

## Bankruptcy in Turkey: a Comparative Study of Turkey's Adjourment of Bankruptcy and the United States' Chapter 11 Reorganization

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TABLE OF CONTENTS: 1. Introduction; 2. Development of Bankruptcy Adjourment in Turkey; 2.1. 2003 & 2016 Bankruptcy Code Amendments; 3. Requirements to Adjour Bankruptcy; 3.1. "Over-Indebtedness" of the Entity; 3.2. Court Notification; 3.3. File Request; 3.4. Recovery Plan Submission; 3.5. "Extraordinary Time" Limitations; 3.6. One-Year Rule; 3.7. Expenses 4. Chapter 11 Reorganization; 4.1. Eligibility; 4.2. Debtor Preparation; 4.2.1. The Petition; 4.2.2. Creditor Information; 4.2.3. Credit Counseling; 4.2.4. Schedules; 4.2.5. Small Business Debtor; 4.2.6. The Plan; 4.2.7. Disclosure; 4.3. Code's Protective Powers and Who Controls; 4.3.1. The Automatic Stay; 4.3.2. Debtor in Possession; 4.3.3. The U.S. Trustee and Examiner; 4.4. Rights Exercised by the Debtor in Possession and Creditors; 4.4.1. Avoidable Transfers; 4.4.2. Debtor in Possession's Power to Use, Sell, or Lease Property; 4.4.3. Cash Collateral; 4.4.4. Debtor's Right to Credit; 4.4.5. Executory Contracts and Unexpired Leases; 4.4.6. Adequate Protection; 4.4.7. Creditor's Claims; 4.4.8. Additional Creditor Relief; 4.5. Plan Confirmation; 4.6. Options if Case Fails; 5. Conclusion; 5.1. Authors' Recommendations and Critique.

ABSTRACT: To build and maintain economic fortitude, the paradigm of fiscal success remains steadfast for both developed and developing nations in one specific area: bankruptcy law. History shows that robust economies incorporate reliable bankruptcy codes into their legal schemes so that small and large businesses thrive. However, because of the influences of varied stimuli including worldviews, cultural values, and politics, not all bankruptcy laws are created equal in their respective effectiveness, fairness, and influence. For example, the current United States Bankruptcy Code, ratified after nearly one hundred years of Congressional repeals and re-enactments, is today a comprehensive, well-established legal scheme that efficiently permits debtors of varied status to file under its assorted Chapters. The United States' Code seeks to successfully balance the rights of all parties involved in a bankruptcy, while further reassuring that the honest debtor receives a 'fresh start.' To compare, the Turkish Execution and Bankruptcy Code is still evolving in its structure to better equalize the treatment of debtors and creditors. This comparative paper first looks at the Turkish Bankruptcy Code and how it evolved, specifically in the area of adjourment of bankruptcy. To compare and contrast these two diverse legal structures, the study first analyzes the impacts of the 2003 and 2016 amendments of Article 179 in the area of adjourment, then proceeds to assess the requirements an entity must adhere to when seeking adjourment, and finally concludes with an in-depth analysis and comparison of United States' Chapter 11 with the Turkish adjourment of bankruptcy.

KEYWORDS: *Adjourment; Reorganization; Turkey; Chapter 11; United States Bankruptcy Code; Turkish Execution and Bankruptcy Code; Over-Indebtedness*

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## 1. INTRODUCTION

Globalization, precipitated by worldwide developments in technology, transportation, and communication, led to a complex, international financial labyrinth. Consequently, global trade expansion led to worldwide economic growth and interdependency. These universal partnerships birthed the reality that one nation's financial health predictably reflects the overall health of the global order.<sup>1</sup> As a result, economic decline in one country may threaten the financial stability of other countries. Two quintessential illustrations of this contagiousness are the subprime mortgage crisis in the United States (which morphed into a global financial crisis) and the Greek debt crisis (the impact of which continues to impede the growth of the European Union's economy today).<sup>2</sup>

Because companies encounter economic plight across all industries, developed nations incorporate bankruptcy or liquidation laws into their respective legal schemes to alleviate this pecuniary burden. Essential for all healthy domestic economies is a sound and strong bankruptcy code to guide and assuage the unavoidable impacts of financial decline and to fairly and equitably treat debtors and creditors. A sound example of the symbiotic relationship between a resolute bankruptcy code and a robust economy is found in the United States. The history of the United States Bankruptcy Code (hereinafter U.S. Code) shows one riddled with uncertainty and distrust.<sup>3</sup> However, in 1978 (eighty years after the Bankruptcy Act of 1898), the United States established a more workable statutory scheme that the nation's citizens and businesses could look up to and rely upon when facing economic turmoil.<sup>4</sup>

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<sup>2</sup> See JAMES SUNSHINE, *Globalization Has Made Economic Crises More Likely: OECD*, HUFFINGTONPOST.COM (Aug. 29, 2011), [http://www.huffingtonpost.com/2011/06/29/globalization-economic-crises\\_n\\_887083.html](http://www.huffingtonpost.com/2011/06/29/globalization-economic-crises_n_887083.html).

<sup>3</sup> *Id.*

<sup>4</sup> See generally DAVID ARTHUR SKEEL JR, *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 25 (Princeton U. Press, 5th ed. 2003).

<sup>5</sup> See generally Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV., 1995, at 23 (Discussing History of Bankruptcy Code). Note the significant amendments made to the U.S. Bankruptcy Code, including the 2005 BAPCPA.

Unsurprisingly, in addition to the United States, economic crises catalyze other countries to produce or build upon their own existing bankruptcy law. To illustrate, Turkey, in the aftermath of the 2001 Turkish-banking crisis, established adjournment of bankruptcy.<sup>5</sup> Under Turkish law, adjournment of bankruptcy enables an insolvent stock corporation (hereinafter corporation) or cooperative society (hereinafter cooperative) to avert declaring bankruptcy and liquidation if (and to the extent that) its financial position is ameliorative. Bankruptcy adjournment not only assists companies to repair financial delinquencies by regulating creditor debt collection, but it also cushions other companies in the market from possible antagonistic repercussions associated with bankruptcy and liquidation. There is however, a concern that adjournment of bankruptcy is vulnerable to exploitation by dishonest debtors wishing to avoid paying debts.<sup>6</sup>

This study, using a comparative method, juxtaposes the Turkish Bankruptcy Code with the more well-known United States Bankruptcy U.S. Code and each Code's respective treatment of a debtor in reorganization. First, under title 2, this article investigates the development of bankruptcy adjournment in Turkey and second, under title 3, outlines the requirements that a debtor must fulfill to adjourn bankruptcy. Following this exploration, under title 4, we leap into the complexity of Chapter 11 under the United States Bankruptcy U.S. Code and compare the two Codes' respective approach to reorganization. Following this examination, this study clarifies how the two Codes differ, why they may differ, where they are analogous, and suggests ideas to tweak Turkey's adjournment of bankruptcy to better serve creditors, debtors, and the State's economy as a whole. The study concludes under title 5 where a short summary delineates several feasible improvements to the adjournment of bankruptcy.

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<sup>5</sup> For further information regarding the 2001 Turkish Banking Crisis and measures taken afterwards, see generally, Working Paper of Banking Regulation and Supervision Agency, *From Crisis to Financial Stability (Turkey Experience)* (Banking Regulation and Supervision, Working Paper Sept. 2010). [https://www.bddk.org.tr/WebSitesi/english/Reports/Working\\_Papers/8675from\\_crisis\\_to\\_financial\\_stability\\_turkey\\_experience\\_3rd\\_ed.pdf](https://www.bddk.org.tr/WebSitesi/english/Reports/Working_Papers/8675from_crisis_to_financial_stability_turkey_experience_3rd_ed.pdf).

<sup>6</sup> See MUHSIN KESKIN, *Bankruptcy Protection Provides an "Easy Way Out" in Turkey* LEXOLOGY.COM (Jul. 14, 2016), <https://www.lexology.com/library/detail.aspx?g=9e325aee-0f23-4b2a-92db-860110fbfa52>.

## 2. DEVELOPMENT OF BANKRUPTCY ADJOURNMENT IN TURKEY

In 1987, Turkey enacted law number 3332 to address and aid corporations in financial distress and improve their financial position through reorganization.<sup>7</sup> Then, in response to Turkey's 2001 economic downturn, Parliament, in 2002, enacted law number 4743<sup>8</sup> to aid debtors realize their repayment obligations to banks and other financial organizations with whom they had a credit relationship. The purpose of this law was to maintain and precipitate economic growth by assisting debtors satisfy their repayment obligations.<sup>9</sup>

In harmony with this focus, Parliament amended the law regulating adjournment of bankruptcy to optimize the efficiency and efficacy of the system, which unfortunately "fell by the wayside" due to deficiencies in the law prior to the amendments.<sup>10</sup> In 2003, under law number 4949, adjournment of bankruptcy found its place in the Turkish Execution and Bankruptcy Code (hereinafter Bankruptcy Code) where it is regulated in detail<sup>11</sup> (here, it is helpful to note that the 2003 Bankruptcy Code amendments mainly align with Articles

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<sup>7</sup> See SABRI B. ARZOVA, MURAT YAVAŞ & BARIŞ KÜÇÜK, HUKUKI VE MALİ YÖNDEN İFLASIN ERTELENMESİ VE BORCA BATIKLIK BİLANÇOSU [POSTPONEMENT OF BANKRUPTCY IN LEGAL AND FINANCIAL ASPECTS AND BALANCE SHEET OF DEBT] 27 (2016).

<sup>8</sup> Law on Restructuring of Debts to Financial Sector and Amendments to Some Laws, Law No. 4743, OFFICIAL GAZETTE, Jan. 31, 2002 (Turk.).

<sup>9</sup> *Id.*, art. 1. ("The purpose of this Law is to enable the debtors that have been involved in a credit relationship with banks and other financial organizations and that experience financial bottleneck to fulfill their repayment obligations towards the financial sector and to continue to create value added with such measures as extending maturities, renewing the credit, extending a new credit, reducing principal and/or interest, waiving interest, converting credits into participations in whole or in part, assigning or transferring the credits against a consideration in cash, in kind or subject to collection, liquidating the credits fully or partly against assets in kind belonging to debtor or third persons, making protocols by acting together with other banks, which measures shall be taken under the conditions and periods to be determined under financial restructuring for the credits opened before the effective date of this Law by banks, special finance institutions, and other financial establishments operating in Turkey under the permission obtained pursuant to their special legislation . . .").

<sup>10</sup> Before the amendments, there was no in-depth law regulating the adjournment of bankruptcy. The main sources regulating the adjournment of bankruptcy were Articles 324 & 546 of the Turkish Commercial Code and Article 63 (3) of the Code of Cooperatives. No article outlined the adjournment of bankruptcy under the Turkish Execution and Bankruptcy Code. Accordingly, there was a lack of clarity regarding: (i) the requirements of bankruptcy adjournment; (ii) the measures that could be initiated by a court upon the adjournment decision; and, (iii) the discretion vested in the courts throughout the process. The amalgamation of these deficiencies caused malfunction, and accordingly, compromised the efficacy and the efficiency of the system. See generally SELÇUK ÖZTEK, *İflasın Ertenmesi* [Postponement of Bankruptcy], 59 BANKACILAR DERGİSİ [BANKERS MAGAZINE] 39-83 (2006) (Turk.).

<sup>11</sup> Law Amending the Execution and Bankruptcy Code, Law No. 4949, OFFICIAL GAZETTE, Jun. 30, 2003 (Turk.).

725 and & 725 (a) of the Swiss Code of Obligations).<sup>12</sup> Finally, on July 15, 2016, Parliament enacted the last amendments to the Bankruptcy Code titled under the omnibus law: “The Law Regarding Amendment of Some Laws to Improve the Investment Environment (No.6728).”<sup>13</sup> However, while the amendments came into force on August 9, 2016, they have yet to be administered due to the present prohibition imposed by Decree Law 669 under the State of Emergency (dated July 25, 2016).<sup>14</sup>

### 2.1. 2003 & 2016 BANKRUPTCY CODE AMENDMENTS

Amending the Bankruptcy Code brought new vigor to the adjournment of bankruptcy regime. Not only was the opacity surrounding bankruptcy adjournment remedied, but the new amendments barred mischievous parties from exploiting adjournment. Clearly discernable are the motives behind the amendments to the adjournment of bankruptcy: where the 2003 Bankruptcy Code amendments sought to strengthen and maintain Turkey’s economy by affording its corporations with a ‘new start’ through adjournment of bankruptcy, the 2016 amendments sought to balance the interests of creditors

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<sup>12</sup> SCHWEIZERISCHE OBLIGATIONENRECHT [OR], CODE DES OBLIGATIONS [CO], CODICE DELLE OBBLIGAZIONI [CO], Mar. 1, 1912, SR 220, art. 725 (Switz.) (“(1) Where the last annual balance sheet shows that one-half of the share capital and the legal reserves are no longer covered, the board of directors must without delay convene a general meeting and propose financial restructuring measures. (2) Where there is good cause to suspect over-indebtedness, an interim balance sheet must be drawn up and submitted to a licensed auditor for examination. If the interim balance sheet shows that the claims of the company’s creditors are not covered, whether the assets are appraised at going concern or liquidation values, the board of directors must notify the court unless certain company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit. (3) If the company does not have an auditor, the licensed auditor must comply with the reporting duties of the auditor conducting a limited audit.”); Article 725 (a) of the Swiss Code of Obligations (“(1) On receiving notification, the court commences insolvency proceedings. On application by the board of directors or by a creditor it may grant a stay of insolvency proceedings where there is a prospect of financial restructuring; in this case the court orders measures to preserve the company’s assets. (2) The court may appoint an administrative receiver and either deprive the board of directors of its power of disposal or make its resolutions conditional on the consent of the administrative receiver. It defines the duties of the administrative receiver. (3) Public notice of the stay of insolvency proceedings is required only where necessary to protect third parties.”).

<sup>13</sup> Law Regarding Amendment of Some Laws to Improve the Investment Environment, Law No. 6728, OFFICIAL GAZETTE, Aug. 9, 2016 (Turk.).

<sup>14</sup> Decree Law on the Measures to be Taken Under the State of Emergency, Decree with force of law No. 669, art. 4, Jul, 25, 2016. According to this article, during the State of Emergency, courts shall dismiss all requests filed for the adjournment of bankruptcy. Further, pursuant to Article 10 of Decree Law 673, regarding adjournment of bankruptcy requests filed prior to the declaration of the State of Emergency, courts shall neither rule upon these requests nor grant interim injunction: see Decree Law on the Measures under the State of Emergency, decree with force of law No.673, Aug. 15, 2016.

and debtors by remedying the ease by which bad faith debtors exploited the process. Because the 2003 and 2016 amendments collaborate (but were enacted on different dates), the following paragraphs initially examine the 2003 amendments and follow with an analysis of the changes brought by the 2016 amendments.

First, the 2003 amendments to the adjournment of bankruptcy are as follows:<sup>15</sup>

1) Creditors may report that the entity's liabilities exceed its assets. Creditors exercising this authority are not obligated to substantiate this claim;<sup>16</sup>

2) The competent court may conduct *ex officio* examination of the entity's alleged bankruptcy, regardless of the notice of bankruptcy given by the creditor, the management and representative bodies of the respective corporation or cooperative, or its liquidator in the event of liquidation;<sup>17</sup>

3) The Bankruptcy Code now stipulates the submission of a persuasive and serious recovery plan evincing that the entity's financial position can be cured. Further, the law necessitates that the party demanding the adjournment of bankruptcy submit all information and documents at their disposal substantiating the seriousness and persuasiveness of the recovery plan;<sup>18</sup>

4) The amendments further address the role of the competent court following the court's affirmation of bankruptcy adjournment. According to Article 179 (a) of the Bankruptcy Code, the court shall take all appropriate

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<sup>15</sup> See ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 29–30. *The Bankruptcy Code articles cited between footnotes 13 to 21 reflect amendments made to the Code in 2003, but do not reflect the 2016 amendments to the adjournment of bankruptcy.*

<sup>16</sup> TURKISH EXECUTION AND BANKRUPTCY CODE, Law. No. 2004, Jun. 9, 1932, art. 179 (amended 2003) (“If and when it is declared by the management and representative bodies or if the company or the cooperative society is in liquidation, by its liquidators or a creditor, or it is determined by the competent court that the liabilities of the capital company or the cooperatives society are more than its assets, the capital company or the cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding. . .”).

<sup>17</sup> *Id.* (“ . . . or it is determined by the competent court that the liabilities of the capital company or the cooperatives society are more than its assets, the capital company or the cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding . . .”).

<sup>18</sup> *Id.* (“ . . . Provided, however, that any one of the management and representative bodies or the creditors may demand adjournment of adjudication of bankruptcy by filing to the court a plan of recovery proving that the company or the cooperative society may be recovered. If the plan of recovery is found serious and persuasive, the court will adjourn adjudication of bankruptcy. Information and documents proving that the plan of recovery is serious and persuasive must also be presented to the court.”).

actions required for the protection of properties and assets of the corporation or cooperative to aid in the proper execution of the recovery plan;<sup>19</sup>

5) Last, 179 (b) outlines the adjournment order's intended impact. Article 179 (b) seeks to balance the interests of the creditor(s) and the debtor. According to Article 179 (b),<sup>20</sup> once the bankruptcy adjournment decision is rendered, no executive proceeding (including but not limited to the proceedings under the Act numbered 6183),<sup>21</sup> may be commenced against the debtor and any pending executive proceedings will be stopped and stayed. Further, the limitation/prescription periods and the time limits of forfeiture, permissibly suspended by a legal proceeding, will discontinue.

Notably, Article 179 (b) privileges a particular class of creditor when initiating or continuing an executive proceeding. Pursuant to the Article, during adjournment, creditors whose collection of debts are secured by a real property mortgage, chattel mortgage, or commercial enterprise pledge, may initiate an executive proceeding for realization of the mortgage or pledge, or

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<sup>19</sup> *Id.* (a) (“ . . . . [T]he court will also take all kinds of measures required for protection of properties and assets of the company or the cooperative society by also considering the plan of recovery.”).

<sup>20</sup> *Id.* (b) (“(1) Upon an order for adjournment of adjudication of bankruptcy, no proceeding, including but not limited to the proceedings under the Code 6183, can be initiated against the debtor, and the pending proceedings will be stopped and stayed, and the limitation/prescription periods and the time limits of forfeiture which may be suspended by a legal proceeding will not continue to be counted. (2) During the period of adjournment, for collection of the debts secured and backed by a real property mortgage, chattel mortgage or commercial enterprise pledge, a legal proceeding for realization of mortgage or pledge may be initiated or the pending legal proceedings may be continued; provided, however, that conservatory measures such as seizure for security cannot be taken and the pledged or mortgaged property cannot be sold out. However, in this case, the interests which will continue to be accrued during the period of adjournment, but cannot be covered and paid by the existing mortgage or pledge are required to be separately securitized. (3) Execution proceedings for attachment can be initiated for collection of the debts listed in the first rank in article 206. (4) Maximum period of adjournment is one year. This period may be extended further by one year by considering the report of the administrative receiver. The accumulation of the extension periods, however, cannot exceed four years. The administrative receiver will regularly file reports to the court about his activities and the situation of the company or society, in intervals to be determined by the court. (5) Upon dismissal of a demand for adjournment of adjudication of bankruptcy or if it is determined at the end of the period of adjournment that recovery is not possible, the court will adjudicate the company or the cooperative society bankrupt. Furthermore, at any time during the period of adjournment if the court concludes upon reports of the receiver that it is not possible to improve and recover the financial situation of the company or the cooperative society, the court may abate the order for adjournment and adjudicate the company or the cooperative society bankrupt.”).

<sup>21</sup> Law on Procedure of Collection of Public Receivables, Act. No. 6183, OFFICIAL GAZETTE, JUN. 28, 1953. The provisions of the Act apply to the following: principal public receivables such as taxes, duties, charges, court fees for criminal investigations and procedures, tax penalties, monetary penalties, and to auxiliary public receivables, such as delay fines and interest due to the government, the private offices of the provinces and to municipalities and to other receivables due to the same bodies from implementation of public services by the same bodies other than those due under contract, tort, misappropriation and to the follow-up costs of the same.

may maintain the pending executive proceeding. Notwithstanding this privilege, conservatory measures shall not be taken, nor may the pledged or mortgaged property be sold.<sup>22</sup> Nonetheless, interests that continue to accrue during the period of suspension (but cannot be covered and paid by the existing mortgage or pledge) are required to be separately securitized.<sup>23</sup>

Article 179 (b) also delineates the circumstances under which a court may dismiss the bankruptcy adjournment judgement and deem the corporation or cooperative as bankrupt. According to the Article, the court may dismiss the adjournment of bankruptcy request upon: a) following the receipt of reports submitted by an administrative receiver, reflecting that the entity is unsalvageable or, b) if the court finds, at any time throughout the adjournment period, that the entity cannot be rehabilitated, that entity may be adjudged bankrupt.<sup>24</sup>

Next, the amendments to the adjournment of bankruptcy regime introduced by the omnibus law of 2016 are as follows:

1) Rather than relying on a sole declaration, Article 179 (1) of the Bankruptcy Code now also requires over-indebtedness to be established via an interim balance sheet organized using the presumptive sale prices of the entity's assets. This amendment clarifies the ambiguity created by Article 376 (3) of the Commercial Code. According to Article 376 (3), on the suspicions of over-indebtedness, the Board of Directors (hereinafter B.o.D) shall have an interim balance sheet prepared based upon the going-concern value and liquidation value of the assets. Here, clearly, two interim balance sheets must

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<sup>22</sup> *Supra* note 16, art. 179 (b), (“(2) During the period of adjournment, for collection of the debts secured and backed by a real property mortgage, chattel mortgage or commercial enterprise pledge, a legal proceeding for realization of mortgage or pledge may be initiated or the pending legal proceedings may be continued; provided, however, that conservatory measures such as seizure for security cannot be taken and the pledged or mortgaged property cannot be sold out. However, in this case, the interests which will continue to be accrued during the period of adjournment, but cannot be covered and paid by the existing mortgage or pledge are required to be separately securitized”).

<sup>23</sup> 179 (b) of the Turkish Execution and Bankruptcy Code *Id.* (“(2) . . . . the interests which will continue to be accrued during the period of adjournment, but cannot be covered and paid by the existing mortgage or pledge are required to be separately securitized.”).

<sup>24</sup> Article 179 (b) of the Turkish Execution and Bankruptcy Code *Id.* (“Upon dismissal of a demand for adjournment of adjudication of bankruptcy or if it is determined at the end of the period of adjournment that recovery is not possible, the court will adjudicate the company or the cooperative society bankrupt. Furthermore, at any time during the period of adjournment if the court concludes upon reports of the receiver that it is not possible to improve and recover the financial situation of the company or the cooperative society, the court may abate the order for adjournment and adjudicate the company or the cooperative society bankrupt.”).

be prepared in accordance with two different criteria. This uncertainty generated confusion about which interim balance sheet determined over-indebtedness. Thus, Article 179, by identifying the criterion pursuant to which over-indebtedness is determined, clarified the ambiguity of Article 376 (3);<sup>25</sup>

2) Prior to the 2016 amendments, before filing a request for the adjournment of bankruptcy, corporations notoriously forum-shopped and relocated their registered addresses to other jurisdictions where the request would be favored. Subsequent to the amendments, however, to prevent the applicants from engaging in forum-shopping, jurisdiction now vests within the commercial court where the entity's headquarters were registered for over one year;<sup>26</sup>

3) Pursuant to Article 179 (2), the recovery plan must outline how working capital and management expenses will be disbursed during adjournment. In addition, the current legislation now specifies the documents and data that applicants shall submit, along with the recovery plan, when applying for an adjournment. According to Article 179 (3) of the Bankruptcy Code, the documents required include: the due dates and specifics of existing debts, creditors' addresses, lists displaying stocks, the stocks' amounts and waiting periods, the most recent balance sheet and income table submitted to tax authorities, trade registry certificates, and other information and documents corroborating the seriousness and persuasiveness of the recovery plan. In this context, Article 179 (4) states that if the applicant does not simultaneously provide the preceding documents along with the adjournment of bankruptcy request or fails to submit missing documents within a two-week grace period, the applicant shall be adjudged bankrupt upon the identification of over-indebtedness. Last, with the additions made to Article 179 (a),

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<sup>25</sup> *Id.* (1) ("If and when it is reported by the management and representative bodies or if the capital company or the cooperative society is in liquidation, by its liquidators or a creditor, or it is determined by the competent court that the capital company or the cooperative society is over-indebted pursuant to the interim balance sheet prepared in accord with the presumptive sale prices of either the capital company's or the cooperative society's assets, that capital company or cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding.") (*Translation from Turkish to English made by the author - ed.*)

<sup>26</sup> *Id.* ("Provided, however, that any one of the management and representative bodies or the creditors may demand the adjournment of bankruptcy adjudication by providing the court, where the company's or cooperative society's headquarters has been registered for over one year, with a recovery plan proving that company or cooperative society may be recovered.") (*Translation from Turkish to English made by the author - ed.*)

applicants are now permitted to submit a revised recovery plan one time during adjournment proceedings.<sup>27</sup>

4) To prevent debtors from exploiting the adjournment of bankruptcy regime and preserve and solidify coherency among the extraordinary time limit and the adjournment of bankruptcy, Article 179 (5) now prohibits applicants, who previously benefitted from the adjournment of bankruptcy, from requesting a further one-year adjournment, starting from the cessation of the previous postponement period (including extension periods);<sup>28</sup>

5) According to Article 179 (a) (1), the court may now appoint multiple administrative receivers if it concludes that a sole administrative receiver will not sufficiently perform all required duties. Additionally, courts may now dismiss administrative receivers and appoint new ones if it deems necessary;<sup>29</sup>

6) With the 2016 amendments, creditors now enjoy a legislative basis to oppose an adjournment of bankruptcy request. According to Article 179 (a) (2), within two weeks of the request's announcement in the trade registry, creditors

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<sup>27</sup> *Id.* (“(2) The recovery plan must lay out the investment of new capital resources in conjunction with objective resources and precautions including, how management expenses and working capital shall be covered. (3) When applying to adjourn bankruptcy, the applicant shall provide the court with the due dates and specifics of existing debts, creditors’ addresses, lists displaying stocks, the stocks’ amounts and waiting periods, the most recent balance sheet and income table submitted to tax authorities, trade registry certificates, and other information and documents corroborating the seriousness and persuasiveness of the recovery plan. (4) If the applicant does not provide the preceding documents along with the adjournment of bankruptcy request or fails to submit missing documents within two-week grace period, the applicant shall be adjudged bankrupt upon the identification of over-indebtedness.”); Article 179 (a) (8) of the Turkish Execution and Bankruptcy Code (“The capital company or cooperative society may submit a revised recovery plan once during the adjournment proceedings.”) (*Translation from Turkish to English made by the author - ed.*).

<sup>28</sup> *Id.* (5) (“A capital company or cooperative society, that has already benefitted from the adjournment of bankruptcy, cannot apply for a further adjournment for a year starting from the expiry of the previous adjournment period, including the extension period.”) (*Translation from Turkish to English made by the author - ed.*).

<sup>29</sup> *Id.* (a) (1) (“Upon receiving the adjournment of bankruptcy request, the court may appoint one or more administrative receivers who hold the required professional and technical knowledge and either divest the management body of all its power and authority and delegate same to the receiver, or the court may rule that all acts and decisions of the management body will be valid and enforceable only if and when they are approved by the receiver. The administrative receiver (s) shall also be responsible for initiating and controlling the inventory preparation process.”); Article 179 (a) (6) of the Turkish Execution and Bankruptcy Code (“If it is deemed necessary, the court may dismiss the administrative receiver and appoint a new one as a replacement.”) (*Translation from Turkish to English made by the author - ed.*).

may object to the request on the sole basis that the applicant fails to fulfill the statutory requirements of adjournment;<sup>30</sup>

7) Contrary to the former version of Article 179 (a), the amended Article 179 (a) (3) dictates that interim injunctions and provisional attachments, granted against the applicant prior to the adjournment of bankruptcy request, shall not be executed during the adjournment of bankruptcy adjudication. New Article 179 (b) (1) supplements this sentiment regarding the period following the adjournment request, once consented to by the court;<sup>31</sup>

8) Next, judgments furnished by the court at the conclusion of proceedings are dictated in the new Article 179 (a) (10). Pursuant to the article, the court may: (i) adjourn the bankruptcy if it finds the applicant to be worthy and the recovery plan to be serious and convincing; (ii) dismiss the adjournment of bankruptcy request if it concludes that the corporation or cooperative is not over-indebted; or (iii) allow the bankruptcy to proceed if the court determines that the corporation or cooperative is over-indebted, but the recovery plan is neither serious nor convincing, and accordingly, the applicant is incapable of debt reimbursement.<sup>32</sup>

9) Prior to the 2016 amendments, the bankruptcy adjournment period could be extended to a total of four years. However, following the amendments, extensions were reduced from four years to one year.<sup>33</sup> The motive behind this reduction was to address the statistically proven infertility of the four-year extension period. The figures upon which the Parliament premised the diminution, revealed that the four-year extension period disturbed the

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<sup>30</sup> *Id.* (a) (2) (“ . . . The announcement made in the trade registry pertaining to the adjournment of bankruptcy request will indicate that creditors may object to the request within two weeks of the announcement on the grounds of nonfulfillment of statutory requirements of the adjournment of bankruptcy and may demand the dismissal of the request from the court.”) (*Translation from Turkish to English made by the author - ed.*).

<sup>31</sup> *Id.* (a) (3) (“ . . . During this period of time, interim injunctions and provisional attachments shall not be enforced and, moreover, the limitation/prescription periods and the time limits of forfeiture which may be suspended by a legal proceeding, will not continue to be counted.”) (*Translation from Turkish to English made by the author - ed.*).

<sup>32</sup> *Id.* (a) (10) (“The court: (i) adjourns the bankruptcy if it concludes that the recovery plan is serious and convincing and the company or cooperative society is worthy; (ii) dismiss the adjournment of bankruptcy request and bankruptcy if it concludes that the company or cooperative society is not over-indebted; or (iii) adjudges the company or cooperative society as bankrupt.”) (*Translation from Turkish to English made by the author - ed.*).

<sup>33</sup> *Id.* (b) (4) (“Maximum period of adjournment is one year. This period may be extended by one year if deemed appropriate by the court.”) (*Translation from Turkish to English made by the author - ed.*).

equilibrium between the interests of creditors and debtors, to the detriment of creditors, because, not only was the entity generally deprived of its assets, but also its debts escalated during the extension period.<sup>34</sup> Accordingly, the majority of corporations and cooperatives to which the four-year extension period was granted could not avert insolvency and liquidation.

10) With the presentation of a three-tiered court system in Turkey, a new article on the right of appeal was integrated into the Bankruptcy Code. According to the newly introduced Article 179 (c), the corporation, cooperative, or creditor that requested the adjournment of bankruptcy may dispute the commercial court's judgment before the regional appellate court within ten days subsequent to service of the decision. Third parties may also contest the judgment within ten days starting from the announcement of the judgment in the Trade Registry. It is also possible to appeal the regional appellate court's judgment before the Court of Appeals in conformity with the aforementioned principles and time limits.<sup>35</sup>

Markedly, amendments to the adjournment of bankruptcy do not abrogate other regulations related to the adjournment of bankruptcy already in effect. Accordingly, Articles 376 and 377 of the Turkish Commercial Code (hereinafter the Commercial Code)<sup>36</sup> and Article 63 of the Turkish Code of

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<sup>34</sup> Law Regarding Amendment of Some Laws to Improve the Investment Environment, Law No. 6728, Preamble to art. 3, OFFICIAL GAZETTE, Aug. 9, 2016 (amending Law. No. 4949, art. 179 (b)) (which amends Article 179 (b) of the Turkish Execution and Bankruptcy Code).

<sup>35</sup> *Supra* note 16, art. 179 (c) ("The capital company, the cooperative society, or the creditor who requested the adjournment of bankruptcy may contest the commercial court's judgment before the regional appellate court within ten days, starting from the service of the decision, or following the announcement for third parties. The judgment of the regional appellate court can also be challenged before the Court of Appeals in conformity with the same principles.") (*Translation from Turkish to English made by the author - ed.*).

<sup>36</sup> TURKISH COMMERCIAL CODE [TCC], Law. No. 6102, adopted Jan. 13, 2011, Official Gazette, art. 376 (repealing Law. No. 6762 of Jul. 2, 1956). ("(1) If it is clear in the last annual balance sheet that half of the sum of the capital and statutory reserves is unsecured due to loss, the B.o.D. shall immediately convoke the G.A. and submit the remedial measures it considers appropriate. (2) According to the last annual balance sheet, if it is clear that two-thirds of the sum of the capital and statutory reserves are unsecured due to loss, unless the G.A. immediately convoked decides to fully supplement the capital or to be satisfied with one-third of the capital, the company shall automatically terminate. (3) If suspicions are raised that the company's liabilities exceed its assets, the B.o.D. shall have an interim balance sheet prepared based on the going concern value and based on liquidation value of the assets and shall give it to the auditor. The auditor shall inspect this interim balance sheet within seven business days and shall present his/her evaluation and proposals to the B.o.D. in the form of a report. The proposals of the early detection committee regulated in Article 378 must also be taken into account in the proposals of the auditor. If it is clear in the report that the assets are not sufficient to cover the receivables of creditors of the company, the B.o.D. shall notify the commercial court of first instance at the location of the company's headquarters of this situation and shall file a claim for bankruptcy. This shall be done

Cooperatives (hereinafter the Code of Cooperatives)<sup>37</sup> preserve their enforceability. These Articles outline the process to be followed by the B.o.D. of a corporation or a cooperative prior to filing a request for the adjournment of bankruptcy. In contrast, the Articles from the Bankruptcy Code regulate the process subsequent to the filed demand for adjournment.<sup>38</sup> Ultimately, these articles co-exist symbiotically for the efficient and effective operation of bankruptcy adjournment.

Indisputably, these amendments addressed substantial deficiencies that hindered the efficacy of the adjournment of bankruptcy regulation. Today, the law, post amendments, not only dictates the prerequisites to adjourn bankruptcy with clarity, but also delineates the steps that a competent court must take when delivering an adjournment decision. Further, the amendments define the effects of the adjournment order, as well as dictate what constitutes a proper recovery plan to better avert exploitation. These amendments evidently resurrected the adjournment of bankruptcy system to help viable corporations confront and tackle severe economic fluctuations.<sup>39</sup>

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provided that before the adjudication of bankruptcy, the company's creditors representing an amount sufficient to cover the company's deficit and to eliminate the indebtedness of the Company accept in writing that they will be ranked after all other creditors and that the legitimacy, authenticity, and validity of this declaration or contract is verified by experts assigned by the court which shall be notified of the request for bankruptcy by the B.o.D. Otherwise the application made to the court for an expert inspection shall be considered as notification of bankruptcy."); *id.* art. 377 ("The B.o.D. or any creditor can request the postponement of bankruptcy by presenting to the court an improvement project indicating the objective and actual resources and measures, including the new capital contribution in cash. In such case, Articles 179 to 179/b of the Executive and Bankruptcy Law shall be applied.").

<sup>37</sup> TURKISH CODE OF COOPERATIVES, Law. No. 1163, Apr. 24, 1969, art. 63 (as amended by Law No. 3476, Oct. 6, 1988) ("(1) Where there are serious reasons to prove the insolvency of the cooperative, the B.o.D. shall immediately draw up an interim balance sheet on the basis of the current market prices. In case the last year's balance sheet or a liquidation balance sheet prepared afterwards, or the interim balance sheet referred to above implies that the resources of the cooperative are not sufficient any more to cover the debts, the B.o.D. shall notify the related Ministry thereof and call the General Assembly for an extraordinary meeting. (2) In a cooperative where share promissory notes have been already issued, if half of the resources of the cooperative remains to be bounced within the last year's balance sheet, the B.o.D. shall call the General Assembly for a meeting and address the situation to the information of the members. The B.o.D. shall at the same time notify the court and the related Ministry thereof. However, in case of cooperatives where the members are obliged with additional payments, if the deficit shown in the balance sheet is not covered up with the additional payments of the members within three months, the related Ministry shall be notified thereof. (3) Where it is deemed possible that the financial situation can be rectified, the court may delay the filing of an action for bankruptcy, upon the request of either the B.o.D. or one of the creditors, in which case it shall take the necessary precautions related to the protection and the maintenance of the resources of the cooperative, such as keeping the assets book or the appointment of an administrator.").

<sup>38</sup> See ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 30.

<sup>39</sup> See *Turkish Companies Using Bankruptcy Laws to Postpone Debts*, HÜRRIYET DAILY NEWS (Mar. 11, 2016), <http://www.hurriyetdailynews.com/turkish-companies-using-bankruptcy-laws-to->

Currently, the law bestows profound power and conviction upon judges. With broad discretion bequeathed to judges by the amendments, the healthy and legitimate operation of bankruptcy adjournment is now primarily contingent upon a judge's experience, knowledge, and diligence.<sup>40</sup> By duly executing this discretion, not only may judges help creditors and debtors realize anticipated outcomes from adjournment, but also, they can hamper debtors from exploiting the adjournment of bankruptcy regime.<sup>41</sup>

### 3. REQUIREMENTS TO ADJOURN BANKRUPTCY

Delivering an affirmative adjournment of bankruptcy decision is conditioned upon fulfilling the requirements laid out by relevant regulations. In light of the Turkish Supreme Court judgments and the articles from the Bankruptcy Code, the Commercial Code, and the Code of Cooperatives, the requirements necessitating fulfillment by a party seeking bankruptcy adjournment are explored as follows: (3.1) "over-indebtedness" of the entity; (3.2) court notification; (3.3) file request; (3.4) recovery plan submission; (3.5) "extraordinary time" limitations; (3.6) one-year rule; and last (3.7) expenses.

#### 3.1. "OVER-INDEBTEDNESS" OF THE ENTITY

While there is no particular definition of "over-indebtedness," relevant articles under the Codes that regulate adjournment of bankruptcy illuminate the meaning of over-indebtedness.<sup>42</sup> From these articles, over-indebtedness may be defined as a financial standing where "the assets of a corporation or a

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postpone-debts.aspx?pageID=238&nID=96316&NewsCatID=345. ("Some 484 legal bankruptcy suspension demands were placed in Turkey in 2012, 645 in 2013, and 720 in 2014, before exceeding 1,000 [in 2015].").

<sup>40</sup> See ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 33.

<sup>41</sup> See Ismail Kayar, *Iflasın Ertelenmesinde Borca Batıklık ve İyileştirme Projesi ile İlgili Yargıtay Kararlarının Değerlendirilmesi* [[The evaluation of supreme court decisions about negative balance at postponement of bankruptcy and improvement project]], 33 ERCIYES ÜNİVERSİTESİ İKTİSADI VE İDARI BİLİMLER FAKÜLTESİ DERGİSİ [U. ERCIYES MAG. ECON. & ADMIN. SCI.], 2009, at 19, 40-41.

<sup>42</sup> *Supra* note 16, art 179 ("... the liabilities of the capital company or the cooperative society are more than its assets . . ."); *supra* note 37, art. 63 ("... the resources of the cooperative are not sufficient any more to cover the debts . . ."); *supra* note 36, art. 376 ("... the assets are not sufficient to cover the receivables of creditors of the company . . .").

cooperative are insufficient to cover the monetary claims raised by creditors against the company or cooperative.”<sup>43</sup>

Under the Bankruptcy Code, over-indebtedness is specified as a ground for direct bankruptcy<sup>44</sup> and is used solely for debtor corporations and cooperatives. In this respect, Article 179 of the Bankruptcy Code states:

[i]f and when it is declared by the management and representative bodies or if the company or the cooperative society is in liquidation, by its liquidators or a creditor, or it is determined by the competent court that the capital company or the cooperative society is over-indebted pursuant to the interim balance sheet prepared in accord with the presumptive sale prices of either the capital company's or the cooperative society's assets, that capital company or cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding. Provided, however, that any one of the management and representative bodies or the creditors may demand adjournment of adjudication of bankruptcy by filing to the court a plan of recovery proving that the company or cooperative society may be recovered.

Pursuant to this Article, in the absence of over-indebtedness, there shall be no bankruptcy order, and similarly, no legally permissible adjournment of bankruptcy. Hence, over-indebtedness is a financial prerequisite a debtor must satisfy to be eligible for an adjournment of bankruptcy. In harmony with this Article, the Turkish Supreme Court stated, “. . . in order to adjourn the bankruptcy proceedings, the company demanding the adjournment of bankruptcy has to be over-indebted . . . .”<sup>45</sup> This statement, in conjunction with the Article, illustrates that over-indebtedness is a necessary prerequisite to bankruptcy adjournment.

To prove over-indebtedness, an interim balance sheet must be prepared. This document reflects presumptive sale prices of the debtor's

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<sup>43</sup> ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 55–58. See also Öztekin, *supra* note 10, at 53–54.

<sup>44</sup> Direct bankruptcy is a method where a creditor may file a bankruptcy suit against a debtor without conducting a prior executive proceeding.

<sup>45</sup> ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 57 (citing 19<sup>th</sup> Civil Chamber, 2010/101 E.; 2010/1740 K. (22.02.2010) (*Translation from Turkish to English made by the author - ed.*)). See also Öztekin, *supra* note 10, at 49 (citing 19<sup>th</sup> Civil Chamber, 2005/6312 E.; 2005/11314 K. (17.11.2005) (“In order to furnish a decision of whether or not to adjourn bankruptcy, the respective court must first determine whether the company requesting the adjournment is over-indebted.”)) (*Translation from Turkish to English made by the author - ed.*).

assets. According to Article 376 (3) of the Commercial Code, if there is “good cause” to suspect over-indebtedness, the B.o.D. shall prepare an interim balance sheet to disclose the fair market value of the assets owned by the entity. The interim balance sheet is central for a court when determining over-indebtedness because it is a core financial instrument evincing whether the entity’s assets cover creditors’ claims. Therefore, upon debtor-request of bankruptcy adjournment, the interim balance sheet must be submitted to the court in conjunction with the request.

Because of the complexities associated with determining the financial health of corporations and cooperatives, courts commonly assign expert witnesses to investigate interim balance sheets. Consequently, expert witness testimony largely governs whether the adjournment of bankruptcy will be granted. In accord with this procedure, the Turkish Supreme Court stated that:

[t]o adjudge the stock corporation as bankrupt on the basis of over-indebtedness, preliminarily, its over-indebtedness must be determined. Here, the expert witness made the finding that the stock corporation’s financial status failed to meet the threshold of over-indebtedness. Rather, the entity’s balance sheets reflected mere financial woes, insufficient for the court to adjourn the bankruptcy . . . .<sup>46</sup>

Clearly, the courts will look up to and rely upon the expertise of expert witnesses and will deny an adjournment request if the expert witness’ analysis reflects that the debtor is not over-indebted.

### 3.2. COURT NOTIFICATION

Over-indebtedness is a necessary threshold to satisfy in order to be able to adjourn bankruptcy. Articles 376 and 377 of the Commercial Code, Article 63 of the Code of Cooperatives, and Article 179 of the Bankruptcy Code collectively dictate that once the B.o.D. prepares an interim balance sheet manifesting over-indebtedness, the Board may seek refuge in adjournment of bankruptcy.

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<sup>46</sup> Öztekin, *supra* note 10, at at 53 (citing 19<sup>th</sup> Civil Chamber, 2004/9593 E., 2004/13439 K. (30.12.2004) (Translation from Turkish to English made by the author-ed.)).

First, however, to initiate the adjournment procedure, the debtor must notify the respective court regarding its over-indebtedness and file a claim for bankruptcy. Pursuant to Article 376 of the Commercial Code:

. . . . If it is clear in the report [prepared by the auditor upon the examination of an interim balance sheet] that the assets are not sufficient to cover the receivables of creditors of the company, the Board of Directors shall notify the commercial court of first instance at the location of the company's headquarters of this situation and shall file a claim for bankruptcy . . . .

Notably, there is a bifurcation in opinion among scholars regarding the relationship between the commencement of the adjournment procedure and the notification of over-indebtedness. According to one school of thought, unless the respective court is notified of the over-indebtedness, adjournment of bankruptcy cannot be requested, nor can the relevant judicial proceedings be initiated.<sup>47</sup> In other words, notifying the court of over-indebtedness is a formal requirement that must be satisfied in order to embark upon the adjournment of bankruptcy procedures.

The other school of thought, however, propounds that, regardless of whether the over-indebtedness notification is given, filing a claim for bankruptcy or requesting the adjournment of bankruptcy suffices to commence the adjournment procedure.<sup>48</sup> Pursuant to this conviction, a claim filed for bankruptcy or a request submitted for the adjournment of bankruptcy embraces an implicit notification of over-indebtedness. Thus, even if there is no prior notification of over-indebtedness given to the court, it is possible to effectuate adjournment of bankruptcy. In tandem with this idea, the Turkish Supreme Court held, that, “[t]he request filed for the adjournment of bankruptcy also amounts to the notification of over-indebtedness given to the court.”<sup>49</sup> Thus, the Court appears to obviate the need for prior notification.

Behind the requirement that a debtor ought to notify the court of over-indebtedness, is a desire to protect creditor interests and to prevent the debtor

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<sup>47</sup> See ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 64.

<sup>48</sup> See Öztekin, *supra* note 10, at 53.

<sup>49</sup> *Id.* at 50 (citing 19<sup>th</sup> Civil Chamber, 2005/448 E., 2005/3753 K. (07.04.2005) (Translation from Turkish to English made by the author –ed.)).

from pursuing new contractual relationships that may exacerbate the over-indebtedness and extend financial instability to third parties.<sup>50</sup> Accordingly, rather than enforcing Article 376 (3) *verbatim et literatim* and demanding an explicit notification of over-indebtedness, concentration should focus upon notifying creditors and third parties of the financial downfall of the company. In accord with this goal, as seen from the foregoing judgment, the Turkish Supreme Court adopts a lenient approach to the format of over-indebtedness notification, which can be either explicit or implicit (respectively, filing a claim for bankruptcy or lodging a request for the adjournment of bankruptcy), and gives precedence to the reasoning behind the over-indebtedness notification.

According to Article 179 (1) of the Bankruptcy Code, parties authorized to notify the court of over-indebtedness are creditors, management and representative bodies, and liquidators if the company or the cooperative is in liquidation. Most common, the respective company's management and representative bodies bear the burden of diagnosing over-indebtedness and subsequently notifying the court. Both Article 376 (3) of the Commercial Code and Article 63 of the Code of Cooperatives confer this responsibility upon the B.o.D.

To fulfill this responsibility and avoid possible criminal liability arising from Article 345 (a) of the Bankruptcy Code and Article 553 (1) of the Commercial Code,<sup>51</sup> where there is good cause to suspect over-indebtedness, the B.o.D. must prepare an interim balance sheet premised upon the going-concern value and liquidation value of assets and shall then submit it to the auditor for scrutiny. Once the auditor receives the balance sheet, he or she must produce a report and if the report reflects that the assets are insufficient to cover the claims of the company's creditors, the B.o.D. must notify the commercial court of first instance at the location of the entity's headquarters. The B.o.D. cannot be relieved of this responsibility (following the amendments

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<sup>50</sup> See ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 64–65.

<sup>51</sup> *Supra* note 16, art. 345 (a) (“If the Board of Directors or liquidators do not file a claim for bankruptcy stating that the assets of company do not cover the claims of the company's creditors, there will be a sanction of imprisonment from ten days to three months upon the complaint lodged by a creditor.”); *supra* note 36, art. 553 (1) (“Founders, the members of the Board of Directors, directors, and liquidators are held accountable to the company, shareholders, and creditors if they wrongfully breach their duties emerging from the law and the articles of association.”).

to the articles of association), nor can the General Assembly pass a resolution preventing the B.o.D. from notifying the court of over-indebtedness.

When informing the court of over-indebtedness, the B.o.D. should also submit the interim balance sheet evincing the entity's financial decline, along with the notification of over-indebtedness. If the B.o.D. does not present the interim balance sheet in conjunction with the notification, the court may request the issuance and submission of it from the Board.

According to Supreme Court precedent, once all documents are received, the court should assign an expert witness to examine the documents to find whether or not the entity is over-indebted. Notably, a judgment not founded upon expert witness examination contravenes precedent and very likely results in a reversal of the judgment.<sup>52</sup>

### 3.3. FILE REQUEST

Once over-indebtedness of the corporation or cooperative is established by a judicial judgment, if the entity desires to pursue adjournment, an authorized party must request an adjournment of bankruptcy. Without an explicit or implicit statement reflecting the intent of the entity to seek an adjournment of bankruptcy, the court, *sua sponte*, cannot adjourn bankruptcy. Pertinent articles of the Commercial Code arguably read that an adjournment of bankruptcy may not be requested absent a claim for bankruptcy. For example, Article 376 (3) of the Commercial Code states that,

if it is clear in the report that the assets are not sufficient to cover the receivables of creditors of the company, the BoD [Board of Directors] shall notify the commercial court of first instance at the location of the company's headquarter of this situation and shall file a claim for bankruptcy.

In light of this article, some scholars assert that bankruptcy adjournment may be requested, either along with a claim lodged for bankruptcy, or throughout bankruptcy adjudication emanating from the notification of over-

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<sup>52</sup> See ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 73 (citing 19<sup>th</sup> Civil Chamber, 2001/6232E., 2001/8385K. (14.02.2001)).

indebtedness.<sup>53</sup> In other words, it is not possible to file a request solely directed to adjourn bankruptcy.

The Supreme Court however, generally strays from this hardened requirement and adopts a stance corroborating the individuality of the adjournment of bankruptcy request. The Supreme Court perceives the adjournment of bankruptcy to be an independent path and does not condition the admissibility of the adjournment of bankruptcy request upon its companionship with a bankruptcy claim or with the existence of an over-indebtedness notification. To illustrate, the Turkish Supreme Court held that,

[a]ccording to Article 324 (2) of the [former] Commercial Code, the adjournment of bankruptcy request embraces the notification of over-indebtedness. Therefore, the respective court should initially determine whether the stock corporation requesting the adjournment of bankruptcy is over-indebted and if it is over-indebted, it should be examined whether it is probable to ameliorate this stock corporation's financial situation.<sup>54</sup>

In a modern judgment, the Supreme Court, in 2014, maintained its stance of the individual nature of the adjournment of bankruptcy request. In this judgment, the Court stated that, “. . . the adjournment of bankruptcy request encompasses the mandatory [over-indebtedness] notification. Therefore, even if there is a waiver of the request, if the stock corporation is over-indebted, it should be adjudged bankrupt . . . .”<sup>55</sup>

In light of these judgments, the Turkish Supreme Court does not require an adjournment of bankruptcy request to be accompanied by a bankruptcy claim, nor does the Court require prior over-indebtedness notification.

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<sup>53</sup> *Id.* at 74-75 (citing Hakan Pekcanitez, *İflasın Ertelenmesi [Postponement of Bankruptcy]*, 79 *İSTANBUL BAROSU DERGİSİ [İSTANBUL BAR ASSOCIATION MAGAZINE]* 325, 358 (2005)). SEYİTHAN DELİDUMAN, *İFLASIN ERTLENMESİNİN ETKİLERİ [EFFECTS OF POSTPONEMENT OF BANKRUPTCY]* 32 (2008); Oğuz Atalay, *İflasın Ertelenmesi [Postponement of Bankruptcy]* 47 *BANKACILAR MAGAZİNEİ [BANKERS MAGAZINE]* (2003).

<sup>54</sup> ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 75 (citing 19<sup>th</sup> Civil Chamber, 2004/9014E., 2005/2429K. (10.03.2005) (*Translation from Turkish to English made by the author - ed.*)).

<sup>55</sup> 23<sup>RD</sup> CIVIL CHAMBER, 2014/3784E., 2014/3888K. (2014), <http://www.forumadalet.net/index.php?topic=2289.0> (*Translation from Turkish to English made by the author - ed.*). See also ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 5, at 75 n.316 (citing a Supreme Court judgment stating: “The submission of a request for the adjournment of bankruptcy amounts to the notification of over-indebtedness given to the court. Accordingly, there is no need to file a separate claim for bankruptcy.” (*Translation from Turkish to English made by the author - ed.*)).

The next question demanding clarification is who constitutes an authorized party capable of filing a request for the adjournment of bankruptcy? According to Article 179 of the Bankruptcy Code, “any one of the management and representative bodies or the creditors” may file a request for the adjournment of bankruptcy by submitting a recovery plan manifesting that the recovery of the entity is feasible. At this juncture, it is necessary to distinguish the parties authorized to notify the court of over-indebtedness from those authorized to file a request to adjourn bankruptcy.

Article 179 of the Bankruptcy Code lists the parties authorized to notify the court of over-indebtedness: (i) the management and representative bodies; (ii) liquidators of the corporation or cooperative if it is in liquidation; and (iii) creditors. However, according to the same article, the parties authorized to present a request for adjournment are (i) any one of the management and representative bodies and (ii) creditors. Notably, Article 179 grants liquidators the power to notify the court of over-indebtedness, and yet does not give them authority to request a bankruptcy adjournment.

According to Article 540 of the Commercial Code, liquidators, upon taking their office, shall draw up a balance sheet in conjunction with an inventory spreadsheet and shall submit it to the General Assembly for approval. Moreover, pursuant to Article 542 (c) of the Commercial Code and Article 179 of the Bankruptcy Code, where the liquidators deduce that the corporation is over-indebted, they shall notify the commercial court of first instance at the location of the corporation’s headquarters. Here, of popular scholarly debate, is whether liquidators may demand the adjournment of bankruptcy along with a notification of over-indebtedness.

Liquidation occurs following an entity’s dissolution. The grounds of liquidation are listed in Articles 529, 530, and 531 of the Commercial Code. With the initiation of the liquidation, the primary duties of liquidators are to<sup>56</sup> (i) represent the entity in all transactions pertaining to the liquidation process, including reaching settlements, concluding arbitration agreements, and even, where deemed necessary, effecting new transactions; (ii) call in share capital; (iii) realize the entity’s assets; (iv) fulfill the entity’s legal obligations; (v)

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<sup>56</sup> See generally *supra* note 36, art. 542.

furnish the balance sheet; (vi) notify the court of over-indebtedness if over-indebtedness is established; and (vii) avert engagement in legal transactions not required for the regular operation of liquidation.

Upon conclusion of the liquidation, liquidators file a request to the commercial register to have the entity's name deleted. Clearly, the task of liquidators is to dissolve the corporation or cooperative, essentially killing the entity, rather than reorganizing it. By adjourning bankruptcy, the entity lives and the main objective is to aid the corporation or cooperative overcome its financial obstacles.

Thus, as both the Commercial Code and the Bankruptcy Code have no language permitting liquidators to request bankruptcy adjournment, likely because of the opposing motives and goals of liquidation and adjournment, liquidators do not have vested power to request bankruptcy adjournment.

Once an authorized party files a request for bankruptcy adjournment, the next issue turns to how the court assesses the request. The focal point of the court's assessment is the alleged over-indebtedness of the corporation or cooperative. At the conclusion of the evaluation, the court may rule in three different ways.<sup>57</sup> First, the court may find that over-indebtedness is present, but the entity's financial position may be remedied in a recovery plan. Here, the adjournment of bankruptcy request is favored. Second, the court may find over-indebtedness, but that the entity is unsalvageable. Here, the corporation or cooperative is adjudged bankrupt. Last, the court may find that no over-indebtedness exists, and accordingly, will dismiss the adjournment of bankruptcy request.

When evaluating the adjournment of bankruptcy request, the court should consider entering an interim order to avoid further financial harm to the entity. Today, it is well accepted that a court may enter an interim order to maintain the entity's financial status until the evaluation of the adjournment request is concluded.<sup>58</sup>

According to Article 179 (a) (1), upon receipt of the adjournment of bankruptcy request, the court shall appoint an administrative receiver and

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<sup>57</sup> *Supra* note 16, art. 179 (a) (10).

<sup>58</sup> *See generally* Öztekin, *supra* note 10, at 39-83; ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 95-98.

either deprive the B.o.D. of its disposal power or make the Board's actions contingent upon the consent of the administrative receiver. In addition, Article 179 (a) (3) prompts the court to employ any measures deemed necessary to conserve the entity's assets, ensure the maintenance of the entity's operation, and, last, enable the healthy execution of the recovery plan.

In sum, even absent without an express regulation giving the court authority to grant an interim injunction while reviewing the adjournment request, the synthesis of the above-mentioned sub-articles paves the way for the court to grant an interim injunction. However, when granting an interim injunction, the court should practice caution and be mindful of any adverse effects upon creditors' interests. Therefore, unless the expert report establishes the over-indebtedness of the applicant and finds its recovery plan serious and convincing, the court should avert granting an interim injunction to maintain equilibrium between the creditors and debtor.<sup>59</sup> Clearly, the expert's report influences the court's decision of whether or not an interim injunction is necessary. Resultantly, essential to proper execution of the bankruptcy adjournment is a timely filed expert witness report.<sup>60</sup>

#### 3.4. RECOVERY PLAN SUBMISSION

Because approval of the adjournment of bankruptcy request is fundamentally contingent upon the prospect of financial recovery, it is essential for the respective corporation or cooperative to show the likelihood of financial rehabilitation. Here, the recovery plan, prepared and submitted by the party requesting adjournment, reflects the feasibility of financial recuperation.

A recovery plan is a document where the applicant endeavors, not only to prove that the entity's financial reclamation is probable, but also to outline the measures necessary to revive the entity from its financial woes. Prior to the 2016 amendments, legislation had no criteria with which a recovery plan had to conform. However, the 2016 amendments dictated necessary standards that

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<sup>59</sup> ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 98.

<sup>60</sup> *Id.*

a recovery plan must meet. According to the new version of Article 179 (2) of the Bankruptcy Code, a recovery plan must now incorporate, in detail, objective and actual resources and precautions, including new capital contributions (in cash), and further, outline how management expenses and working capital shall be covered throughout adjournment.

Today, it is well recognized that an applicant's recovery plan is the main element controlling a court's decision of whether or not to grant an adjournment of bankruptcy request. Therefore, it is crucial for the applicant to submit a recovery plan that is both comprehensive and demonstrative of probable financial recovery. In harmony with this, scholars and judiciary often find that it is fundamental for a recovery plan to incorporate information regarding:<sup>61</sup> (i) the reasoning upon which the adjournment of bankruptcy request is founded; (ii) measures to be taken to revive the corporation or cooperative from its financial failure; (iii) methods to be employed to recruit objective and actual resources, including new capital contribution in cash; (iv) new investment plans that may contribute to the rectification of the entity's financial position and how these investment plans will be executed; and (v) the approximate period of time that is needed to restore the entity's financial position.

Significantly, simply because a recovery plan conforms to the requirements laid out above is not, in itself, sufficient to have the adjournment of bankruptcy request granted. Article 179 (3) of the Bankruptcy Code expounds that a recovery plan must be serious and persuasive and obliges the applicant to submit specific documents in conjunction with the adjournment request. Pursuant to the article, documents requiring submission are:<sup>62</sup> (i) the due dates and specifics of existing debts; (ii) creditors' addresses; (iii) lists displaying stocks, the stocks' amounts and waiting periods; (iv) the most recent balance sheet and income table submitted to tax authorities; and (v) trade registry certificates. In addition to these papers, the applicant is encouraged to submit

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<sup>61</sup> ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 99-105; Öztekin, *supra* note 10, at 51-52.

<sup>62</sup> *Supra* note 42, art. 179 (3) (“(3) When seeking adjournment, the applicant shall provide the court with the due dates and specifics of existing debts, creditors' addresses, lists displaying stocks, the stocks' amounts and waiting periods, the most recent balance sheet and income table submitted to tax authorities, trade registry certificates, and other information and documents corroborating the seriousness and persuasiveness of the recovery plan.”) (*Translation from Turkish to English made by the author - ed.*).

any supplementary documents and data that aid to establish the seriousness and persuasiveness of a recovery plan.

According to Article 179 (4) of the Bankruptcy Code, if the applicant fails to submit any or all of the preceding documents, the court will grant the applicant a two-week grace period to complete the adjournment of bankruptcy application. Where the applicant fails to submit all the documents required by the law within this two-week grace period, the court shall regard the adjournment of bankruptcy request as unproven and shall adjudge the applicant bankrupt upon the identification of over-indebtedness.<sup>63</sup>

When all the required documents are submitted, the court shall begin to evaluate the recovery plan. During evaluation, the court primarily concentrates upon the seriousness and persuasiveness of the recovery plan, the appropriateness of the measures and methods propounded by the applicant, the maintenance of the equilibrium of rights between the creditors and debtor, and the attainability of the recovery plan. Notably, the court is prohibited from re-designing the submitted recovery plan, designating measures and methods different from the ones set forth in the recovery plan, and may not replace these measures and methods with new ones. However, in accord with the changing circumstances and criticisms raised by the court, the applicant may invoke Article 179 (a) (8) of the Bankruptcy Code and revise the recovery plan once throughout the adjournment proceedings.<sup>64</sup>

### 3.5 “EXTRAORDINARY TIME” LIMITATIONS

An extraordinary time limit is regulated under Articles 317-329 (a) of the Bankruptcy Code. In light of Articles 317 and 318, an extraordinary time limit is an opportunity conferred upon bona fide debtors who cannot fulfill their contractual obligations due to economic depression. An extraordinary time

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<sup>63</sup> *Id.* (4) (“(4) If the applicant fails to provide the preceding documents with the adjournment of bankruptcy request or fails to submit missing documents within a two-week grace period, the applicant shall be adjudged bankrupt upon the identification of over-indebtedness.”) (*Translation from Turkish to English made by the author - ed.*).

<sup>64</sup> *Id.* (a) (8) (“The capital company or cooperative society may submit a revised recovery plan once during adjournment proceedings.”) (*Translation from Turkish to English made by the author - ed.*).

limit becomes available for bona fide debtors who reside in particular regions specified by the Council of Ministers in the event of an economic depression.

To benefit from an extraordinary time limit, the requirements imposed by Article 318 of the Bankruptcy Code are: (i) economic depression; (ii) a bona fide debtor who cannot perform contractual obligations; (iii) a debtor residing in a region specified by the Council of Ministers; and, (iv) a prospect of a financial recovery and, accordingly, fulfillment of contractual obligations at the cessation of an extraordinary time limit.

Article 329 (a) of the Bankruptcy Code regulates the nexus between an extraordinary time limit and the adjournment of bankruptcy regime. This article states:

(1) In the event that a capital company or cooperative society is granted an extraordinary time limit, it will not be eligible for the adjournment of bankruptcy under Article 179 et sequent for one year following the end of the time limit. (2) If the bankruptcy of a capital company or a cooperative society is adjourned pursuant to Article 179 et sequent, an extraordinary time limit cannot be granted for one year following the end of the period of adjournment.

The language of this Article evidences a desire to eliminate exploitation of both extensions and adjournments. However, a tension remains in the Article, as there is also a desire to allot the company or cooperative with sufficient time to reorganize its affairs in hopeful economic reorganization. In this vein, Article 329 (a) of the Bankruptcy Code causes scholarly divergence. The majority opines that, while over-indebtedness is not a requirement for obtaining an extraordinary time limit, this is not determinative of whether or not the entity will become over-indebted within a year subsequent to the cessation of an extraordinary time limit.<sup>65</sup> Therefore, supporters of this view believe that a corporation or cooperative, over-indebted within a year following the end of an extraordinary time limit, should be able to find recourse in adjournment, so long as there is a likelihood of financial recovery.

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<sup>65</sup> See ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 105-06. See also Nükhet Eroğlu, İflasın Erteleme Talebi Üzerine Alınabilecek Tedbirler ve Erteleme Kararının Sonuçları (2014) (unpublished LL.M. thesis, Başkent Üniversitesi Sosyal Bilimler Enstitüsü İcra ve İflas Hukuku Anabilim Dalı Özel Hukuk Yüksek Lisans Programı).

There are, however, scholars skeptical of the majority view regarding the balance of interests between creditors and debtors. Members of this assessment assert that allowing debtors to consecutively benefit from an extraordinary time limit and the adjournment of bankruptcy regime compels the creditor to “coercive” sacrifice and disturbs the equilibrium between the interests of creditors and debtors.

Here, by revising the language of Article 329 (a) of the Bankruptcy Code and espousing a more resilient approach to the relationship between an extraordinary time limit and the adjournment of bankruptcy regime the law will prove constructive for the interests of both creditors and debtors. In this respect, Article 329 (a)’s prohibitory language based upon the “mutual exclusivity” of an extraordinary time limit and the adjournment of bankruptcy regime should be tailored and courts should be vested with discretionary authority allowing them to conduct a case-by-case analysis within the context of Article 329 (a).

### **3.6 ONE-YEAR RULE**

With the 2016 amendments to the adjournment of bankruptcy regime, it is no longer permissible for applicants, who already benefited from the adjournment of bankruptcy, to request a further adjournment for a year starting from the cessation of the previous postponement period, including the extension period. According to Article 179 (5) of the Bankruptcy Code: “A capital company or cooperative society, which has already benefited from the adjournment of bankruptcy, cannot apply for a further adjournment for a year starting from the expiry of the previous adjournment period, including the extension period.”<sup>66</sup>

Undoubtedly, this Article seeks to maintain a fair and equitable balance between creditors and debtors by preventing the debtor from exploiting the adjournment of bankruptcy process in pursuit of an unending stay of executive proceedings.

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<sup>66</sup> *Translation from Turkish to English made by the author - ed..*

### 3.7. EXPENSES

Although not directly regulated under the Bankruptcy Code, it is well accepted that money going towards expenses associated with the adjournment of bankruptcy request must be deposited into the respective court's treasury to initiate judicial proceedings concerning the adjournment request. In consonance with this, the Turkish Supreme Court held:

By virtue of the relation between public order and bankruptcy, the party requesting the adjournment of bankruptcy is required to deposit money with the respective court's treasury to meet the expenses that will be originating from: (i) announcing the adjournment request; (ii) notifying the relevant third parties of the adjournment request; (iii) appointing an administrative receiver; and, (iv) measures that will be taken by the court . . . .<sup>67</sup>

Here, even if an applicant fulfills the other legal requirements, unless the required money is deposited with the respective court's treasury, not only will the adjournment request be dismissed, but the entity will also be adjudged bankrupt.<sup>68</sup>

In sum, the recent amendments to the Turkish Bankruptcy Code in bankruptcy adjournment seek to balance the rights of creditors with the rights and needs of financially troubled entities. The 2003 amendments, in conjunction with the 2016 amendments, furnish creditors with a stronger voice in court proceedings, prevents forum-shopping, demands greater evidence of viability in an entity's recovery plan, and gives the entity a better chance for financial recovery by enacting a "stay" on proceedings. Further, because the law now requires an interim balance sheet to be prepared, courts are better able to determine whether the company or cooperative is salvageable. However, while these additions all contribute to an "improved" Bankruptcy Code, this study will illustrate how the U.S. Bankruptcy Code treats businesses in financial distress and will proceed to illustrate how the Turkish Bankruptcy Code may adopt certain provisions of the U.S. Code to enhance its efficacy in balancing the rights of creditors and debtors.

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<sup>67</sup> ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 106.

<sup>68</sup> *Id.* at 107.

#### 4. CHAPTER 11 REORGANIZATION

To better understand the advantages and disadvantages of bankruptcy adjournment, it is auspicious to compare Turkey's Execution and Bankruptcy Code with the United States Bankruptcy U.S. Code (hereinafter U.S. Code). This title compares the similarities and differences of the U.S. Code's Chapter 11 (commonly referred to as the "reorganization" chapter) with Turkey's own "reorganization" regime (adjournment of bankruptcy) by investigating the following Chapter 11 aspects: (4.1) debtor eligibility; (4.2) debtor preparation (including subheadings 4.2.1-4.2.7); (4.3) the U.S. Code's protective powers and who controls the entity (including subheadings 4.3.1-4.3.3); (4.4) rights exercised by the debtor in possession (hereinafter D.I.P) and creditors (including subheadings 4.4.1-4.4.8); (4.5) plan confirmation; and finally, (4.6) options for the debtor if the case fails. Throughout this examination, this study compares and contrasts the two codes and concludes the comparison with recommendations aimed at strengthening and refining the Turkish adjournment of bankruptcy.

##### 4.1. ELIGIBILITY

First, while the bankruptcy codes of both Turkey and the United States provide debtors with the opportunity to reorganize, the two codes diverge in regarding who or what constitutes a qualifying debtor. Under adjournment, an insolvent corporation, a struggling cooperative society,<sup>69</sup> or a creditor may petition the court for a bankruptcy adjournment.<sup>70</sup> However, in the interest of protecting small businesses and large entities alike, the U.S. Code is more flexible.

Pursuant to 11 U.S.C. §§ 109 (a) & (d), to file a Chapter 11 petition, a debtor must reside, be domiciled, or have property within the United States and may be a railroad, a qualifying debtor under Chapter 7 (with certain exceptions), or a corporation. This definition allows for individuals, small

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<sup>69</sup> See *supra* note 37, art. 1 (As amended by Law No. 3476) ("A cooperative is defined as a body with variable members, variable capital and legal identity that is established by natural and public legal entities and private administrations, municipalities, villages, societies and associations in order to ensure and maintain certain economic interests and specifically the needs of their members toward professional life and living standards by means of mutual assistance, solidarity and service as trustees to each other.").

<sup>70</sup> See also *supra* note 42, art. 179.

businesses, and large corporations to pursue reorganization. In addition, the U.S. Code specifically dictates that a “small business debtor” may file for Chapter 11 protection and generally places the cap of aggregated debts at \$2,000,000.00.<sup>71</sup>

Akin to Turkish law, under the U.S. Code, creditors may also petition for reorganization (recovery). Under the Turkish Code, if a creditor is aware of the financial woes of a corporation or cooperation, a creditor may file for adjournment of bankruptcy, stipulating that the creditor supplies the court with an effective recovery plan.<sup>72</sup> Similarly, the U.S. Code grants creditors the ability to file a Chapter 11 involuntary petition, provided that the creditor holds a statutorily defined claim against the debtor.<sup>73</sup> Thus, while both codes permit creditors to instigate reorganization procedures, when compared to the U.S. Code, the Turkish Code is more limited in its allowance of who may request bankruptcy adjournment. To allow more entities to benefit from adjournment, this definition may easily be expanded to include individuals and small businesses. By expanding the definition of debtor, the Turkish domestic economy will favor, not only its large companies, but also, its “mom-and-pop” shops and encourage the growth of a stronger middle and upper-middle-class population.

#### 4.2. DEBTOR PREPARATION

Both codes of the United States and Turkey outline specific requirements a debtor must satisfy prior to seeking reorganization. To receive an adjournment in Turkey, the debtor must meet the threshold of over-indebtedness, notify the court of over-indebtedness, file a request to adjourn bankruptcy, submit a recovery plan, deposit costs of adjournment into the court’s treasury, be in accord with the one-year rule, and must not have benefitted from an extraordinary time limit.<sup>74</sup> Debtors in the United States must also fulfill statutory requirements. These requirements resemble those outlined by the Turkish Code, but naturally, contrast with others.

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<sup>71</sup> 11 U.S.C. §§ 101 (51C)-(51D) (2010).

<sup>72</sup> See *supra* note 16, art. 179.

<sup>73</sup> 11 U.S.C. §§ 303 (a)-(b) (2010).

<sup>74</sup> See *supra* pp. 17-34 (Section B: Requirements to Adjourn Bankruptcy).

#### 4.2.1. THE PETITION

First, to commence filing under the U.S. Code, the debtor must file (if voluntarily), a voluntary petition.<sup>75</sup> The voluntary petition reflects the debtor's general identification, such as name, address, social security number (or tax identification), the Chapter the debtor intends to file under, and the debtor's plan, or the debtor's intent to file a plan. Here, clearly in contrast to adjournment of bankruptcy, the U.S. debtor is not required to immediately submit a plan to the court. Rather, unlike Turkish law, a debtor in the United States may submit its plan of reorganization following the filing for bankruptcy. Once a voluntary petition is filed, the debtor assumes the debtor in possession<sup>76</sup> identity, which grants the debtor the same powers that a trustee has in other Chapter filings.<sup>77</sup>

#### 4.2.2. CREDITOR INFORMATION

In addition to the petition, and similar to the Turkish debtor's responsibility to submit a list of known creditors (albeit, in its recovery plan),<sup>78</sup> the U.S. debtor must, in accordance with Rule 1007 of the Federal Rules of Bankruptcy Procedure, dictate an address list of foreseeable creditors to be included on Schedules D (creditors holding secured claims), E/F (creditors holding unsecured claims), G (creditors with executory contracts and unexpired leases), and H (co-debtors). Further, when filing Chapter 11, the debtor must complete a list of its twenty largest unsecured creditors and provide the names, addresses, and claim amounts.<sup>79</sup> Also as outlined by Rule 1007, the debtor, if a corporation, must additionally file a corporate ownership interest statement. Should the petition be involuntary, the debtor has seven days to include the creditor contact list.<sup>80</sup>

Notably, unlike in Turkey, where courts take a "hands-on" approach to determine whether the debtor is "over-indebted" and grant an adjournment of

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<sup>75</sup> See 11 U.S.C. § 301 (2005).

<sup>76</sup> See 11 U.S.C. § 1101(1) (1978).

<sup>77</sup> 11 U.S.C. § 1107 (a) (1984).

<sup>78</sup> See *supra* note 42, art. 179 (3).

<sup>79</sup> FED. R. BANKR. P. 1007(d).

<sup>80</sup> *Id.* at 1007(a)(2).

bankruptcy, in the United States bankruptcy courts do not investigate, at this primary stage, whether the debtor is sufficiently “over-indebted” to allow it to file Chapter 11. Perhaps this is because in Turkey, where liquidation and bankruptcy are largely synonymous, a debtor wishing to reorganize has no alternative but to adjourn bankruptcy, while, in the United States, different Chapters provide a debtor with an initial choice of reorganization or liquidation. This is clearly an advantage for debtors in the United States. Thus, rather than the U.S. Code demanding a minimum debt in order to file Chapter 7 (liquidation), the U.S. Code places qualifying numbers for filing under Chapter 13<sup>81</sup> and if the debtor’s debts exceed those of Chapter 13, the debtor must file under Chapter 11 if the debtor wishes to pursue reorganization.

#### 4.2.3. CREDIT COUNSELING

Next, unlike Turkish law, to file for Chapter 11 protection, the debtor, if an individual (or joint petition), must submit to the court, within 180 days prior to filing, a certificate of credit counseling.<sup>82</sup> Mandatory under the Bankruptcy Abuse Prevention and Consumer Protection Act (B.A.C.P.A.),<sup>83</sup> this regulation seeks to prevent fraud and to provide financial education to debtors prior to filing for bankruptcy. The Turkish Code does not require such a document to adjourn bankruptcy.

#### 4.2.4. SCHEDULES

Along with filing the petition, creditor list, and credit counseling (if applicable), under Rule 1007(b) of the Federal Rules of Bankruptcy Procedure, the debtor, either at the time of filing, or within the designated timeline,<sup>84</sup> must file with the court the following documents: schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, statement of financial affairs, a copy

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<sup>81</sup> See 11 U.S.C. § 109 (2010).

<sup>82</sup> *Id.* at. §§109(h)(1) & 111.

<sup>83</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

<sup>84</sup> FED. R. BANKR. P. 1007(c).

of income from an employer within sixty days prior to filing (if applicable), and report any interest a debtor has, as defined in § 521(c) of the Code.<sup>85</sup> These requirements do parallel Turkish law, in that, the Turkish entity must provide the court with its assets, liabilities, and other documents to help the court understand the financial status. However, the time to provide the Turkish court with these documents is earlier than that explicated by the U.S. Code.

Because adjournment of bankruptcy is an innovation to avoid liquidation, the court must, at first blush, determine the debtor's viability. However, in the United States, the U.S. Code provides some breathing room for the debtor regarding the time limits to file these additional documents and allows the debtor to seek extensions *via* motion, (given that the reasoning is for a good cause and if the proper parties are notified).<sup>86</sup> Notably, it is not uncommon for debtors in the United States to file under emergency circumstances. By filing an emergency petition, the debtor gains the protection of the automatic stay. Then, the debtor is given time to collect all required documents and information. This breathing room is essential to a healthy functioning bankruptcy system.

#### 4.2.5. SMALL BUSINESS DEBTOR: ADDITIONAL REQUIREMENTS

While Chapter 11, for the most part, is an option for “larger” entities, small businesses (and on occasion individuals), may also file Chapter 11. It is because of this flexibility that requires the small business debtor to file additional documents. First, to qualify under this section, the debtor must satisfy the definition of “small business debtor” under the Code.<sup>87</sup> Once a debtor is found eligible, the duties and responsibilities of an overseeing U.S. Trustee expand. Typically, small business cases do not have large creditors (or creditors interested in forming committees) and thus, the trustee must have a method for greater oversight. Resultantly, the U.S. Code dictates additional supervision under 11 U.S.C. § 1116. Pursuant to this section, the D.I.P. must also file (with

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<sup>85</sup> 11 U.S.C. § 521(b) (2014).

<sup>86</sup> See FED. R. BANKR. P. 1007(a)(5), (c).

<sup>87</sup> 11 U.S.C. § 101(51D) (2010).

the petition or within seven days if involuntary), a balance sheet, statement of operations, cash-flow statement, and Federal income tax return (or, if not filed or prepared, the debtor must file a statement swearing to the same).

Along with these documents, small business debtors must also file intermittent reports that reflect its profitability, cash disbursements and receipts (comparing these with prior reports), and demonstrate continued compliance with post-petition requirements.<sup>88</sup> These additional requests allow the trustee to maintain a watchful eye on the debtor and quickly identify whether or not the debtor is capable of plan confirmation. Should Turkish law allow small business debtors to take advantage of its reorganization provision and monitor them as the U.S. Code outlines, it is likely that the Turkish economy will strengthen, as these entities are numerous and may be considered the lifeblood foundation of all domestic economies.

#### 4.2.6. THE PLAN

While bankruptcy codes of both Turkey and the United States dictate that the debtor must submit a plan, the U.S. Code is again, more lenient regarding the statutory timeframe of submission (likely because Turkish courts must immediately evaluate whether a debtor is over-indebted, but financially recoverable). Pursuant to the U.S. Code, a debtor (voluntary or involuntary) may file a plan with the petition, or at any time during a case.<sup>89</sup> Further, the U.S. Code gives the debtor 120 days following the petition's filing, to be the sole entity capable of proposing a plan.<sup>90</sup> In the event the debtor<sup>91</sup> fails to file a plan after the 120 days, or is unable to confirm a plan within 180 days, other interested parties may propose a plan.<sup>92</sup> Notably, the courts have judicial discretion to alter these dates, for cause, given that the extended timeframe

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<sup>88</sup> *Id.* § 308.

<sup>89</sup> *Id.* § 1121(a).

<sup>90</sup> *Id.* § 1121(b).

<sup>91</sup> Note: the small business debtor must follow a slightly different timeline to the 'regular' Chapter 11 debtor. Regulations of this timeframe is found in 11 U.S.C. § 1121(e) (2005).

<sup>92</sup> 11 U.S.C. § 1121(c) (2005).

falls within the dates dictated by the U.S. Code and the proper parties are notified.<sup>93</sup>

Historically, critics categorized the notion of allotting a debtor with greater time to reorganize, to be abuse. However, Elizabeth Warren and Jay L. Westbrook, dismiss this argument and argue,

[a]ny thoughtful evaluation of Chapter 11 eventually boils down to weighing costs and benefits. It is clear that any legal system that allows for reorganization will incur costs from delayed liquidation that must be balanced against the benefits of reorganization. The problem of costs is often overstated, but costs remain substantial nonetheless. The professional fees and other expenses associated with a Chapter 11 case diminish the value available to creditors, a consequence that is felt most sharply if the reorganization fails and liquidation follows. In addition, the time spent in bankruptcy itself leads to the loss of value, comprising an indirect cost. On the other side of the ledger, it is generally thought that successful reorganization pre- serves value, especially going-concern value, compared with a liquidation option. A reorganization is also thought to produce substantial positive externalities, such as maintaining employment, preserving the local tax base, and advancing community stability. To ensure that these benefits exceed the costs of delay and the administrative expense of reorganization, a reorganization system should move cases through the system quickly, giving an opportunity to those with a real chance of success and disposing of those that were destined for liquidation.<sup>94</sup>

Clearly, Warren and Westbrook believe a balance in equity must be reached regarding debtor and creditor rights. However, both scholars find that the benefits of a successful reorganization outweigh the costs of a longer timeframe.<sup>95</sup> This is an idea that the Turkish Parliament should revisit. Because the amendments to the Turkish Code seek to minimize the time a debtor may take to “recover,” Warren and Westbrook would argue that this strategy likely inhibits the prospects of successful recovery.

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<sup>93</sup> *Id.* § 1121(d)(1)-(2).

<sup>94</sup> Elizabeth Warren & Jay L. Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 625 (2009).

<sup>95</sup> See generally *id.* (This finding was shown through Warren and Westbrook’s studies on the success rates of reorganization where debtors are granted greater time to reorganize).

Interestingly, while the Turkish recovery plan contrasts with the American reorganization plan, there are similarities. Generally, both plans must be comprehensive and realistic. If a debtor is reorganizing under the U.S. Code, the debtor's plan must: a) categorize each class and treat each class the same (unless by creditor agreement, treated less than others within that class);<sup>96</sup> b) dictate any impaired claims under the plan and explain how they will be treated; c) specify any unimpaired claims; and d) illustrate how the plan will succeed and how creditors will continue to be paid.<sup>97</sup> These requirements are not unlike those demanded by the new amendments under Turkish adjournment.<sup>98</sup> Both laws seek to treat creditors equitably and fairly, while simultaneously giving the debtor a chance to recover and reorganize.

However, the plans contrast greatly in terms of creditor involvement. With the enactment of the 2016 Turkish amendments, creditors do have a right to a) oppose an adjournment of bankruptcy, in the event they find that the debtor is not satisfying statutory requirements<sup>99</sup> and b) request an adjournment of bankruptcy, provided that they propose a recovery plan satisfying the Turkish Code's requirements.<sup>100</sup> Thus, while creditors have a voice in the adjournment process, under the U.S. Code, creditors are an integral aspect of the debtor's plan and a plan cannot be accepted, nor confirmed without their participation.

Under the U.S. Code, Chapter 11 creditors may play a large role in influencing the plan's content. The U.S. Code demands that the U.S. Trustee shape and develop willing creditor committees (usually consisting of the seven largest unsecured claims).<sup>101</sup> If appropriate, the U.S. Trustee, a creditor of the debtor, or an equity security holder of the debtor may request the formation of additional committees to assure adequate protection and representation.<sup>102</sup>

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<sup>96</sup> 11 U.S.C. § 1122 (1978).

<sup>97</sup> *Id.* § 1123 (2005).

<sup>98</sup> *See supra* pp. 5-17 for "Development of Bankruptcy Adjournment in Turkey."

<sup>99</sup> *See supra* note 16, art. 179 (a)(2). *Discussed supra.*

<sup>100</sup> *See supra*, Discussion on the over-indebtedness of the stock corporation or cooperative.

<sup>101</sup> 11 U.S.C. § 1102.

<sup>102</sup> *Id.*

Notably, in small business cases, if good cause is shown, a party in interest may request that a committee of creditors not be formed.<sup>103</sup>

Creditor committees are required to meet at a scheduled time and place and may appoint attorneys and accountants to represent their interests.<sup>104</sup> Powers of creditors are numerous and include the ability to:

- consult with the trustee or D.I.P. concerning the administration of the case;
- investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
- participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
- request the appointment of a trustee or examiner under section 1104 of this title;
- perform such other services as are in the interest of those represented.<sup>105</sup>

Clearly, the U.S. Code, by bestowing these powers upon creditor committees, seeks to assure the fair and equitable treatment of all interested entities.

Next, a plan may only be confirmed upon committee agreement as outlined by § 1126 of the U.S. Code. Under § 1126(c), a class of claims accepts the plan when, "at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors" approves. Further, a plan cannot be confirmed unless all impaired claim holders approve of the plan or are adequately protected by property value (if liquidated).<sup>106</sup> Once

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* § 1103.

<sup>105</sup> *Id.* § 1103(c).

<sup>106</sup> *Id.* § 1129(a)(7).

a plan is accepted, but prior to confirmation, the party proposing the plan may modify the plan. However, in accordance with Rule 3019 of the Federal Rules of Bankruptcy Procedure, this is conditioned upon a judge, following a court hearing, finding that the plan does not adversely impact any creditor who has not signed the modified plan. In sum, while creditors in Turkey indeed have a voice in adjournment of bankruptcy, creditors in the United States are obviously integral to reorganization.

#### 4.2.7. DISCLOSURE

Finally, when a plan is filed, the debtor must also file a disclosure statement.<sup>107</sup> This document is not separately required in adjournment of bankruptcy. Influenced by a case's complexity, this document often falls under the purview of judicial discretion. This document's purpose is to aid creditors to make informed decisions regarding the debtor's plan by listing the debtor's assets, liabilities, and other economic interests.<sup>108</sup> A plan's confirmation is conditioned upon judicial approval of the disclosure statement.

Unsurprisingly, when a debtor seeks to reorganize, the Turkish Bankruptcy Code and the U.S. Code differ in their respective procedures. Where the United States has a regulated, but flexible timeline to file a petition, plan, and associated documents, the Turkish Code is less forgiving and demands that the debtor provide more information at the start. As noted earlier, this is, in part, a likely side effect of the differing goals of each debtor. For instance, a Turkish debtor seeks to delay bankruptcy and the American debtor seeks to take refuge under it. However, while the two codes differ in timeline and specific document requirements, the two codes do share a common goal of fair and equitable creditor treatment through proper notice and participation in both the adjournment of bankruptcy request and the reorganization plan.

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<sup>107</sup> The small business debtor may be exempt from this requirement if the court finds sufficient information is already within the plan. *See* 11 U.S.C. § 1129(f) (2010).

<sup>108</sup> *See* 11 U.S.C. § 1125 (2005).

### 4.3. CODE'S PROTECTIVE POWERS AND WHO CONTROLS

#### 4.3.1. THE AUTOMATIC STAY

When a U.S. debtor considers bankruptcy, the shelter and breathing room of the automatic stay offers strong incentive for the debtor to file.<sup>109</sup> This device protects the debtor at the time of filing and shields the debtor from creditor collection efforts, repossessions, and foreclosures. The automatic stay thus shelters the debtor and prevents further irreparable harm. Notably different from adjournment, in the United States, the debtor must *file* for bankruptcy to be protected. In Turkey, because the debtor seeks to avoid bankruptcy, legislation addresses the need to temporarily protect debtors from aggressive creditors by providing courts with a staying power, notwithstanding the absence of an actual bankruptcy filing. Article 179(a) of the Turkish Code gives a court the power to “take all appropriate actions required for the protection of properties and assets of the corporation or cooperative to aid in the proper execution of the recovery plan.”<sup>110</sup> Undoubtedly, this includes the power to order a stay.

Next, and similar to Turkish law, the U.S. Code leaves room for a) specific proceedings to be immune from the stay and b) specific creditors able to request relief from the stay.<sup>111</sup> Proceedings immune from the stay include, but are not limited to, criminal proceedings, establishment of paternity, domestic violence proceedings, domestic support obligations, and interception of tax refunds.<sup>112</sup> Creditors desiring relief from the automatic stay must file with the court, a motion for relief<sup>113</sup> and cite one or more of the following: “for cause, including the lack of adequate protection of an interest in property of such party in interest . . . .”<sup>114</sup> or, regarding a relief of an interest in property, show that “the debtor does not have an equity in such property *and* such property is not necessary to an effective reorganization.”<sup>115</sup> To compare, Article 179 (b)(2) of the Turkish Bankruptcy Code, dictates, in the spirit of balancing

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<sup>109</sup> 11 U.S.C. § 362 (2010).

<sup>110</sup> See *supra* pp. 7–10 for discussion on 2003 amendments.

<sup>111</sup> *Supra* note 109.

<sup>112</sup> *Id.*

<sup>113</sup> See FED. R. BANKR. P. 4001.

<sup>114</sup> 11 U.S.C. § 362 (d)(1) (2010).

<sup>115</sup> *Id.* at § 362 (d)(2) (emphasis added).

the rights of the debtor and creditor, that particular creditors are exempt from the court's stay.<sup>116</sup> Clearly, regarding the staying power of the courts, there are parallel goals sought by both codes.

#### 4.3.2. DEBTOR IN POSSESSION

After a Chapter 11 case is filed, the debtor usually assumes the role of D.I.P. .<sup>117</sup> A D.I.P. controls the entity during reorganization and has the duty to report and “investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan . . . .”<sup>118</sup> When a debtor maintains control, a case trustee<sup>119</sup> is not appointed and the D.I.P. may use special powers that a case trustee, if appointed, would employ.<sup>120</sup> A D.I.P. may hold this title until the plan's confirmation, but will lose this identity if the plan is converted to liquidation or if a trustee takes control of the entity (by election or appointment). The idea of a D.I.P. does not exist in Turkey.

Debtor control (albeit with judicial oversight), is foreign to adjournment, where the court either a) appoints an administrative receiver to manage the entity or b) makes every decision of the debtor contingent upon the administrative receiver's consent.<sup>121</sup> The administrative receiver's role is essential during bankruptcy adjournment. The receiver studies the presented recovery plan to determine whether the financial progress of the entity is in accord with the plan and will report to the court every three months on the entity's progress.<sup>122</sup> If the receiver reports that the entity is not financially viable the court will discontinue the adjournment, adjudge the entity bankrupt, and proceed with liquidation.<sup>123</sup> In sum, while the duties of the administrative

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<sup>116</sup> See *supra* at 7-10 concerning Article 179 (b)(2) of the Turkish Execution and Bankruptcy Code and discussion of the 2003 amendments.

<sup>117</sup> 11 U.S.C. § 1101 (1978).

<sup>118</sup> 11 U.S.C. § 1106(3) (2010); FED. R. BANKR. P. 2015.

<sup>119</sup> Note: a case trustee differs from a U.S. Trustee. The U.S. Trustee plays a great role in Chapter 11 administration.

<sup>120</sup> See 11 U.S.C. § 1107 (1984).

<sup>121</sup> See *supra* note 16, art. 179(a).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

receiver and the D.I.P. are comparable, the control bestowed upon the D.I.P. in the United States is more beneficial for reorganization because, unlike the Turkish receiver, the D.I.P. is familiar with the necessary day-to-day business decisions that keep the insolvent business afloat.

#### 4.3.3. THE U.S. TRUSTEE AND EXAMINER

While the D.I.P. controls the assets and manages the bankrupt entity, the U.S. Trustee plays a large oversight role to keep the entity on track in its case and plan. To illustrate, the U.S. Trustee collects the debtor's reports and conducts the creditor's meeting, "within a reasonable time after the order for relief in the case"<sup>124</sup> (341(a) meeting).<sup>125</sup> Notably, the court has no involvement in 341(a) meetings. The purpose of the meeting is to question the debtor under oath and assure the propriety of its actions in management of the bankrupt entity. Here, drawing comparison between the two codes, the duties and responsibilities of the U.S. trustee and the administrative receiver are notably similar. Because the administrative receiver has strong control over the debtor corporation or cooperative in a bankruptcy adjournment, if the receiver is playing a supervisory role, undoubtedly, the receiver must be able to question the debtor's actions. Because the receiver must consent to the actions of the debtor, this is an inherent role. However, there is no formal meeting such as the 341(a) established under the Turkish Code.

Next, an examiner may play a role in Chapter 11.<sup>126</sup> Although rarely ordered, an examiner has duties similar, but more limited, to those of a trustee. At the request of either an interested party or the U.S. Trustee (so long as a case trustee has not been appointed), the court may assign an examiner if such appointment is in the interest of creditors and the debtor's debts exceed \$5,000,000.00.<sup>127</sup> The U.S. Code permits the examiner to investigate the debtor's actions and file a statement of investigation.<sup>128</sup> A court has judicial discretion in what an examiner may do when a D.I.P. cannot perform a

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<sup>124</sup> S. Rep. No. 95-989, at 1 (1978).

<sup>125</sup> 11 U.S.C. § 341 (2005).

<sup>126</sup> *Id.* § 1106(b).

<sup>127</sup> *Id.* § 1104(c).

<sup>128</sup> *Id.*

required duty. Although rare, an examiner may play a valuable role, especially under suspicion of a debtor's fraud, dishonesty, and mismanagement. Under Turkish law, it is likely that the administrative receiver would also fulfill this role. However, prior to reaching a judicially approved adjournment, the court performs an in-depth investigation of the corporation or cooperative. Any signs of fraud, mismanagement, or dishonesty would likely be spotted by the court and be resolved at an early stage.

#### **4.4 RIGHTS EXERCISED BY THE DEBTOR IN POSSESSION AND CREDITORS**

##### **4.4.1 AVOIDABLE TRANSFERS**

A Chapter 11 case is often riddled with claims, legal actions, and court appearances. This is because both the D.I.P. and creditors have many legal recourses under the U.S. Code. This allows for an even playing field for both parties. For example, one power of the D.I.P. (or case trustee if assigned) in a Chapter 11 case, is the avoidance power. Under the U.S. Code, the debtor may avoid money or property transfers made within 90 days prior to filing.<sup>129</sup> The purpose of this power is to regain monies or property of the debtor for the benefit of paying creditors. While the U.S. Code dictates a 90-day period, the period of transfer may be extended for transfers to insiders.<sup>130</sup> Avoidance transfers are a complicated section of the U.S. Code and are dependent on the kind of transfer, to whom the transfer was made, what law governs it, and how long ago the transfer was made.

To compare the U.S. debtor's avoidance powers in Chapter 11 with those of a Turkish debtor in adjournment of bankruptcy, there is not much similarity. In Turkey's adjournment of bankruptcy provision, the law fails to clarify whether the administrator should (or must) 'look back' to the debtor's prior transactions to determine whether they are avoidable and recoverable for the benefit of creditors. However, it can be reasonably gleaned that, in a Turkish court's analysis of whether or not an adjournment is the proper manner in which to proceed, the court would employ a good faith standard and

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<sup>129</sup> *Id.* § 547.

<sup>130</sup> *Id.*

if corrupt acts (fraud, mismanagement, etc.) were suspected, a court may overrule bad faith transactions for the benefit of the creditors. Notably, and in direct contrast to a D.I.P., the over-indebted corporation or cooperative in Turkey does not have avoidance powers, whether for good faith prior transactions or for insider or bad faith dealings.

#### 4.4.2. DEBTOR IN POSSESSION'S POWER TO USE, SELL, OR LEASE PROPERTY

When the D.I.P. is operating a business under a plan of reorganization, there will likely be costs associated within the sphere of the ordinary course of business. Under § 363 of the U.S. Code, the D.I.P. (or case trustee if appointed), may sell or lease property of the estate, without judicial approval, if such action is within the “ordinary course” of the debtor’s business.<sup>131</sup> However, any actions taken by the debtor that impact the estate’s property that are deemed *not* within the ordinary course of business, must be approved by the court following notice and a hearing.<sup>132</sup> This section of the U.S. Code seeks to balance case efficiency with creditor protection. Because the debtor must frequently utilize the estate’s property within the ordinary course of business, it would not be efficient to the debtor or the courts if the debtor were required to constantly seek permission to act, as this would take time and flood the courts with unnecessary motions and delay the debtor in its necessary endeavors. However, to protect creditors, when debtors act beyond the ordinary course of business, they must seek judicial permission prior to acting, as well as notify creditors.

In contrast, in Turkey, if an over-indebted entity is approved for bankruptcy adjournment, the court will bestow one of two duties upon an administrative receiver. First, if the debtor is permitted to manage the entity, the debtor must seek the receiver’s approval for “all acts and decisions...[and these acts will be]... valid and enforceable only if and when they [are] approved by the administrative receiver.”<sup>133</sup> Plainly, this is not an efficient provision. For a business to succeed, the debtor must be unfettered in decisions made within

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<sup>131</sup> *Id.* § 363.

<sup>132</sup> *Id.*

<sup>133</sup> *Supra* note 16, art, 179 (a).

the ordinary course of business. Second, if the court divests the debtor of all management powers and delegates them to the administrative receiver, the receiver likely does not need to alert the court of actions taken upon the entity's properties, so long as they are within the ordinary course of business.<sup>134</sup> Because the receiver's duties are to assure that the business follows the recovery plan, any acts taken by the receiver are in support of that goal. While the Turkish Code does not explicitly state, if the receiver wishes to use the property outside the scope of the ordinary course of business, it is likely that the receiver would be required to ask the court for judicial approval.<sup>135</sup> Clearly, critical to efficient reorganization under both codes are prompt decisions regarding actions made within the ordinary course of business.

#### 4.4.3. CASH COLLATERAL

Next, necessary to reorganization under Chapter 11 is whether the D.I.P. may use cash collateral. Defined under § 363 of the Code, cash collateral is:

cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

To use cash collateral the D.I.P. must ask permission from the secured creditor or the court. If the debtor seeks judicial approval, the court investigates whether the secured creditor is adequately protected.<sup>136</sup> If the court deems that the creditor is adequately protected, the creditor whose property interest is being used, has the right to request the court to limit the use to the extent that

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<sup>134</sup> This is arguably the better route to take in adjournment, as decisions in the ordinary course of business may be made quickly. However, the negative behind the receiver maintaining control, is that a debtor obviously has a better understanding of how the business functions. Thus, these are considerations for the Turkish court to consider.

<sup>135</sup> *Id.*

<sup>136</sup> 11 U.S.C. § 363 (2010).

the creditor is adequately protected. The court monitors and oversees the debtor's use of cash collateral and imposes additional accounting requirements upon the debtor.<sup>137</sup>

When compared to the Turkish Code, the discussion here parallels the discussion *supra* on the debtor's use, lease, or sale of estate property. Again, the focus is on the administrative receiver and the goals of the recovery plan. While the section on adjournment of bankruptcy does not dictate how cash collateral shall be used, it is probable that, if the use of cash collateral is in pursuit of recovery, so long as the receiver deems that creditors are adequately protected, the use is legitimate. However, the question of a creditor's powers in the use of cash collateral are ambiguous, as this section of the Turkish Code does not specify whether creditors have the right to petition the court to demand additional protection in the event of cash collateral. This absence bestows great responsibility upon the receiver and the court, as both entities are charged with assuring that creditors are protected during recovery.

#### 4.4.4. DEBTOR'S RIGHT TO CREDIT

Another power the debtor (or trustee) has, to maintain the bankrupt entity in the United States, is the power to obtain credit. Governed by § 364, the D.I.P., in the ordinary course of business, may incur additional unsecured debts, deemed administrative expenses.<sup>138</sup> Prior to incurring additional debts not within the ordinary course of business, the D.I.P. must seek judicial approval.<sup>139</sup> Importantly, because a debtor often encounters challenges when seeking additional funds, the court (after notice and a hearing, as authorized by § 364 (c)), may allow the debtor to obtain credit with either a) super priority over any administrative expenses, b) secured by an unencumbered property lien of the estate, or c) secured by a second junior lien on property of the estate already encumbered by a lien. This provision of the U.S. Code is again in the spirit of encouraging successful reorganization.

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<sup>137</sup> *Id.* § 363(c)(4).

<sup>138</sup> *Id.* § 364(a).

<sup>139</sup> *Id.* § 364(b).

Again, when compared to adjournment, there is ambiguity in the Turkish Code on obtaining unsecured credit while in the recovery phase. If the debtor is not in control and the administrative receiver is managing the entity, the spirit of the recovery plan demands an analysis of whether the entity is sufficiently viable to competently repay additional incurred debts. This would likely be a strict analysis by the receiver and possibly the judiciary (in the event that the receiver submitted such a request to the court).

#### 4.4.5. EXECUTORY CONTRACTS AND UNEXPIRED LEASES

In Chapter 11, another question the D.I.P. may face is whether the entity will maintain executory contracts and/or unexpired leases.<sup>140</sup> Under § 365 (a) of the U.S. Code, the D.I.P. (or trustee), “subject to the court’s approval, may assume or reject any executory contract or unexpired lease.” This section of the U.S. Code is riddled with complexity and debate.<sup>141</sup> Because of the intricacy of this section and the limited space to dedicate to it here, it must suffice to generalize and state that, the D.I.P. may have the power to assume or reject an executory contract or unexpired lease, albeit, with adequate creditor protection.

Here, consistent with the discussion *supra*, the Turkish Code is silent on whether a debtor or receiver may assume or (assume and) assign executory contracts or unexpired leases. However, pursuant to Article 179, because the court requires the debtor to provide an in-depth recovery plan, this plan must dictate the entity’s assets, debts, and due dates of debts. Here, likely at this initial stage, the debtor must list the entity’s executory contracts and/or unexpired leases. And, while possible, it is unlikely that a creditor with an executory contract would object (at this early phase) to the debtor maintaining said contract. Nonetheless, should a creditor wish to discontinue an executory contract or unexpired lease, the court must analyze whether an adjournment of bankruptcy alters the nature of their contractual relationship, is in the overall

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<sup>140</sup> Executory contracts: in the context of bankruptcy filings, are usually between a debtor and creditor, where both parties have yet to fulfill performance.

<sup>141</sup> For an in-depth look into the mire of the Circuit Split of section 365 and intellectual property contracts, and whether the D.I.P. has the right to assume an executory contract when the debtor has no intent on assigning it to a third party, notwithstanding non-bankruptcy law, and notwithstanding a disagreeable creditor, see Kristi R. Sutton, *To Assume or Assume & Assign? That is the Question: A Critique of the Circuit Split of §365*, NORTON BANKR. L. ADVISOR, Aug. 2014, at 8.

best interests of the debtor and its creditors, and whether it is to the creditor's detriment to continue this relationship with a debtor in adjournment.

#### 4.4.6. ADEQUATE PROTECTION

Our investigation now turns to the rights and powers of creditors, creditor committees, and how the U.S. Code seeks to protect their interests. First, and related to a debtor's use of cash collateral, is a creditor's right to be adequately protected. Sections 363 (c) (2) (a) & (b) prevent the D.I.P. (or trustee) from using, selling, or leasing cash collateral unless "each entity that has an interest in such cash collateral consents; or the court, after notice and a hearing, authorizes such use, sale, or lease . . .". Further, § 361 outlines if the party in interest risks a decline in property value as a result of the debtor using said property, the debtor must make cash payments or periodic cash payments to the interested party, to the extent of the declined value. Section 361 is clearly geared towards assuring creditor protection.

To compare the U.S. Code with Turkish law, it appears that creditors involved in adjournment must rely on the administrative receiver's duty to maintain equity between the parties. During adjournment, because the receiver is the principle guarantor of an entity's ability to stay on track during recovery, the receiver has the duty to assure creditors that they will be fairly and equitably treated.<sup>142</sup> Again, absent under Turkish law, is an exact explication of the possible recourse creditors may seek in the event that their interests are diminished by the indebted entity. However, because bankruptcy in Turkey (automatic liquidation) holds a very different meaning from bankruptcy in the United States, it can safely be adduced that, because the insolvent entity seeks viability, it is in the best interests of creditors to encourage this pursuit, as liquidation undoubtedly results in greater losses for all parties.

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<sup>142</sup> See *supra* note 16, art. 179 (a).

#### 4.4.7. CREDITORS' CLAIMS

While the U.S. Code demands that the debtor list creditors at the initial filing,<sup>143</sup> sometimes creditors are unwittingly omitted. If creditors desire to have their claims recognized and they are not scheduled, they must file a proof of claim.<sup>144</sup> In addition, if creditors are scheduled, but their priorities on the debtor's schedules are incorrect, they may, in accord with Rule 3003 of the Federal Rules of Bankruptcy Procedure, file a claim. If done correctly, “[a] proof of claim or interest executed and filed in accordance with this subdivision [Rule 3003(c)(4)] shall supersede any scheduling of that claim or interest...”<sup>145</sup>. Thus, it is clearly in the best interests of creditors to be diligent on whether their claims are listed on the debtor's schedules and to investigate whether their claims are scheduled correctly.

Like the U.S. Code, Turkish law requires that the debtor list all creditors and debts when requesting an adjournment of bankruptcy.<sup>146</sup> However, where the creditors have a concrete role in Chapter 11 (*e.g.* plan confirmation), creditors in an adjournment, do not maintain the same role. Further, the priority of claims in a Chapter 11 case is central, as superior claims are given precedence in payment over others in a plan. Because the Turkish recovery plan is a mechanism to get the entity “back on track” without filing for bankruptcy, creditors do not, at this stage, need to be so concerned about whether (or in what manner) their claims are outlined. Rather, the purpose of listing the creditors and debts in a recovery plan is not to provide information for a repayment plan, but to notify the court of its over-indebtedness and to prevent violations of a future “stay” by listed creditors. Clearly, the need to provide creditors with the power to file claims is not so pressing at the Turkish adjournment of bankruptcy stage as it is in a U.S. reorganization plan.

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<sup>143</sup> See *supra*, discussion on requirements to list creditors; FED. R. BANKR. P. 1007(d).

<sup>144</sup> See FED. R. BANK. PRO. 3003(2).

<sup>145</sup> *Id.*

<sup>146</sup> See *supra* note 16, art. 179 (3), discussed *supra*.

#### 4.4.8. ADDITIONAL CREDITOR RELIEF

Finally, creditors involved in a U.S. reorganization plan may motion the court for relief from the automatic stay<sup>147</sup> or may proceed with an adversary proceeding.<sup>148</sup> A creditor may request relief for cause or may seek relief regarding property if the debtor has no equity in the property and the property is not necessary for the debtor's reorganization.<sup>149</sup> This is a powerful tool for a creditor who is not adequately protected. Another common action by creditors involves adversary proceedings. Governed by Part VII of the Federal Rules of Bankruptcy Procedure, the scope of adversary proceedings is vast (as the term is synonymous to a lawsuit, but in the bankruptcy context).<sup>150</sup> Here, on occasion and with court approval, a creditors committee may pursue adversary proceedings, to which a debtor must respond.

Notably, mirroring the U.S. Code, Article 179 (b) of the Turkish Bankruptcy Code dictates that specific creditors may seek relief from a court's stay.<sup>151</sup> This section balances the interests of debtors and creditors and where a creditor is at risk of loss, the Turkish Code's provisions ensure protection of those threatened interests. Further, regarding adversary proceedings, a stay in an adjournment, like in a U.S. bankruptcy filing, largely prevents any further proceedings that may hinder the entity's recovery. However, Article 179 (b) of the Turkish Code does leave room for specific creditors to initiate or continue executive proceedings.

In sum, while the goal of recovery is similar for debtors in the United States and Turkey, the two codes differ in the expressed relationship between debtor and creditor. Because a Chapter 11 plan requires creditor consent, the U.S. Code's express delegation of powers of debtors and creditors is of the utmost necessity. This contrasts the adjournment of bankruptcy regime, which, in its present form, does not evince such a necessary working relationship between the parties.

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<sup>147</sup> See 11 U.S.C. § 362(d) (2010).

<sup>148</sup> See FED. R. BANK. PRO. 7001.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See *supra* pp. 5-17 for discussion of the development of Bankruptcy Adjournment in Turkey.

To summarize, under a Chapter 11 plan, the D.I.P. may feasibly control the insolvent entity for many years, but in adjournment, notwithstanding the debtor's management powers, an administrative receiver's control is significantly shorter in time (at most, one to two years). Thus, the necessity of a debtor needing credit, tapping into cash collateral, or conserving executory contracts, is considerably greater in Chapter 11 reorganization than in adjournment. Further, because of significant creditor involvement in reorganization, creditors must have access to adequate protection actions or relief from the automatic stay. This contrasts with the needs of most creditors in a bankruptcy adjournment because creditors in these actions simply do not have a large role to play. Therefore, while the Turkish Code should explicitly state, in greater detail, what debtors and creditors may do while an adjournment of bankruptcy is proceeding, it is easily understood why the U.S. Code, when compared to the Turkish Code, evidences greater concern to identify and clarify the parties' powers.

#### 4.5. PLAN CONFIRMATION

Plan confirmation, unsurprisingly, is the ultimate goal for the Chapter 11 debtor. Reorganization, devoid of plan confirmation, must either be dismissed or converted to another Chapter. Section 1129 outlines the extensive necessary obligations that must be met to confirm a plan and demands that the plan is a) offered in good faith, b) is reasonable and workable, c) shows that any payments made or to be made by the debtor (or other interested party) are reasonable, d) the debtor has disclosed all possible controlling officers, e) all impaired creditors have accepted the plan or are adequately protected to receive, at least liquidation value of its interests, and f) other showings of the protection of all classes of creditors, whether or not impaired.<sup>152</sup> This section of the U.S. Code reflects the necessary cooperation of debtors and creditors and assures that reorganization may not be exploited to avoid obligations. To assure equal treatment of debtors and creditors, even at this stage, any party in

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<sup>152</sup> 11 U.S.C. § 1129 (2010).

interest may still object to a plan's confirmation at the court's confirmation hearing.<sup>153</sup>

Importantly, there may be occasions where the debtor must modify the confirmed plan. Once a plan is confirmed, the debtor may,

modify such plan at any time after confirmation of such plan and before substantial consummation of such plan . . . . [so long as the plan is in accord with the Code and] . . . . becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified . . . .<sup>154</sup>

In the event that the debtor must cure omissions, fix errors, or acknowledge a change of circumstance, this provision allows for the plan to be changed, so long as it is in good faith, reasonable, and not objected to by interested parties. Following confirmation, the debtor is discharged of the debts arising prior to confirmation, as provided in § 1141.<sup>155</sup> Following confirmation, the D.I.P. no longer exists and the newly discharged entity will continue to adhere to the reorganization plan for the defined time that the confirmed plan dictates.

In Turkey, a recovery plan may be modified once at the beginning of an adjournment of bankruptcy<sup>156</sup> and once more if extension is granted to the entity.<sup>157</sup> A modification at the initial stage occurs largely when a court analyzes a recovery plan and finds that specific changes to the plan may result in granting the adjournment request. However, because courts may not themselves modify a recovery plan, this gives the debtor a second chance at adjournment. Dissimilar to a debtor's plan in Chapter, the Turkish recovery plan is not "confirmed" in the same sense as in the United States. For a recovery plan to be approved by the courts, it must adhere to statutory guidelines and must be serious and persuasive.<sup>158</sup> Here, when compared to the power of creditor committees in Chapter 11, creditors involved in an adjournment, do not have much power over whether or not a court approves a

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<sup>153</sup> *Id.* § 1128 (1978).

<sup>154</sup> *Id.* § 1127 (b) (2010).

<sup>155</sup> Note, there are exceptions to this rule, as provided in 11 U.S.C. § 1141 (2010).

<sup>156</sup> See *supra* note 16, 179 (a)(8). Article 179 (a)(8) of the Turkish Execution and Bankruptcy Code.

<sup>157</sup> *Id.* § 179 (b)(4).

<sup>158</sup> See *supra*, discussion: (iv) Submission of a Recovery Plan & Article 179 (3) of the Turkish Execution and Bankruptcy Code.

recovery plan. Creditors must instead, rely on the statutory demands of the Turkish Code, a court's strict adherence in assuring that creditors are fairly and equitably treated, and an administrative receiver's duties to maintain the entity's assets and assure that the business is operated in accordance with an approved recovery plan. There are clearly positives and negatives to this lack of power on behalf of the creditors. However, time will show, once the adjournment of bankruptcy is again an available device to pursue in Turkey, whether the 2016 amendments sufficiently protect all interested parties.

#### 4.6 OPTIONS IF CASE FAILS

The U.S. Code, with limited exception, permits a Chapter 11 D.I.P. to convert its case to a Chapter 7.<sup>159</sup> A court will convert a case to Chapter 7 if doing so is in “the best interests of creditors and the estate, for cause, unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.”<sup>160</sup> Here, the definition of “for cause” is extensive and may include, but is not limited to, the following: i) gross mismanagement of the estate, ii) failure to comply with an order of the court, iii) failure of the debtor to pay domestic support; or iv) failure to file a disclosure or have a plan confirmed within the statutory timeline.<sup>161</sup> When a Chapter 11 case is converted to Chapter 7 (liquidation), the debtor's assets are collected, sold, and the proceeds go towards compensating creditors; this is essentially the death of the entity.<sup>162</sup>

Under the U.S. Code, a Chapter 11 conversion to Chapter 7 is similar in effect to when an over-indebted entity in Turkey fails to thrive under its recovery plan. When the recovery plan fails, the corporation or cooperative is deemed bankrupt by the court and liquidated. Article 179 (b) of Turkey's Code outlines when a court may dismiss the adjournment of bankruptcy request and

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<sup>159</sup> 11 U.S.C. § 1112(a) (2010).

<sup>160</sup> *Id.* § 1112(b)(1).

<sup>161</sup> *Id.* § 1112(b)(4).

<sup>162</sup> Note: while not as common as conversion to Chapter 7, in some circumstances, the U.S. Code also permits the D.I.P. to seek conversion to Chapter 12 or 13 if the debtor meets the statutory guidelines and such an action is fair and equitable to all interested parties. *See* 11 U.S.C. § 1112(d) (2010).

declare the entity as bankrupt.<sup>163</sup> When the court receives reports from an administrative receiver reflecting that the entity is unsalvageable or when the court itself finds, at any time during adjournment, that the entity cannot be saved, the entity may be declared bankrupt.<sup>164</sup>

In addition to case conversion, the U.S. Code dictates that, if the court finds that the best interests of the creditors are served by dismissal, the court may order the dismissal. The effect of dismissal differs from conversion. When a court dismisses a bankruptcy case, there is no discharge, the case ends, and all adversary proceedings stop. A dismissal may be voluntary or involuntary. If a trustee or creditor files a motion to dismiss and the court grants it, the case is dismissed. Another effect of dismissal is that, depending on the Chapter, the entity's status, and circumstances of the dismissal, the debtor will face a statutory time limit before it may file another case. Notably, the U.S. Code, under § 349 (a) clarifies that:

[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

This section of the U.S. Code is critical in that it reflects the spirit of bankruptcy in the United States, where the debtor may again seek a second chance to reorganize and have a “fresh start.”

Case dismissal in the United States and failed recovery in Turkey operate similarly, but with some great differences. Noted *supra*, when a Turkish court finds that an entity cannot successfully follow a recovery plan and cannot be saved, the insolvent entity reaches the “end of the road” and is liquidated; there are no second chances. While appeal is an option to pursue (by debtors and creditors), due to the potential significant amount of time for an appeal to be heard by the appellate court, an entity in financial woes may not survive to appeal.<sup>165</sup> This makes the appellate procedure, arguably,

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<sup>163</sup> *Supra* note 42, art. 179(b).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (c).

ineffectual in adjournment. The inability for an over-indebted entity to seek shelter under multiple modified recovery plans demonstrates the Turkish Code's desire to rid its economy of unviable businesses, even if it is not in the best interests of the creditors to do so. Perhaps, if the Turkish Code modified its sections on adjournment to allow the debtor to easily amend its recovery plan, plans would be more likely to succeed; as daily changes in circumstance may negatively impact the entity's success in one plan but make it feasible to succeed in a modified plan. Until the Turkish Code is more forgiving and flexible in its implementation, an insolvent entity's rate of realization in bankruptcy adjournment will be minimal.

## **5. CONCLUSION**

While the Turkish Code experienced a positive overhaul in procedure when Parliament amended the laws of bankruptcy adjournment, when compared to the U.S. Code's finely tuned Chapter 11, much legislative work remains to make adjournment equally effective to the U.S. Code's reorganization. Further, while much ambiguity inherent in the 2003 amendments found clarification in the 2016 amendments, remaining uncertainties must be made plain. In light of the comparative discussion of the Turkish Bankruptcy Code and the U.S. Code, the following list outlines a few suggestions to build adjournment of bankruptcy into a more effective and beneficial legal strategy for debtors and creditors.

### **5.1 AUTHORS' RECOMMENDATIONS AND CRITIQUE**

1) Definition of Debtor: Article 179 of the Turkish Bankruptcy Code dictates that an adjournment of bankruptcy request may be made by a) management and representative bodies (cooperative or corporation) or b) creditors. To sufficiently cover all entities in need of financial aid, this definition should expand to include small businesses and individuals. This will provide smaller entities with an opportunity to take advantage of bankruptcy adjournment and encourage growth in Turkey's domestic economy.

## 2) Requirements to Adjourn Bankruptcy:

a) First, the requirement of over-indebtedness is arguably an unworkable threshold that may dampen the percentage of possible recovery. While over-indebtedness is a key aspect to request adjournment, this rule is exceedingly strict. Under the U.S. Code, there are several Chapters ranging from liquidation to reorganization. While Chapter 11 debtors must have debts exceeding statutorily defined amounts, in excess of those outlined for Chapter 13, the Code's spirit is to encourage financial recovery before the entity is too deep in debt to be salvaged. This is critical for reorganization. Arguably, the over-indebtedness threshold negatively prevents entities in financial distress from seeking refuge in adjournment and inhibits the ability for the B.o.D. to get a "jump-start" on financial recovery under the protection of a court's staying powers.

b) Second, Turkish bankruptcy law requires a debtor to estimate how long a recovery may take and provide the court with a timeframe. While the court must be aware of a timeline for recovery, because the debtor has minimal time to submit all necessary documents to the court and because the period of adjournment is limited to one or two years, asking the debtor to provide this timeline is both challenging and unrealistic. In contrast, while a reorganization plan in Chapter 11 indeed has a timeline, there is significant time and planning on behalf of debtor and creditor alike to carefully craft a workable plan and timeframe. In some cases, Chapter 11 plans carry on for years. While some critiques cite this as exploitation, taking time is not bad faith and is a legitimate way to assure recovery. The adjournment of bankruptcy process would benefit from acknowledging that simply because an entity is sheltered for years, does not insinuate debtor corruption or exploitation.

c) Third, adjournment of bankruptcy would benefit from being less strict in the timeline of documents submission. While adjournment basically delays bankruptcy, a debtor must be given more time, for cause, to submit all required documents. Under Article 179 (3) of the Turkish Code, the debtor has a mere two-week grace period to submit all documents and should the debtor fail, the court has the right to liquidate the entity once over-indebtedness is shown. This is a drastic and dangerous repercussion. In the United States,

many debtors file emergency petitions and are unable to include all the complicated documents and necessary schedules. The U.S. Code provides breathing room for this situation and allots debtors additional time to collect documents while under the shield of the automatic stay. In adjournment of bankruptcy, there will be cases where a debtor is in serious financial troubles, but still wishes to try recovery over liquidation. The Turkish Code should acknowledge and understand this possibility and provide a more flexible deadline to submit all papers.

d) Last, the Turkish Code demands that debtors seeking to adjourn bankruptcy must provide all up-front costs associated with adjournment. This may prove cumbersome for a struggling entity. For example, these costs include the administrative receiver's retainer and because these costs are established by the court on a case-by-case basis and depend on a case's complexity, this payment may prove impossible. Thus, the costs for a receiver (or receivers) could be large. Here, legislation should look to Chapter 11 and note that costs to the debtor may be treated within the reorganization plan. While there are upfront statutory filing fees to be paid to the court, the very purpose of Chapter 11 is to give the debtor the time and ability to repay its debts. By forcing the debtor to provide the Turkish court's treasury with possibly a large sum of money at the beginning of a case, this undoubtedly hinders its ability to recover and defeats the purpose of adjournment.

### 3) Debtor Powers:

a) When a debtor seeks adjournment, the court will either divest all powers from the entity's management body and place them into the administrative receiver's hands or will allow the entity's management to stay in place, but make their actions answerable to the receiver. In contrast, the U.S. Code (usually) allows the D.I.P. to maintain control over the insolvent entity. Because the D.I.P. is answerable to the U.S. Trustee, the creditors, and the court, this oversight prevents mismanagement. Keeping the D.I.P. lowers costs and maintains the business, as the debtor knows how the business functions and what decisions must be made in the ordinary course of business. By dictating that the D.I.P. must seek court approval for actions beyond the ordinary course of business, the U.S. Code assures that all parties are protected.

Keeping the debtor in control during adjournment would likely lower the costs, lessen the court's responsibilities, and increase the likelihood of success.

b) Where the powers of the D.I.P., trustee, or examiner are clearly outlined by the U.S. Code, there is great ambiguity in the powers of the administrative receiver. For example, the U.S. Code states that an examiner may conduct investigations of the debtor and that a D.I.P. (or trustee) may avoid transfers, seek additional credit, use, sell, or lease property, or, with court approval, use cash collateral. However, the Turkish Code is largely void in what the administrative receiver may do with or without court approval. And, while the adjournment process is presently much shorter than typical Chapter 11 reorganizations, the ability to pursue these powers may be essential to a successful recovery. Thus, it would behoove Parliament to amend Article 179 to address these powers and state clearly what an administrative receiver may do, with or without court approval.

4) Creditor Involvement: Creditor power and involvement in adjournment of bankruptcy drastically differs from creditor action in Chapter 11 reorganization. Where creditor presence is almost nonexistent in Turkish recovery, creditors involved in U.S. reorganization are present every step of the way. Perhaps because the recovery timeline is short, the Parliament did not see the need to have creditors control the plan or be influential players. However, one of the main reasons Chapter 11 plans succeed is because, to confirm a plan, all interested parties must be "on board" with the plan's treatment of claims. Where creditors have great express power in Chapter 11, creditors in Turkish recovery have very little influence and rely on the administrative receiver to assure their adequate protection. Here, if the adjournment of bankruptcy process were extended in time, creditors could be similarly prioritized and bestowed with powers to accept or reject proposed plans and assure their own protection.

5) Modification and Plan Confirmation: Under the Turkish Code, a debtor is limited in the number of permitted plan modifications. The debtor may modify a plan once prior to a court adjourning bankruptcy and once more prior to an extension (if granted). This is not conducive to recovery. Businesses change every day and a plan for one day may not encourage recovery on

another day. The U.S. Code accounts for these changes in circumstance and provides the D.I.P. with statutory rights to request plan modification. With proper notice to all parties and a court hearing, a Chapter 11 debtor may modify a plan prior to confirmation, after acceptance, and even post-confirmation. This process assures that creditors are notified and provided with objection power in the event they feel the proposed modification negatively impacts their rights. In Turkey, failure of a bankruptcy adjournment equates to liquidation. This drastic result should incentivize Turkish legislation to modify Article 179 to provide for “good faith” recovery plan modifications with the purpose of aiding struggling cooperatives and corporations.

6) Failed Plans: As made plain, failed bankruptcy adjournment in Turkey equates to liquidation and death to the insolvent entity. However, in the United States, the U.S. Code provides the debtor with several options. First, and similar to the Turkish Code’s finding that an entity is bankrupt and will be liquidated, Chapter 11 may be converted to Chapter 7 liquidation. However, conversion to Chapter 12 or 13 may be a viable option to keep the case alive if the debtor satisfies the statutory requirements and the court finds that it is in the best interests of the creditors to convert to one of these Chapters. Further, the court may dismiss the case. Depending on the circumstance of dismissal and the statutory timeline for filing multiple cases, the debtor may file another case, in search of a fresh start. Obviously, these options are less drastic than liquidation. While Turkish law provides the debtor or creditor with an appellate procedure to protest the initial court’s decision on adjournment, this is not efficient. As a general rule, appellate cases take time; time that an insolvent entity likely does not have. Thus, a probable result to an appeal is the entity losing its viability and being forced to liquidate before a decision is rendered.

To conclude, in a time of globalization, nations cannot ignore the economic needs of their domestic and international institutions. A sound bankruptcy law is a necessary step towards assuring a healthy economy. With the amendments to the Turkish bankruptcy law, particularly in 2003 and 2016, Turkish Parliament acknowledged this void in their bankruptcy law and amended its code in hopes of pursuing a legal scheme that fairly and efficiently served its citizens. These amendments improved the Turkish law because they

gave creditors a voice, bestowed greater judicial power upon the court, demanded a more inclusive recovery plan, and prevented the indebted entity from exploiting time extensions to delay debt obligations.<sup>166</sup>

While these amendments to the adjournment of bankruptcy were necessary, much still needs to be done to make the process competent, impartial, and successful for both debtors and creditors. Thus, the U.S. Code and Chapter 11 reorganization may act as an excellent template for many nations, including Turkey, to adopt when building upon and developing a recovery or reorganization process. Clear from the comparison of the two codes, the U.S. Code could positively influence the Turkish Code in the areas of debtor definition, debtors' duties, and adjustments in the requirements of bankruptcy adjournment.

This study sought to illustrate the benefits that the U.S. Code may provide for developing economies. It is clear from recent legislation that Turkish legislators strive to build a stronger bankruptcy framework. By looking abroad, and adopting other successful legal schemes, Turkish bankruptcy law will be fortified and this strength will undoubtedly encourage domestic economic growth and enhance the State's international presence.

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<sup>166</sup> See *supra* notes 16–18: Discussion of Article 179.