

EXPERTISE IN PRIVATE LAW CASES IN TURKISH LAW

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Abstract:

The issue of the using expertise information to solve a case before the Court is important and the Turkish Law is regulating the issue in details. With the changes made in Code of Civil Procedure (CCP) that took effect on October 1, 2011, new regulations concerning expertise were introduced in order to be implemented in issues related to private law. Regulations regarding expertise were made in articles between 266 and 287 in CCP. Although, there are regulations regarding expertise in other laws apart from CCP, in order not to go beyond the scope of the present study, regulations related to expertise in other laws apart from CCP will not be looked at. The Article is going to explore the issue of the expertise institution in Turkish Civil Procedure Law.

Keywords: Expertise, Code of Civil Procedure, Expert Oath, Expert Obligations

Introduction

Code of Civil Procedure (CCP) took effect on October 1, 2011. With this law, new regulations concerning expertise were introduced in order to be implemented in issues related to private law. Regulations regarding expertise were made in articles¹ between 266 and 287 in CCP.

In this study, since the rules in the said law concerning expertise will be dealt with generally, doctrine and court decisions were not handled².

¹ Only the abbreviation “art.” indicates the relevant articles in CCP. For example: Turkish Civil Code art. 409.

² For some publications on views of doctrine and decisions of the Court of Appeals regarding expertise, see: Akcan R., Reasons for Appeal Based on Incongruity of Codes of Procedure, Ankara 1999 p. 133 and so on.,

There are regulations regarding expertise in other laws apart from this law. In order not to go beyond the scope of the present study, regulations related to expertise in other laws apart from CCP were not included³.

CCP will be enforced in disputes concerning private law but if there are specific regulations regarding expertise in the relevant laws in matters related to private law, these regulations will be implemented first whereas in other cases regulations in CCP will be enforced⁴.

I. Cases That Require Referring to an Expert

The court decides to take the vote and view of the expert upon demand of one of the parties or out of its own will in cases whose settlement requires specific or technical knowledge outside of law. One does not refer to an expert on issues that can possibly be solved through general and legal knowledge as required by the profession of judicature (art. 266).

It is necessary to refer to an expert in some cases⁵. In compulsory cases, on the other hand, an expert must definitely be consulted. Apart from compulsory cases, reference to an

p.168 and so on; Alangoya Y./Yıldırım M. K/Deren-Yıldırım N., Principles of Code of Civil Procedures, İstanbul 2011 p. 358 and so on ; Arslan R., Practice of Expertise and the Effect of Court of Appeals on This Practice, Journal of Court of Appeals, Special Issue, 1989/1-4, p. 156 and so on; Deryal Y., Expertise in Turkish Law and Sample Expertise Reports, İstanbul 2001; Karlı A., Coursebook for Civil Procedure Law, İstanbul 2011 p. 534 and so on; Köroğlu H., Expertise in Turkish Courts and Institutions of Expertise, Ankara 2001; Kuru B./Arslan R./Yılmaz E., Law of Civil Procedure, Ankara 2011 p. 440 and so on; Muşul T., Law of Civil Procedure, Ankara 2012 p. 389 and so on.; Pekcantez H./Atalay O./Özekes M., Law of Civil Law According to the Provisions of Code of Civil Procedure, Ankara 2011 p. 517 and so on; Tanrıver S., The Status, Obligations, Powers and Responsibilities of An Expert, Ankara 2002; Yılmaz E., Expertise in Practice and Expertise Reports (1), Financial Law 1996, Issue 62, p. 12 and so on; Symposium on Expertise, 9-10 November 2001 (Organized jointly by the Bar of Samsun and Union of Turkish Bars and Published in Book Form).

³ Regulations related to expertise apart from CCP are generally concerned with public law. Some of these laws are included in the following laws: Expropriation Law art.9-11, art.13, art.15, art.19, art. 27, art. 29, art. 31; Code of Criminal Procedure art. 22, art. 62-73, art. 79, art. 84, art. 153, art. 169; Law on Procedures of Collection of Public Receivables art. 81, art.91, art.109; Legal Profession Act art. 38, art. 147, art. 150, art. 161. These laws are given as examples. Other laws also include provisions concerned with expertise.

⁴ See. For example: Turkish Civil Code art. 409, art.436/5; Law on Adoption of Statutory Decree on Settlement of Legal Disputes Arising from Disasters in Natural Disaster Areas and Simplification of Some Procedures art. 1; Banking Act art. 144, art. 165.

⁵ For example: Turkish Civil Code art. 436; Turkish Law on Debts art. 224.

expert is possible when there are special and technical matters⁶. There is a ban on some officials to act as experts⁷.

II. Number of Experts, Their Appointment and The Scope of their Task

The court may appoint only one person as an expert. However, it is also possible to appoint a single committee consisting of more than one person as experts on condition that its reason is stated clearly (art. 267/1).

In some cases, it is necessary to refer to official experts⁸. Persons and institutions that laws enjoin expressing their views are referred to preferentially on matters for which they were authorized. However, public officials can not be appointed as experts on matters and cases related to institutions where they are employed (art.268/2).

According to the provision of Article 268/1: Experts are commissioned from among the people on the lists that are prepared every year by the justice commissions of the judiciary of the regional court of law. If there are no experts in the field of expertise on the lists, then experts may be appointed from the lists formed by other regional courts of law and if there are not any there, either, then experts can be commissioned from outside the list.

The basis and procedures concerning the preparation and updating of the expert lists and exclusion of those on the list need to be indicated in the rules and regulations that will be prepared by the Ministry of Justice by taking the views of relevant ministries into consideration (art.268/3). These rules and regulations took effect except for some matters⁹.

The duty of expertise involves obeying the summons by the court and appearing at the court on the assigned day and hour, taking oath and submitting their vote and opinion to the court concerning the matter in question within the allotted time (art. 269/1).

Experts who fail to appear at the court on the appointed day and hour without a valid reason or come to the court but refrain from taking oath or submitting their vote and view

⁶ In addition to the regulations of expertise in CPP, a new provision entitled expertise view was included for the first time: This provision was stated in article 293 of CPP: “Parties may obtain scientific opinion of an expert concerning the matter in dispute (art.293/1). The judge may decide to invite and hear the expert from whom the report was received upon request or ex officio. The judge and the parties may ask necessary questions at the trial to which the expert was invited (art.293/2). If the expert does not turn up for the trial where he was invited without a valid reason, the report that he prepared is not accepted for consideration” (art.293/3).

⁷ The President and Members of Banking Regulation and Supervision Agency can not act as experts by virtue of Banking Law art.86.

⁸ See. Turkish Civil Code art. 409 and art. 436.

⁹ See. On Rules and Regulations Concerning the Preparation of Expert Lists by Regional Court of Law Judiciary Justice Commissions: The Official Gazette 8.4.2012 Issue. 28258.

within the allotted time are subjected to disciplinary provisions concerning testimony (art. 269/2).

III. Persons Who Are Obligated to Accept the Duty of Expertise and Experts' Oath

The following persons and institutions are obliged to accept the duty of expertise (art. 270/1): Official experts and those who are on the lists stated in article 268 (art.270/1-a). Those who can not perform their profession or craft without knowing the subject about which they will be consulted (art. 270/1-b). Those who are officially licenced to perform the profession or art regarding the subject about which they will be consulted (art. 270/1-c). These persons may quit acting as experts on the basis of an excuse that will be accepted by the court (m. 270/2).

Experts who are appointed from among persons registered on the lists are made to take an oath at the presence of provincial judiciary justice commission by having them repeat the words "I swear upon my honor and all beliefs and values that I hold sacred that I will perform my duty of expertise impartially and objectively with loyalty and care in accordance with science." These experts are not made to take an oath for every case or job for which they have been appointed; however, they are reminded in the assignment document that they are obliged to express their vote and views by honoring the oath they have taken before (art. 271/1).

If experts have been appointed from among persons that are not registered on the lists, they are made to take an oath by the tasking court before they begin their duty as stated in the first provision. The official report about the oath is signed by the judge, the court clerk and the expert (art. 271/2).

IV. Ban on Experts to Perform their Duties and their Refusal

Rules related to reasons for ban and refusal of judges are also valid for experts. However, the fact that an expert has been heard as a witness in the same case or situation before is not a reason for refusal (art. 272/1).

If one of the reasons for disqualification about judges holds true for an expert, the court can always relieve the expert of duty until the verdict is given or the expert may ask to be relieved of duty (art. 272/2).

If one of the reasons for refusal holds true for the expert, the parties may demand refusal of the expert or the expert can refuse himself. It is obligatory that the demand for

refusal or the expert's refusal of himself be made within a week at the most beginning with the learning of the reason for refusal (art. 272/3).

The demand for relief of duty, refusal and the expert's refusal of himself is examined in the relevant dossier by the court tasking the expert and a decision is made. Decisions about acceptance are definitive. Legal steps can be taken about decisions related to refusal only with the verdict about accusations (art. 272/4).

V. Determination of the Area of Duty of the Expert and Term of Office

The court has to include the following issues in its decision about the appointment of the expert by taking the views of the parties (art.273): Determination of the subject of investigation with all its limitations and clearly. Duration for the presentation of the report. What the expert is going to investigate is submitted to the expert in the appendix of the tasking letter attached to the list of contents in a sealed form if necessary.

The period of time that will be allowed for the preparation of the expertise report can not exceed three months. Upon the expert's request, the court tasking him can extend the period of time not more than three months by stating the reason (art. 274/1).

The expert who does not submit his report within the given time is dismissed and another person can be appointed as expert instead of him. In this case, the court demands the dismissed expert to make an explanation about the activities that he performed until he was deposed and asks him to submit immediately to the court the dossier and its appendixes which were given to him for investigation regarding his task. Save for the provisions regarding the legal and penal responsibilities of the said experts, the tasking court decides, if necessary, that payments not be made to them as fees or expenses or demand the regional court of justice judiciary justice commission to ban that person from acting as expert for a certain period of time or be omitted from the list by stating the reasons (art. 274/2).

VI. Some Obligations of the Expert

A. The Expert's Obligation to Inform

The expert who is consulted informs the tasking court within a week that the task assigned to him is not within his area of expertise and therefore needs the cooperation of another expert in order to clarify and determine the material facts of the case in question or he has an excuse that will justify his refraining from accepting the task (art. 275/1).

If the expert needs to investigate and determine some issues beforehand and get hold of some records and documents in order to conduct his investigation, he informs the court tasking him within a week and demands to do this (art. 275/2).

B. The Expert's Obligation to Perform His Task in Person

The expert is obliged to perform the task assigned to him by the court in person and can not delegate the execution of his task to another person partially or entirely (art. 276).

C. The Expert's Obligation to Keep Secrets

The expert is obliged to keep the secrets that he has learned a result of his task or while he performs his task and avoid using them to his or others' benefits (art. 277).

VII. The Expert's Powers

The expert conducts his task under the superintendence of the court. If the expert hesitates about the scope of his task or its limits, he can always ask the court to remove his hesitation (art. 278/1-2).

If he needs and if the court approves, the expert may ask for information from the parties while he performs his investigation. In cases where one of the parties will be consulted, the court reminds the expert beforehand that one of the parties can not be heard when the other party is not present. If it is necessary for the expert to conduct an investigation on something in order to express his vote and view, he can perform the necessary investigation upon the decision of the court (art. 278/3-4).

VIII. The Expert's Statements, Report and His Fee

The court decides that the expert submit his vote and view in writing or orally. It is necessary that the names and surnames of the parties, the subjects about which the expert have been appointed, material facts which have become the subject of observation and investigation, justification and the conclusions arrived at, if there are disagreements among the experts, their reasons, the date of preparation of the document and the signatures of the experts be included in the report. The expert who is in the minority may submit his vote and view to the court as a separate report (art. 279/1-2).

If the court decides that the expert state his vote and view orally, the expert's statements are recorded in the official report and the expert's signature is also included at the end of the official report. If people are appointed as experts in the form of a commission, they

are allowed to discuss among themselves the subject of their appointment and the vote and view stated at the end of the discussion are recorded in an official report signed by the experts. The expert can not make legal evaluations in his report and oral statements (art.279/3-4).

The expert submits his report to the court together with things given to him to be investigated and a list of contents; date of submission is written on the report and copies of it are given to the parties before the day of trial (art. 280).

The parties may demand, within two weeks of the submission of the expert's report to them, that the the expert complement the missing points in the report and make an explanation about the ambiguous issues or a new expert be appointed (art. 281/1).

The court may receive an additional report from the expert by preparing new questions in order to complement or clarify the missing or ambiguous points in the expert's report or demand him to make an oral explanation at a trial that it will determine. The court, if it deems necessary, can also order a reinvestigation by appointing a new expert (art. 281/2-3).

The judge evaluates the expert's vote and view freely together with other evidence (art. 282).

The expert is paid a fee proportionate to the labor and time he spent including expenses of investigation, travel, accomodation and others. A price list that will be issued by the Ministry of Justice and be updated every year is used as a basis (art. 283).

IX. Responsibility of the Expert

The expert is a public official according to the Turkish Penal Code (art. 284).

Those who suffer when the court uses as a basis a contrary-to-facts report which the expert has prepared deliberately or as a result of gross negligence may file a lawsuit against the state for compensation for these damages. The state recourses to the expert in charge for the compensation it has paid (art. 285/1-2).

In cases where the contrary-to-facts expert report is taken as a basis for judgment by the court of first instance, the lawsuit for damages against the state is tried at the civil chamber of the regional court of justice in the judicial locality where this court is located but if it is taken as a basis for judgment by the regional court of justice, it is heard at the relevant civil chamber of the Court of Appeals. The recourse case that the state will open against the expert is conducted at the court which decided the lawsuit for damages (art. 286/1-2).

The state recourses to the responsible expert for the compensation it has paid within a year of payment. If the expert report that has been taken as a basis for judgment has been deliberately prepared in a contrary-to-facts manner, period of limitation is enforced for the penalty (art. 287).

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