this tragic event, people who had suffered personal injuries and economic harm as a result of the collapse of their houses claimed compensation from the builders.

b) Judgment of the Court

Although most of the damaged buildings had been constructed before the 1980s, the Supreme Court accepted that there was no reason for the injured persons to bring an action at the time of the (faulty) construction, and held that the ten-year statute of limitations for initiating a claim against the builders began to run only when the claimants discovered the damage – in other words, from the date of the earthquake.[1] The Court ruled against the pleas of prescription filed by the contractors on the basis of contractual as well as extra-contractual statutes of limitations, which, according to the first instance judgments, had both expired. The Supreme Court held that since the claim was not yet actionable as at the date of construction, it would not be fair that the ten-year time limit should start to run from that date.

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[1] Y4.HD, 3.2.2005T, 2004/7039E, 2005/746K. See also Y4.HD, 30.6.2004T, 2004/2110E, 2004/8595K; YHGK, 4.6.2003T, 2003/4-400E, 2003/393K; Y4.HD, 18.12.2002T, 2002/13842E, 2002/14290K; Y4.HD, 13.5.2002T, 2002/4491E, 2002/5701K; Y4.HD, 11.12.2001T, 2001/8406E, 2001/12825K. For a similar approach in bodily injury cases, see Y4.HD, 30.01.2009T, 2008/5440E, 2009/1354K (stating that the time limit begins when the plaintiff is aware of his bodily injury and not when the traffic accident occurred). A comparative overview is offered by *E Büyüksagis*, Le nouveau CO turc est-il toujours attaché à ses racines suisses? - Analysée à la lumière du principe européen d'effectivité, une réponse particulièrement intéressante en matière de prescription extinctive (2012) HAVE/REAS 44 ff. .

c) Commentary

Until the above judgments of the Supreme Court were presented, the general rule in Turkish private law was that the statute of limitations begins when harmful conduct occurs, and not when the plaintiff is aware of the injury that might have happened a long time ago.[2] The reason for such an application is to avoid long dormant claims.

However, as the Court of Justice of the European Union (CJEU) provided in one of its recent judgments, "the objective of rapidity [… should] not permit […] to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights".[3] Such an affirmation is particularly justified in latent damage cases. According to one author, "there is no discernible reason why the victim should be any less worthy of protection and thus denied his claim if, for instance, due to slow-working chemical substances or radiation, damage only occurs more than 30 years after the action imputable to the damaging party […] With all due respect for the interests of the damaging party in having closure as regards past events at some point, the basic value determined by the legal system must be kept in mind, namely that when all grounds for liability are met, the victim is recognised as being more worthy of protection than the damaging party".[4]

While accepting that prescription does not run against one who is unable to recognise the vital facts relating to the damage (*contra non valentem agere nulla currit praescriptio*), the Turkish Supreme Court has found an interesting solution to latent damage cases, which is in line with the opinion expressed by some European authors.[5] One can wonder whether the new legislative framework,

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2 *A Havutçu*, Haksız Fiil Sorumluluğunda Zamanaşımı Sürelerinin Başlangıcı [The Starting Point for Time-limits on Filing a Tort Law Suit] (2010) Dokuz Eylül Law Faculty Review 579 ff.

3 CJUE, 28 January 2010, C 406/08 *(Uniplex (UK) v NHS Business Services Authority)* [2010] 2 CMLR 47. For an analysis, see *E Büyüksagis* (fn 1) 47 f.

4 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 9/23. For similar arguments in Switzerland, see *P Pichonnaz*, Le point sur la partie générale du droit des obligations, (2012) RSJ/SJZ 188, 189; *F Werro*, Vers la révision du droit de la prescription (2012) HAVE/REAS 70, 71; *P Widmer*, Der dies a quo bei der (absoluten) Verjährung von Schadenersatzforderungen aus Delikt (*supra*) 92, 93; *E Büyüksagis* (*supra*) 47 f; *R Brehm*, Berner Kommentar (2013) art 60 OR N 64a. In France, see *G Viney*, Discussion du projet turc, in: B Winiger (ed), La responsabilité civile européenne de demain: projets de révision nationaux et principes européens/Europäisches Haftungsrecht morgen: nationale Revisionsentwürfe und europäische Haftungsprinzipien (2008) 135, 138.

5 A very similar approach has also been adopted in the US. See *Dincher v Marlin Firearms Co*, 198 F 2d 821, 823 (2d Cir. 1952): "Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house

which took effect on 1 July 2012,[6] will lead the Court to change its current approach based on the discovery rule. It will take some time to accurately assess the impact of the new legislative framework on the Turkish legal world. However, in light of the recent judgement of the European Court of Human Rights (ECtHR) in *Howald Moor v Switzerland*, which stated that in cases where it was scientifically proven that a person could not know the harmful effects of a wrongful act, that fact should be considered in calculating the limitation period,[7] it would be reasonable to think that the Turkish Supreme Court's approach is at least in line with the ECtHR's case law and art 6(1) of the European Convention on Human Rights.

never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff". This famous paragraph has been quoted by several authors. Among the recent quotes see *P Widmer*, Le dies a (quipro) quo dans la prescription subsidiaire (2014) HAVE/REAS 69, 72.

6 For an overview of the new legislative framework, see *E Büyüksagis*, Le nouveau droit turc des obligations, Perspective comparative avec les droits suisse et européen (2014) no 190 ff.

7 ECtHR *Howald Moor v Switzerland,* 11.3.2014, nos 52067/10 and 41072/11, para 78. According to the press release issued by the registrar of the ECtHR (069 (2014)), "the case concerned a worker who was diagnosed in May 2004 with a highly aggressive malignant tumour caused by his exposure to asbestos in the course of his work in the 1960s and 1970s. He died in 2005. The Swiss courts dismissed the claims for damages brought by his wife and two children against Mr Moor's employer and the Swiss authorities, on the grounds that they were time-barred. The Court held that the rules on limitation periods infringed the rights of persons suffering from diseases which, like asbestos-related diseases, could not be diagnosed until many years after the events. Under the law in force, claims by asbestos victims were invariably time-barred. The Court considered that in cases where it was scientifically proven that an individual could not know that he or she was suffering from a particular disease, that fact should be taken into account in calculating the limitation period". For a similar approach in Turkish law, see *E Büyüksagis*, Yeni Sosyo-Ekonomik Boyutuyla Maddi Zarar Kavramı [The Concept of Damage in its New Socio-Economic Dimension] (Istanbul 2007) no 1079 ff.