

Law Bulletin

Employment Law | Turkey | March 2025

CHOICE OF LAW IN EMPLOYMENT AGREEMENTS WITH A FOREIGN ELEMENT FOUND UNCONSTITUTIONAL

On 5 November 2024, the Constitutional Court ("**Court**") issued an important decision¹, which was published in the Official Gazette on 10 March 2025. In its decision, the Court has ruled that the first paragraph of Article 27 of the Law on Private International Law and Procedural Law ("**Law**") violates the state's obligation to protect employees' rights, as stipulated by Article 49 of the Constitution of the Republic of Türkiye ("**Constitution**"). Consequently, the Court annulled the paragraph. The annulment decision will take effect on 10 September 2025, and it is expected to have significant consequences for employers who hire employees abroad and conduct business internationally.

In its judgment, the Court determined that, due to the choice of law, a more suitable law could not be applied to employment agreements with a foreign element. Accordingly, the choice of law creates a risk for employees, as the employees may be subjected to a less protective law. Additionally, the Court emphasized that it is challenging for employees to be aware of the details belonging to the choice of law through their own efforts and that employers might exploit their bargaining power to enforce a law unfavorable to employees. Accordingly, the Court decided to annul the first paragraph of Article 27 on the grounds that, the principle of protection of employees must be taken into account and the state must fulfill its positive obligation in this subject as per Article 49 of the Constitution.

As part of the applications subject to the decision, the annulment of the second paragraph of Article 27 of the Law has also been requested. However, the Court ruled that when no choice of law is made in employment agreements with a foreign element, the applicable law would be the law of the place of business where the work is typically performed. Additionally, the

¹ Constitutional Court decision dated 5 November 2024 and numbered 2023/158 E. 2024/187 K.

KOLCUOĞLU DEMİRKAN KOÇAKLI

Court underlines the possibility of applying a more suitable law related to such agreements. The Court also emphasized that if a more suitable law offers greater protection to employees than the law of the place of business where the work is typically performed, employees can benefit from that higher level of protection. The Court also emphasized that if the more suitable law offers greater protection to employees than the law of the place of business where the work is typically performed, employees can benefit from that higher level of protection. Consequently, the Court concluded that the state's positive obligation to protect employees does not conflict with the second paragraph of Article 27 of the Law. Therefore, it is determined that this provision is constitutional.

The decision contains two separate dissenting opinions. Within the dissent concerning the annulment of the first paragraph, it is noted that when the protection offered by the choice of law and the law of the place of business where the work is typically performed is insufficient, Turkish law may still be applied to the conditions that contradict public order. Additionally, the dissent noted that it is not the first paragraph of Article 27 that prevents the application of the more suitable law but rather the fourth paragraph of the same article, as it does not refer to the first paragraph. As a result, the dissenting opinion suggested that it is the fourth paragraph that may be unconstitutional.

The second dissenting opinion argued that the second paragraph of Article 27 contradicts the principles of a social state. It argues that Turkish employees are effectively deprived of the protection mechanisms that Turkish law provides due to this paragraph. Therefore, it insists that the second paragraph should also be annulled.

Please contact us if you have any questions on the subject.

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