

THE INTELLECTUAL
PROPERTY
REVIEW

TWELFTH EDITION

Editor
Dominick A Conde

THE LAWREVIEWS

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CONTENTS

PREFACE.....	v
<i>Dominick A Conde</i>	
Chapter 1 BRAZIL.....	1
<i>Philippe Bhering and Jiuliano Maurer</i>	
Chapter 2 CANADA.....	17
<i>Caroline Henrie and Kristin Wall</i>	
Chapter 3 CHILE.....	29
<i>Marino Porzio</i>	
Chapter 4 CHINA.....	38
<i>Stephen Yang, Wei Yang and Zunxia Li</i>	
Chapter 5 CYPRUS.....	53
<i>Marcia Baltaian</i>	
Chapter 6 CZECH REPUBLIC	63
<i>Petr Kusý</i>	
Chapter 7 FRANCE.....	76
<i>Stanislas Roux-Vaillard</i>	
Chapter 8 GERMANY.....	88
<i>Philipp Rastemborski and Niels Schuh</i>	
Chapter 9 GREECE.....	101
<i>Lambros Belessis and Aristeidis Papathanasiou</i>	
Chapter 10 INDIA	112
<i>Sujata Chaudhri, Urfee Roomi, Anubhav Chhabra and Jaskaran Singh</i>	

Chapter 11	INDONESIA.....	127
	<i>Emirsyah Dinar</i>	
Chapter 12	JAPAN	136
	<i>Nobuto Shirane</i>	
Chapter 13	ROMANIA	144
	<i>Raluca Vasilescu</i>	
Chapter 14	SINGAPORE.....	155
	<i>Jonas Lindsay, Upasana Patel, Nikki Lai and Kwok Tāt Wai</i>	
Chapter 15	SLOVAKIA	167
	<i>Michal Baláž and Dominik Bajger</i>	
Chapter 16	TURKEY.....	177
	<i>Hatice Ekici Tağa and Burak Özdağstanlı</i>	
Chapter 17	UNITED STATES	188
	<i>Erin J D Austin and Dominick A Conde</i>	
Chapter 18	VIETNAM.....	199
	<i>Duong Thanh Long, Do Viet Dung and Vo Quang Hung</i>	
Appendix 1	ABOUT THE AUTHORS.....	211
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	223

PREFACE

The reopening of borders, economic activity and many aspects of daily life over the past year brings a sense of a return to normalcy following the coronavirus pandemic shutdowns. At the same time, some of the changes made or accelerated in response to the pandemic, such as the increased prevalence of remote work and video proceedings in legal practice, seem likely to remain at least for the near future. While it will take time for all the ramifications to become clearer, the momentousness of the past few years' events is already evident. Those experiences have highlighted the world's interconnectedness and reliance on international trade, including both benefits and challenges.

Intellectual property laws and policy are often closely related to and affected by international trade and relations, in addition to domestic policy, meaning that practitioners have much to keep abreast of as those things continually evolve. The ongoing issue of trade relations between the United States and China, including as related to intellectual property protection, is just one example. Another is the way countries view intellectual property protection of new medicines and other medical advances in relation to the issues of medical innovation, healthcare costs and access. Intellectual property law and practice also must keep up with abounding technological advances. As just a few examples, courts are beginning to hear cases about trademarks in the metaverse, and practitioners are considering questions about intellectual property as related to generative artificial intelligence. Against this backdrop, practitioners must navigate a variety of legal systems and intellectual property laws in which many differences remain, despite some movements toward harmonisation.

To aid practitioners in the ever-changing environment of global intellectual property, we present the 12th edition of *The Intellectual Property Review*. In this edition, we present 18 chapters that provide an overview of the forms of intellectual property coverage available in each particular jurisdiction, along with an update on its most recent developments. Each chapter is written and assembled by leading practitioners in that jurisdiction. While all involved have striven to make this review both accurate and comprehensive, it is necessarily a summary and overview, and we strongly recommend that the reader seek the advice of experienced advisers for any specific intellectual property matter. Contact information for the authors of each chapter is provided at the end of this *Review*.

Dominick A Conde

Venable LLP

New York

April 2023

TURKEY

Hatice Ekici Tağa and Burak Özdağistanlı¹

I FORMS OF INTELLECTUAL PROPERTY PROTECTION

i Overview

Turkey is one of the most important jurisdictions for intellectual property (IP) law, litigation and enforcement. It is a transportation hub between Europe and Asia. Most textile companies either have manufacturing facilities in Turkey or outsource the manufacturing of their products to companies in Turkey. Therefore, the protection of IP rights is essential in the country.

In Turkey, IP cases are handled by specific IP courts (IP civil courts and IP criminal courts). These courts are located in most of the large cities, including Istanbul, Ankara and Izmir. Judges in these courts handle solely IP cases, which creates a more predictable litigation and enforcement environment.

Further, Turkish IP law is closely aligned with EU law and international norms. Therefore, Turkey is well positioned for the protection of IP rights both in terms of modern and EU-aligned legislation and in terms of IP litigation. That said, there are many local features, which are explained below.

With regard to the alignment to EU laws, Turkey is a signatory to the following key treaties and conventions, which have all been enacted and are part of local IP law:

- a* the Paris Convention;
- b* the Patent Cooperation Treaty;
- c* the European Patent Convention;
- d* the Berne Convention;
- e* the Madrid Protocol;
- f* the Hague Agreement; and
- g* the Rome Convention.

Turkey is also a member of the World Trade Organization and is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights.

ii Legislation

In Turkey, there are two main laws regulating IP rights: Law No. 6769 of 22 December 2016 on Industrial Property (the Industrial Property Law) and Law No. 5846 of 5 December 1951 on Intellectual and Artistic Works (the Law on Intellectual and Artistic Works).

¹ Hatice Ekici Tağa and Burak Özdağistanlı are managing partners at Ozdagistanli Ekici Attorney Partnership.

Patents, utility models, trademarks, industrial designs and geographical indications are mainly protected by the Industrial Property Law. Copyrights are protected under the Law on Intellectual and Artistic Works. According to Turkish law, protection is also possible under general provisions such as those on unfair competition.

Brief descriptions of the commonly recognised IP rights in Turkey are given below. See Sections III and IV for information on how to acquire protection for these rights, the limits of protection and how to enforce these rights.

iii Trademarks

A trademark is a sign that distinguishes a company's products or services from those of its competitors. Names, designs, logos, letters and numerals can be registered as a trademark. Trademarks can also include the shape of products or their packaging.

iv Copyrights

Original works that bear the characteristics and originality of the author are protected by copyright. These works are classified by the Law on Intellectual and Artistic Works as follows:

- a* science and literature;
- b* music;
- c* fine art; and
- d* cinema.

These categories are *numerus clausus*, but there are also some subcategories such as computer software, which is listed under 'science and literature'. Note that, in Turkey, only the author of a work can be its initial owner or, in other words, the individual who is the creator of a copyright in Turkey.

v Industrial designs

The appearance of the whole or a part of a product can be registered as a design. This includes features such as the product's lines, colour, texture and shape.

vi Patents and utility models

A new invention can be protected as a patent or utility model. Both patents and utility models require the invention to be novel and capable of industrial application. The requirements for acquiring a utility model are less stringent than for patents. The registration process for utility models is significantly simpler and faster than for patents. The length of protection is also different for patents and utility models.

vii Geographical indications

Signs indicating the origin of a product can be registered as geographical indications. Products that have a specific quality, reputation or characteristic attributable to a particular place, area, region or country can have a geographical indication.

II RECENT DEVELOPMENTS

On 29 December 2022, the Regulation on Electronic Commerce Intermediary Service Providers and Electronic Commerce Service Providers was published in the Official Gazette. This Regulation determines the procedures and principles required to establish an effective and fair competition environment and to ensure the development of electronic commerce. According to the Regulation, a complaint regarding intellectual and industrial property rights violations can be made to the electronic commerce intermediary service providers (ETAHs) via the internal communication system, notary public or KEP (registered email). Subject to the complaint, the ETAH shall remove the product and notify the electronic commerce service provider and the rights holder within 48 hours of receipt of the complaint. This method aims to more efficiently prevent the loss of intellectual and industrial property rights. The Regulation does not prevent complainants from applying to civil and criminal courts in addition to making a complaint to ETAHs.

On 19 August 2022, the Information and Communication Technologies Authority (BTK) issued a press release on .tr network information systems (known as TRABIS). TRABIS operations began on 14 September 2022. Within the scope of the legislation that includes TRABIS, domain name transactions such as applications, renewals, cancellations and transfers can be carried out by registry agencies that have been certified by BTK. Further, the sale of existing .tr domain names, which was previously prohibited, can be carried out three years after TRABIS started operating.

On 4 March 2022, the Turkish Patent and Trademark Office published its Trademark Examination Guide, which has been updated in line with the principles of the likelihood of confusion.

III OBTAINING PROTECTION

i Trademarks

All distinctive and graphically representable signs, such as words, names, acronyms, letters, numbers, devices, holograms, the three-dimensional form of an item or its packaging and any combination of the above, including sound marks graphically represented, can be registered as a trademark.

Trademark applications should be filed with the Turkish Patent and Trademark Office. Alternatively, as Turkey is a member of the Madrid Protocol, an international application can be filed through the World Intellectual Property Organization by designating Turkey.

It is possible to claim priority based on an earlier application filed in another country, provided that the country where the earlier application is made is a member of the Paris Convention.

The application will first be examined by the Turkish Patent and Trademark Office. The Patent and Trademark Office can reject the application on absolute grounds stipulated in Article 5 of the Industrial Property Law:

- a* non-compliance with the legal requirements of the Industrial Property Law;
- b* existence of an identical or indistinguishably similar earlier trademark or trademark application, covering the same or same type of goods or services;
- c* descriptiveness;
- d* if the mark has become customary in current and established trade practices;
- e* if the mark consists of a shape resulting from the nature of the goods or necessary to obtain a technical result or that gives substantial value to the goods;

- f* deceptiveness;
- g* no authorisation from the relevant authorities for the use of the mark;
- h* the mark involves armorial bearings, emblems or hallmarks with historical and cultural value that are of concern to the public and the registration of which is not authorised by the relevant authorities;
- i* the mark involves religious values or symbols;
- j* the mark is contrary to public policy and public morals; and
- k* the mark is composed of or contains a registered geographical indication.

If the Turkish Patent and Trademark Office does not reject the application on absolute grounds, it will authorise the publication of the trademark in the Official Bulletin.

Third parties can oppose the application based on absolute or relative grounds as stipulated in Article 6 of the Industrial Property Law. The time limit for filing an opposition is two months from the publication date in the Official Bulletin.

The relative grounds for refusal are that:

- a* the application is identical or similar to an earlier trademark registration or application and covers identical or similar goods or services, and there is a likelihood of confusion between them;
- b* it is an application for an identical or indistinguishably similar trademark by the trademark owner's agent or representative, to be registered under the agent's or representative's own name, without any valid justification or authorisation from the trademark owner;
- c* there is prior and genuine ownership by a third party of the mark applied for;
- d* there is a well-known mark under Article 6 bis of the Paris Convention;
- e* there is an earlier trademark registration or application well known in Turkey;
- f* the application contains the name, trade name, photograph, copyright or industrial property right of a third party;
- g* the application is identical or similar to a trademark registration, the protection period for which has ended because of non-renewal, covers identical or similar goods or services, the application is filed within two years of the end of the protection period of the earlier registration, and the earlier registration is put to use within this two-year period; and
- h* the application is filed in bad faith.

If the application is *ex officio* rejected or rejected based on a third-party opposition, the applicant will be entitled to object to the rejection within two months of receiving the relevant notification. In this case, the Re-examination and Evaluation Board will examine the objection. The decision of the Re-examination and Evaluation Board is the final decision of the Turkish Patent and Trademark Office. To object to this decision, a court action can be initiated within two months of the notification of the final decision.

If no rejection or opposition occurs, the trademark will be registered after the payment of registration fees. The trademark registration process typically takes approximately seven to eight months, provided there are no objections or opposition. Having said that, protection of a trademark starts as of the first application date and, therefore, during the registration process the trademark is entitled to protection.

The term of protection of a registered trademark is 10 years from the date of filing of the application. Registration is renewable for further periods of 10 years perpetually.

ii Industrial designs

In Turkey, unregistered designs can be protected under unfair competition and copyright provisions, and are also protected under the Industrial Property Law, provided that the unregistered design is novel, individual and made available to the public for the first time in Turkey.

Unregistered design protection starts from the moment the design is made available to the public in Turkey and lasts for three years.

The application for the registration of an industrial design should be filed with the Turkish Patent and Trademark Office. The industrial design can be registered if it is novel and has an individual character.

A design is deemed novel if it has not been made publicly available anywhere else in the world prior to the application date or the priority date. However, the application can be filed in Turkey up to 12 months after the first disclosure of the design. If the Turkish Patent and Trademark Office finds that the application is appropriate for registration, the industrial design is registered without any further administrative steps. However, third parties may file an opposition to a registration at the Turkish Patent and Trademark Office within three months of the publication date of registration.

Registered design protection starts from the filing date and lasts for five years. It can be renewed for four consecutive periods of five years, for up to 25 years in total.

Some designs may also meet the requirements of copyright protection. In this case, the design in question benefits from protection both as a design and as a work according to copyright legislation (the multi-cumulative protection principle). The ability of design owners to preserve their designs as a work gives them a great advantage. While a design is protected for a maximum of 25 years according to the design legislation, the same design is protected as a work within the scope of copyright legislation as long as the designer is alive, and the protection lasts for 70 years after the designer's death. While there is a requirement of registration for design protection, registration is not required for works.

iii Patents

An invention is patentable in Turkey if it is novel, involves an inventive step and is capable of industrial application.

The Industrial Property Law stipulates that the following are not considered to be inventions and therefore cannot be registered as a patent:

- a* discoveries, scientific theories, mathematical methods;
- b* plans, methods and rules in relation to mental acts, business and game activities;
- c* computer programs;
- d* literary and artistic works, scientific works, creations having an aesthetic characteristic; and
- e* delivery of information.

The Industrial Property Law also stipulates that the following are accepted as inventions but cannot be registered as a patent:

- a* inventions violating public order or morality;
- b* plant and animal varieties or species or biological processes for producing or breeding plants and animals, excepting microbiological processes or products of them;
- c* all treatment methods, including diagnostic and surgical methods on humans or animals;

- d* simple discovery of one of the elements of the human body, including a gene sequence; and
- e* human cloning processes, the use of human embryos for industrial or commercial purposes and certain processes for modifying the human genetic code.

The patent claim right belongs to the inventor or the inventor's successor, and transfer of the right is possible. If the invention has been made by more than one individual, the patent claim right belongs to all of them unless decided otherwise. However, if the invention has been made by two or more individuals independently of each other, the patent claim right belongs to the earlier applicant, on condition of the earlier dated application being published. The first applicant of a patent will be the rightful owner of a patent until proven otherwise.

Patent applications are filed with the Turkish Patent and Trademark Office. Once the Office publishes the patent in the Official Bulletin, third parties can file an opposition within six months of the publication date (post-grant opposition procedure). The grounds of objection can be as follows:

- a* the patent subject matter does not fulfil the patentability conditions;
- b* the invention has not been sufficiently disclosed; or
- c* the patent subject matter exceeds the scope of the application.

The Office shall notify the objection to the patentee. The patentee should present their comments within three months of the date of this notification or make changes to the patent. The objection is evaluated by the Re-examination and Evaluation Board, considering the patentee's comments and the requests for changes in the patent.

Patent protection starts from the date of the application. The term of protection is 20 years and this term is not renewable.

The rights provided by a patent application or a patent should not be put forward against bona fide third parties unless they are registered in due form.

iv Copyright

In Turkey, copyrights are mainly protected under the Law on Intellectual and Artistic Works. Registration is not required to establish rights. Cinematographic and musical works and video games (because video games are accepted as cinematographic works by the State Council) must be registered with the General Directorate of Copyrights, part of the Ministry of Culture and Tourism, to exploit these rights and facilitate proof of ownership, but not for the creation of the rights themselves.

There is no need to file any application to gain the copyright protection as it is obtained automatically when the work is created. However, a timestamp is helpful to prove the time of creation. In Turkey, rights holders generally apply to the Ministry of Culture and Tourism for registration of the work, which helps to prove the ownership and creation date of the work. Software, games, books and other intellectual and artistic works can be subject to this optional registration. Certification by a notary public is also common practice in Turkey to prove the creation date of the work.

Copyright protection starts from the creation of the work and lasts for 70 years after the author's death.

IV ENFORCEMENT OF RIGHTS

Turkish law provides an effective enforcement procedure for the protection of IP rights. Usually, the first step for enforcement is determining an IP infringement. Once an infringement has been determined, it is advisable to send a cease-and-desist letter from a notary public as this may lead to an easier and faster relief for the IP owner.

If infringement continues or if an IP owner wants to move forward with enforcement as the first step, it is possible to request the determination of evidence from civil courts or request search warrants from criminal courts to conduct raids and secure evidence.

i Possible venues for enforcement or revocation

Under Turkish law, it is possible to enforce IP rights before the criminal law courts and civil law courts.

In terms of civil law protection, IP infringement actions are filed before the specialised civil courts of industrial and IP rights in Istanbul, Ankara and Izmir. In other cities, one of the regular civil courts (if there are more than two courts, the third civil court, otherwise the first civil court) is assigned as a specialised IP court.

It is also possible to enforce IP rights before specific criminal courts of industrial and IP rights in Istanbul, Ankara and Izmir for cases where the legislation stipulates imprisonment or a judicial monetary penalty for infringement of a certain IP right. In other cities, one of the regular criminal courts (if there are more than two courts, the third criminal court, otherwise the first criminal court) is assigned as a specialised IP court.

It is possible that any goods or products that infringe IP rights may be confiscated by the customs authorities during their import, export or transit. The customs authority, without the necessity of a court or public prosecutor order, may confiscate any goods that breach IP rights and notify the IP right owner afterwards to follow the next steps, such as the initiation of a civil case or the obtaining of an injunction.

It is also possible that invalidation or revocation, or both, of a registered trademark may result from a judicial decision. Any interested party may file a lawsuit before the Turkish IP courts by requesting invalidation or revocation of a registered trademark.

There is a time limit for the filing of an invalidation action. The owner of the prior trademark (registered or unregistered) cannot claim invalidity of the later trademark if they know of the use of the later trademark but have stayed silent on it for five years. However, if the later trademark use is in bad faith, the time limit is not applicable.

With respect to revocation actions based on non-use, if the trademark has not been used without a justifiable reason in Turkey or if the use has been suspended during an uninterrupted period of five years, the trademark will be revoked.

Article 9 of the Industrial Property Law defines the use as follows:

- a* use 'with different elements which do not alter the distinctive character of the mark';
- b* use 'on goods or on the packaging solely for export purposes'; and
- c* use by third parties 'with the consent of the trademark proprietor'.

ii Requirements for jurisdiction and venue

Turkish courts have jurisdiction in IP infringement cases if either the IP right is registered in Turkey, the defendant resides in Turkey or the tortious act was committed in Turkey. According to Turkish law, if the place where the tortious act was committed is not the place where the damage has occurred, the law of the state where the damage has occurred shall govern.

The applicable jurisdiction in Turkey may be one of the following:

- a* the regular domicile of the IP rights holder;
- b* the place where the infringement was committed; or
- c* the place where the act of infringement produced consequences.

iii Obtaining relevant evidence of infringement and discovery

Under the Turkish Civil Procedural Law, the burden of proof lies on the claimant. Therefore, it is very important to collect relevant evidence before initiating a lawsuit.

One of the methods that is widely used is the determination of evidence, where, by order of a court, an examination can be made with experts or a judge, and evidence can be collected. This examination usually entails visiting a premises to document the situation to be used as evidence.

Another method, which can be used in cases where IP infringement may result in criminal sanctions, is obtaining a search warrant and asking for an expert examination. For this method, the rights holder applies to the public prosecutor, requesting that the prosecutor ask for a search warrant from the magistrates' court. If the magistrates' court accepts the public prosecutor's request, the public prosecutor appoints an expert and orders the search warrant to be executed with the police.

Other than those methods, any legally obtained evidence may be used in courts and these may include details of purchases made from the seller of counterfeit goods, relevant payment slips and opinions obtained from laboratories.

iv Preliminary injunctions

Preliminary injunctions are available in Turkey before or during the substantive proceedings. The claimant must prove that:

- a* they are the rights holder;
- b* their rights are being infringed or there is a high likelihood of infringement; and
- c* they may suffer irreparable harm or damage.

The rights holder may apply for a preliminary injunction for the cessation or prevention of the infringing activities, as well as for seizure of the infringing goods.

v Trial decision-maker

In accordance with Turkey's provision for special IP courts, the judges for IP cases are specialists. Furthermore, technical expertise is also very important, and in almost all cases the judge asks for an expert examination from a court-appointed expert or court-appointed expert panel. As a result, the expert report is a significant element of the judicial process. There is no jury trial in Turkey.

vi Structure of the trial

Civil procedure in Turkey is mainly based on writing. The briefs of the parties and the written expert report are the most significant documents.

Before the trial, the claimant provides the claim petition to the court and the defendant responds to it with a response petition. Afterwards, secondary petitions are provided to the court by the claimant and defendant respectively. All evidence, claims and defences of parties must be submitted to the court at this stage with their respective petitions. In principle, admitting additional evidence or bringing new claims and defences is not allowed under procedural law after this stage has been completed.

During the proceedings, the judge will hear the parties; however, because trials are based on the written documents submitted to the court, the hearing is generally used as a tool to point out some of the critical issues for the judge to concentrate on.

IP litigation relies on documentary evidence provided by the parties or the expert report obtained by the court. While it is possible to take witness statements, this is not standard practice in IP litigation, and witness statements rarely preclude documentary evidence.

There are certain minimum requirements for a document to be accepted as proof before the court. For example, all agreements related to the transfer of copyrights must be in writing.

vii Infringement

Patent and trademark protection prevents third parties from offering or making available goods or products that are the subject matter of the patent or are branded with that trademark.

viii Defences

Trademarks

The most common defence in Turkey is that the challenged trademark has no distinctive character or is deceptive or descriptive.

In Turkey, as a defence, the defendant can also claim to be the prior rights holder or that the trademark owner has not been using the trademark for a period of at least five years. The defendant can file a separate invalidation or revocation action on the grounds of non-use or being the prior user.

The principle that a right can be lost by remaining silent can also be used as a defence. The defendant can claim that the trademark owner is acting in bad faith by filing the infringement claim after a long period of tolerance.

Designs

In a design infringement case, the defendant may argue that the registered design should be cancelled and that the use of the design was a technical necessity or for personal use, or for an experimental, educational or repair purpose.

Patents

In Turkey, the most common defence against infringement claims is filing an invalidity action against the patent.

A defence relating to prior-user rights can also be raised as patent owners do not have the right to prevent persons from using the invention if they began to use it in good faith before the application date.

The defendants can also raise an exhaustion defence, which is essentially an exemption to patent infringement. The release of a product bearing an IP right anywhere in the world is sufficient for the exhaustion of the IP right in Turkey.

Copyright

The Law on Intellectual and Artistic Works stipulates specific situations in which use of copyrighted work without the rights holder's permission does not constitute copyright infringement. Commonly used exceptions are:

- a* personal use;
- b* use for educational purposes in schools or other educational institutions;
- c* use under 'freedom of quotation';
- d* influential use to create an original and independent work;
- e* use for reasons of public order or in the interests of the community; and
- f* expiry of copyright.

ix Time to first-level decision

In most cases, it is possible to obtain a first-level decision in an IP infringement case or other dispute within 18 to 24 months. This term also includes an expert examination.

x Remedies

The remedies available in Turkey include:

- a* the cessation of the infringing acts;
- b* the confiscation or destruction of the infringing products and the equipment and machinery used to produce the products;
- c* compensation for material and moral damage; and
- d* publication of the court's decision.

There are no criminal remedies for design and patent infringements. However, for trademark and copyright infringements, criminal remedies, including imprisonment and fines, are regulated.

xi Appellate review

In Turkey, final decisions of the courts of first instance can be appealed before the district courts, and the decisions of the district courts can be appealed before the courts of appeal. An appeal does not automatically stop the execution of the decision, and the suspension of the execution should be requested together with the appeal. Appeal proceedings last between 18 months and two years. With respect to preliminary injunctions, district court decisions are final and cannot be appealed before the court of appeal.

xii Alternatives to litigation

As of 1 January 2019, mediation is mandatory for IP-related disputes regarding receivables and compensation claims. However, there is no restriction on applying mediation to other disputes as well.

IP-related disputes can also be resolved by arbitration. Under the Turkish Civil Procedure Law, arbitral decisions are executable without the need for any judicial approval or decision.

Alternative dispute resolution methods have significant advantages, such as the arbitrators' expertise, the confidentiality of the proceedings and the flexibility to adapt the proceedings to different situations.

V TRENDS AND OUTLOOK

In the global IP world, the topic of whether an artificial intelligence (AI) system can be the owner of a patent is being discussed. Although there have as yet been no decisions or changes in this context in Turkey, it seems that AI-related changes to legislation will be necessary.

On 21 December 2018, all authorisations regarding the management and allocation of .tr domain names were transferred from Nic.tr to BTK. On 14 September 2022, TRABIS finally became operational after BTK announced that expected legislative developments had been completed.

Fundamental changes have since been made to the dispute resolution process. During the Nic.tr period, domain name disputes were resolved by the dispute resolution mechanism within the Ministry of Transport's DNS Working Group. However, disputes of this nature are now resolved by the dispute resolution service provider system, by arbitrators or arbitral committees within dispute resolution service provider organisations certified by TRABIS.

