



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ATEŞ MİMARLIK MÜHENDİSLİK A.Ş v. TURKEY

(Application no. 33275/05)

JUDGMENT

STRASBOURG

25 September 2012

FINAL

11/02/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ateş Mimarlık Mühendislik A.Ş. v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

Işıl Karakaş,

Guido Raimondi,

Paulo Pinto de Albuquerque,

Helen Keller, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 28 August 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33275/05) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a legal entity, Ateş Mimarlık Mühendislik A.Ş. (“the applicant”), on 9 September 2005. The applicant was represented by Mr B. Kuru, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

2. On 6 November 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

3. The applicant is an architecture company, a legal entity, based in Istanbul.

4. On 10 October 1983 the applicant concluded an agreement (“the agreement”) with the Federal Republic of Germany (“the German State”) for the restoration of the building of the German Consulate in Istanbul. In Article 9.5.7 of the agreement, the Berlin courts were determined as having authority to settle any disputes arising out of the agreement. In Article 9.5.8 of the agreement, German law was defined as the principal applicable law.

Besides, the law of the place where the restoration work was to be carried out was specified as the auxiliary applicable law. Moreover, the parties agreed that some intermediate payments would be made to the applicant on the basis of estimations in accordance with the progress of the work, and the ultimate monetary claims would be determined after the transmission of a final statement of costs (*kesin maliyet hesabı*).

5. The applicant was paid some intermediate fees and expenses incurred while performing its contractual undertakings.

6. On 21 February 1986 the German State terminated the agreement unilaterally.

7. In 1987 the applicant brought an action against the German State challenging its unilateral termination of the agreement and requesting the recovery of its monetary entitlements.

8. The Berlin Court of Appeal (*Kammergericht Berlin*) initially resolved the issue of the law applicable to the dispute between the parties and decided that German law was applicable to the case. In its decision of 20 November 1990 it established that unilateral termination of the agreement was based on a valid cause. On the other hand, the court maintained that the applicant's claim for the outstanding sum would become due only after the issue of the final statement of costs, as provided in the agreement. For this reason, the Berlin Court of Appeal refused the major part of the applicant's claim on the ground that the precondition for requesting the outstanding amount had not yet been fulfilled. It awarded the applicant some partial cost and expenses. Neither of the parties contested this judgment and thus it became final.

9. Following the judgment of the Berlin Court of Appeal, the applicant requested the German State to send the final statement of costs.

10. In a letter of 16 August 1996, the German authorities stated that the applicant could only be entitled to sums for the services provided until the termination of the agreement in 1986.

11. On 7 November 1996 the German authorities drew up the final statement of costs in the reconstruction project, which consisted of the items of expenses and their final costs listed from the planning stage until the termination of the contract. This statement was then sent to the applicant.

12. On 10 January 1997 on the basis of the data provided in the final statement of costs, the applicant calculated the difference between the payments made and its entitlement of the final fee of work. Subsequently, the applicant issued an invoice to the German State, indicating 1,700,000 German mark (DEM) as the outstanding amount.

13. Following the German State's refusal to pay the amount claimed, on 12 July 1997 the applicant lodged an action in the Istanbul Beyoğlu Commercial Court, seeking payment of the sum in question. In the light of the provisions of the agreement and the judgment of the Berlin Court of Appeal, the applicant claimed that the final costs had become due.

14. On 20 October 1998 the Istanbul Beyoğlu Commercial Court observed at the outset that the judgment of the Berlin Court of Appeal complied with the conditions regarding the recognition (*tanıma*) of foreign judgments set out in sub-paragraphs (b) and (c) of section 38 of the Turkish Private International Law and Procedures Act (Law no. 2675 – “the TPILPA”). On the other hand, establishing that the subject matter of the two cases were different from each other, i.e. the proceedings before the Berlin Court of Appeal had been relating to the claim of expenses arose during the delivery of the project and the proceedings filed with the Beyoğlu Commercial Court was related to the payment of unpaid fee of work, the first-instance court asserted that the Berlin Court of Appeal’s judgment could not be considered as a definitive and enforceable judgment (*kesin hüküm*) for the proceedings which were before it. Eventually, the Istanbul Beyoğlu Commercial Court examined the case solely in the light of the Turkish law and held that the amounts payable to the applicant had become time-barred, as in accordance with Articles 126 and 128 of the Turkish Code of Obligations the statutory time-limit of five years had started to run from the date of termination of the contract. In this regard, the Beyoğlu Commercial Court refused the applicant’s claim that its unpaid fee of work had only become enforceable after the transmission of the final statement of costs in the project, a fact which had been established by the Berlin Court of Appeal.

15. On 1 March 1999 the Court of Cassation upheld the first-instance court’s judgment.

16. On 24 June 1999 the Court of Cassation agreed to the rectification of the judgment and remitted the proceedings to the first-instance court for further analysis as to whether any developments which would interrupt running of the time-limit, had occurred in the contractual relation between the parties.

17. In the further stages of the proceedings, the domestic courts no longer examined the issue of recognition of the judgment delivered by the Berlin court, on the ground that the parts of the judgment in question were not subject to the rectification and thus had already become final.

18. In the remainder of the proceedings, the first-instance court and the Court of Cassation continued to examine the case on the basis of an interpretation of the different provisions of the Turkish Code of Obligations as regards the application of the statutory time-limit, and sought to establish which provisions were applicable to the case. Throughout three rounds of examination, the first-instance and appeal courts disagreed on the question whether the defendant party had acknowledged paying any amount to the applicant in its statements of 16 August and 7 November 1996 and whether that could be considered as implicit withdrawal of the right to plead prescription (*zamanaşımı def’inden feragat*) on the part of the German State.

19. On 15 May and 23 July 2001 two expert reports submitted to the Beyoğlu Commercial Court estimating that the applicant be entitled to 1,408,147 DM.

20. On 16 October 2001 the Beyoğlu Commercial Court decided that the final statement of costs issued in 1996 by the German authorities had been an admission of debt forwarded to the applicant company which had an effect of an implicit withdrawal on part of the German authorities of the right to plead prescription of ten years, set out as a general time-limit in Article 125 of the Turkish Code of Obligations. In this connection, the court dismissed the German authorities' pleading for prescription and held that the applicant was entitled to the award of 1,408,147 DM.

21. The judgment was, once more, quashed by the Court of Cassation.

22. The applicant argued before the said courts on numerous occasions that the Berlin Court of Appeal's judgment, having determined the due date of the applicant's claim, should have been considered as conclusive evidence (*kesin delil*) pursuant to Section 42 of the TPILPA, in resolving the issue of the starting point for the time-limit. In this connection, the applicant maintained that it had a lawful and rightful claim to full payment of the outstanding costs, as the Berlin courts had not dismissed its claim on its merits, but had simply deferred its enforceability to a future date. In addition, the applicant alleged that the translation of the Berlin Court of Appeal's judgment lodged in the case file contained fundamental errors, which had misled the national courts.

23. On 30 September 2003 the Istanbul Beyoğlu Commercial Court held that the statutory time-limit of five years under the Turkish Law of Obligations had started to run from the date of termination of the agreement in 1986, and since then the defendant party had not acknowledged any debt to be paid to the applicant or any other reason which would interrupt the running of the time-limit. In its judgment, the court refused the applicant's request to have the translation of the Berlin Court of Appeal's judgment corrected, holding that it had no bearing on the outcome of the proceedings as the issue in question had already been settled. Lastly, while dismissing its case, the Istanbul Beyoğlu Commercial Court ordered the applicant to pay 5,736,500,000 Turkish liras¹ (TL) in legal expenses to the defendant party.

24. On 30 March 2005 the Court of Cassation gave its final decision and held that the case was to be dismissed as having been lodged outside the time-limit prescribed by the Turkish Code of Obligations.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

25. The former Turkish Code of Obligations (Law No. 818) of 8 May 1926 was in force at the time of the domestic proceedings. According to

¹ Approximately 2,400 Euro

Article 125 the general time-limit to claim for the recovery of any debt is ten years, unless a specific provision stipulates another time limit.

Article 126 provides that all claims arising from a freelance contract (*istisna akdi*) is subjected to the five-year time-limit, with an exception of the failure of a contractor to discharge his undertakings agreed in a contract on account of his gross fault or wilful negligence.

Furthermore, Article 128 enunciates that running of a time-limit starts from the date on which a claim has become enforceable.

26. The Turkish Private International Law and Procedures Act (“the TPILPA”) (Law No. 2675) of 2 May 1982 was in force at the time of the domestic proceedings.

Section 2: Applying foreign law

“A judge, *ex officio*, administers the rules on conflict of laws and applicable foreign law to a case. The judge may request the parties to assist him/her in the determination of the substance of the applicable foreign law....”

Sub-paragraphs (b) and (c) of section 38 of the TPILPA state as follows:

Section 38: Requirements for enforcement

“The competent court shall give an enforcement decision provided that the following requirements are fulfilled: ...

(b) the subject of the foreign judgement does not fall within the exclusive jurisdiction of the Turkish courts;

(c) the foreign judgement does not run counter to public order; ...”

Section 42 of the TPILPA reads as follows:

Section 42: Recognition

“A judgment given by a foreign court can be considered as a definitive decision or conclusive evidence once the domestic court has determined that it complies with the requirements for enforcement under the Section 38...”

27. The Turkish Code of Civil Procedure Act (Law No.1086) of 18 June 1927 was in force at the time of the domestic proceedings.

Article 237: Definitive Judgment

“A judgment can be considered definitive in proceedings, as long as the parties, subject matters and causes of the cases are same.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

28. The applicant complained that its right of access to a court had been denied, as the Turkish courts had unfairly refused to take into account a final foreign judgment and had failed to examine its case on its merits. It further alleged that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention.

1. Access to court and fairness of proceedings

29. The applicant complained under Article 6 § 1 of the Convention that having failed to consider the judgment of the Berlin Court of Appeal as conclusive evidence, the Turkish courts had denied its right to have its civil claim examined on the merits, in breach of its right of access to a court and to a fair trial.

30. The Government contested that argument.

A. Admissibility

31. The Government asked the Court in their preliminary objection to dismiss this complaint for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They maintained that the applicant had not raised the complaint before the domestic courts.

32. The Court observes that the applicant did raise the substance of the complaint concerning the denial of access to a court on account of the Turkish courts’ failure to recognise a foreign judgment both before the first-instance court and the Court of Cassation. Consequently, the Court rejects the Government’s preliminary objection. It further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

33. The applicant complained that by dismissing its case on procedural grounds, the Turkish courts had disregarded the findings of the judgment adopted by the Berlin Court of Appeal, even though it met the criteria under the domestic law to qualify for recognition. In this connection, the applicant argued that the domestic courts had denied its right of access to a court,

which entails the right to obtain a judicial decision on the merits of one's case.

34. The Government asserted that a foreign court's decision could constitute a definitive judgment, by virtue of Article 237 of the Turkish Code of Civil Procedure, only if the parties, subject matter and causes of the proceedings were the same. However, the matter in dispute in the proceedings before the Beyoğlu Commercial Court was different from the case decided by the German courts. For this reason, the Turkish courts had not accepted that the Berlin Court of Appeal's decision could be qualified as a definitive judgment in respect of the proceedings before them. Furthermore, the Government contended that had the applicant resorted to the Turkish courts for the enforcement of the Berlin Court of Appeal's judgment of 20 November 1990, it could have obtained what it was due.

35. The Court reiterates that the right of access to a court, as one of the broader concepts of a fair trial, secures to everyone the right to have a claim relating to their civil rights and obligations brought before a court and to have a judicial determination on the merits of their case following a fair hearing (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII). On the other hand, the right to court is not absolute and may be subjected to procedural rules and regulations imposed by the national authorities with a view to ensuring good and expeditious administration of justice.

36. Nevertheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 of the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93).

37. The Court reiterates that it is primarily for the national authorities, notably the national courts, to resolve problems of interpretation of domestic legislation and the role of the Court is limited to verifying whether the effects of such interpretation are compatible with the Convention. This applies in particular to the interpretation by courts of rules of a procedural nature such as time-limits governing the filing of documents or the lodging of appeals.

38. The Court notes that while time-limits are in principle legitimate limitations on the right to a court, as they serve important purposes, namely to ensure legal certainty and finality of proceedings and to protect potential defendants from stale claims, the manner in which they were applied in a particular case may give rise to a breach of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Miragall Escolano and Others v. Spain*, no. 38366/97, §§ 33-39, ECHR 2000-I).

39. In this regard, the national courts must, in applying the rules of procedure, avoid both excessive formalism which would affect the fairness of the procedure, and excessive flexibility that would result in removing procedural requirements established by law (see *Walchli v. France*, no. 35787/03, § 29, July 26, 2007). Indeed, the right of access to court is breached when the regulation ceases to serve the goals of legal certainty and good administration of justice and becomes a kind of barrier to the litigant to have his case decided on the merits by a competent court (see *Efstathiou and others v. Greece*, no. 36998/02, § 24, July 27, 2006).

40. In the case of *Selin Aslı Öztürk v. Turkey*, for instance, the Court found that the disputed domestic law, allowing only the parties to the proceedings to apply for the recognition of a foreign judgment before the Turkish courts and barring the possibility for other interested parties to request the same, imposed a disproportionate burden on the applicant, who was denied any real opportunity to obtain the recognition of her deceased father's divorce, and thereby violated her right of access to a court (no. 39523/03, 13 October 2009).

41. Turning to the facts of this case, the Court observes that the applicant company initially lodged preliminary proceedings before the German courts for the recovery of its monetary entitlements arising from the agreement concluded on 10 October 1983. The Berlin Court of Appeal refused to examine the merits of the applicant's claim for unpaid fee for work, finding that the requested sum would not become due until the final statement of costs was issued, as it had been agreed by the parties in the contract. Following the transmission of the final statement of costs, the applicant sent an invoice to the German authorities for the recovery of the outstanding amount. Upon the latter's refusal, the applicant lodged a lawsuit before the Turkish courts seeking the payment of the due sums.

42. The Court observes that the Turkish courts determined that the decision of the Berlin Court of Appeal fulfilled the required criteria set out under the Section 38 of the TPILPA for the recognition of a foreign judgment by the domestic courts. Even so, the Turkish authorities, notwithstanding their obligation under Section 42 of the TPILPA, did not consider the Berlin court's judgment as conclusive evidence for the due date of the enforceability of the applicant's claim.

43. The Court further observes that the Turkish courts refused to give effect to the Berlin Court of Appeal's judgment by simply holding that the subject matter of the case decided by the German courts was different from the case before it, thus the Berlin Court of Appeal's decision could not be qualified as a definitive judgment in the proceedings concerned.

44. The Court notes that Section 42 of the TPILPA requires that, should a foreign decision meet the required criteria for recognition, the domestic courts shall give effect to that decision either as a definitive judgment or as conclusive evidence. However, in the instant case, although the Istanbul

Beyoğlu Commercial Court explicitly dismissed the first possibility, it did not make any assessment as to whether the decision in question could be considered as conclusive evidence in the proceedings before it, despite numerous requests filed by the applicant in this respect.

45. The Court further notes that having relied on the conclusion reached by the German courts in the preceding proceedings, the applicant had a legitimate expectation to claim the outstanding sums when they became due according to the agreement between the parties. In this regard, it appears that the applicant reasonably awaited the transmission of the final financial statement drawn up by the German State and only after that requested payment of the alleged debt. Furthermore, the findings of the German courts in the proceedings were relevant to the ensuing proceedings before the Turkish courts, which concerned the applicant's claims for the payment of outstanding sums arising from the same agreement.

46. The Court considers that the development of common judicial standards and harmonisation of national laws in civil and commercial matters is an emerging phenomenon in international law. To this end, the national laws of Convention Contracting States, including Turkey, establish rules on the recognition and enforceability of a foreign judgment in their domestic systems with a view to ensuring legal certainty in international relations between private parties and to fostering predictability and coherence in rules and procedures governing those relations.

47. However, in the present case, the Court observes that the conclusion reached by the Turkish courts that the applicant's claim was time-barred under the Turkish Code of Obligations as it had become enforceable at the time of the termination of the contract, contradicted the findings of the German courts on the same matter and consequently denied the applicant the opportunity to have the merits of its claim examined. In the determination of the date on which the applicant's claim became due and payable, the Turkish courts disregarded the probative value of the judgment adopted by the Berlin Court of Appeal in the preliminary proceedings, despite the legal obligation prescribed by Section 42 of TPILPA. Nor did the Turkish courts provide any reasoning for their refusal to recognise the disputed judgment as conclusive evidence, despite the applicant's numerous requests in that respect.

48. In the light of the specific circumstances of this case, the Court concludes that the Turkish courts' interpretation and application of domestic legislation resulted in an impediment to the applicant to have the merits of its case examined by a judicial authority in such a way or to such an extent that the very essence of its right of access to a court is impaired. Therefore, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

2. *As to the length of proceedings*

49. The applicant complained that the length of the proceedings had been excessive, in breach of the right to a hearing within a reasonable time as guaranteed under Article 6 § 1 of the Convention.

50. The Government contested that argument, maintaining that the applicant had contributed to the prolongation of the proceedings by its own acts.

51. The period to be taken into consideration began on 12 July 1997 and ended on 30 March 2005. The proceedings thus lasted seven years, eight months and nineteen days for two levels of jurisdiction.

A. Admissibility

52. The Government put forward a preliminary objection concerning the exhaustion of domestic remedies.

53. The Court reiterates that it has already examined and rejected similar objections of the Government alleging failure to exhaust domestic remedies (see *Karakullukçu v. Turkey*, no. 49275/99, §§ 27-28, 22 November 2005). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned application. It therefore rejects the Government's objection.

54. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

55. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria; the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

56. The Court observes that due to the controversy on the legal categorisation of evidence and applicable provisions of the Turkish Code of Obligations, the case was examined by the domestic courts in several rounds. Despite the fact that the domestic courts adopted eleven separate decisions, the lengthy proceedings cannot be explained in terms of the complexity of the litigation, as the courts did not examine the merits of the case but simply discussed the applicable provisions of the Turkish Code of Obligations concerning statutory time-limits. The Court further observes that no part of the delay can be imputed to the applicant.

57. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above, *Karakullukçu v. Turkey*, no. 49275/99, § 36, 22 November 2005, *Ahmet Kılıç v. Turkey*, no. 38473/02, §§ 32-34, 25 July 2006, and *Daneshpayeh v. Turkey*, no. 21086/04, § 29, 16 July 2009).

58. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

II. OTHER ALLEGED VIOLATION OF THE CONVENTION

59. The applicant lastly complained of the fact that it had sustained financial losses as a result of the Turkish courts’ refusal to examine the case on its merits. It relied on Article 1 of Protocol No. 1 of the Convention.

60. The Court notes that this part of the application is closely linked to the complaint under Article 6 § 1 of the Convention regarding access to a court and must therefore be declared admissible. Having regard to its findings above that the Turkish courts have imposed a disproportionate burden on the applicant which was denied an opportunity to obtain an examination on the merits of its case, and had thereby violated the applicant’s right of access to a court, the Court concludes that there is no need to examine this complaint separately.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. The applicant claimed 1,469,206 euros (EUR) in respect of pecuniary damage, referring to its alleged material loss in the proceedings, and EUR 50,000 in respect of non-pecuniary damage. The applicant also claimed EUR 44,519 for the costs and expenses incurred before the domestic courts as well as the Court. In this respect, it submitted the Turkish Bar Association’s tariff of fees for attorneys and referred to the legal expenses ordered against it by the first-instance court.

62. The Government contested these claims.

63. As regards material damage, the Court reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which it would have been had this provision not been disregarded (see *Teteriny v. Russia*, no. 11931/03, § 56, 30 June 2005, and *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, § 53, ECHR 2006-XII). The Court finds that this principle applies in the present case as well. Consequently, it considers

that the most appropriate form of redress would be the re-opening of the proceedings in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 47, 17 July 2007).

64. As regards non-pecuniary damage, deciding on an equitable basis, the Court awards the applicant EUR 7,800 under this head.

65. For the costs and expenses, the Court reiterates that an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The applicant was ordered to be paid legal expenses to the defendant party in the domestic proceedings and although the only document submitted in the case file was the tariff of fees of attorney, having regard to the complexity of the case and the comprehensive legal work carried out by the applicant's lawyer throughout the proceedings, the Court finds it reasonable to award the applicant EUR 5,000 under this head.

66. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, admissible the complaint under Article 6 § 1 of the Convention concerning the alleged denial of the applicant's right of access to court and the complaint under Article 1 of Protocol No.1 to the Convention;
2. *Declares*, unanimously, inadmissible the remainder of the application;
3. *Holds*, by four votes to three, that there has been a violation of Article 6 § 1 of the Convention on account of the denial of the applicant's right of access to court;
4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the court proceedings;
5. *Holds*, by four votes to three, that there is no need to examine separately the complaint under Article 1 of Protocol No.1 to the Convention;
6. *Holds*, by four votes to three;

- (a) that should the applicant so request, the most appropriate form of redress would be the re-opening of the proceedings before the domestic courts in accordance with the requirements of Article 6 § 1 of the Convention;
- (b) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the convention, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 7,800 (seven thousand and eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge D. Popović, I. Karakaş and P. Pinto de Albuquerque is annexed to this judgment.

F.T.
F.E.P.

PARTLY DISSENTING OPINION OF JUDGES POPOVIĆ, KARAKAŞ AND PINTO DE ALBUQUERQUE

1. We dissent on the finding of a violation of Article 6 of the European Convention on account of the alleged denial of access to court. In our view, this claim is manifestly ill-founded and should therefore have been found inadmissible. Consequently, we would not have awarded any damages or costs and expenses to the applicant. Finally, we do not think that the Court should have ordered the reopening of the proceedings before the domestic courts.

2. The first reason for our disagreement lies in the letter of the agreement concluded between the applicant and the Federal Republic of Germany on 10 October 1983, according to which the ultimate monetary claims of the applicant would be determined after the transmission of a final statement of costs (*Die Schlusszahlung wird fällig wenn die für die Berechnung der Vergütung massgebenden anrechenbaren Kosten feststehen, der Auftragnehmer sämtliche Leistungen aus diesem Vertrag erfüllt und eine prüffähige Rechnung eingereicht hat*) and any disputes arising out of the agreement should be dealt with by the Berlin court (*Der Gerichtsstand ist Berlin*).

3. In the light of the clear letter of the agreement, which was neither revoked nor altered by the parties, the competent courts to decide upon the applicant's final claim regarding payment of the unpaid work fee were the German courts. The judgment of the Berlin Court of Appeal of 20 November 1990 confirms this assertion. In fact, the German court clearly stated that, in accordance with the "tacit legal choice of the parties" (*stillschweigende Rechtswahl der Parteien*), German substantive law was subsidiary to the contract, regard being had, among others factors, to the choice of the German courts as the courts with jurisdiction to rule on any disputes arising out of the contract and the choice of the German Federal Travel Expenses Act (*Bundesreisekostengesetz*) as the law regulating the payment of travel costs. In accordance with German substantive law, the Berlin Court of Appeal rejected the claim for payment of DM 197,196 in respect of construction plans, travel expenses and tender documents (*Bauaufnahmen, Reisekosten und Ausschreibungsunterlagen*) as unfounded (*nicht begründet*) and provisionally rejected two interim claims for payment (*Zwischenrechnungen*) in the amount of DM 638,803 on the grounds that the sums were not yet due (*mangels Fälligkeit jedenfalls zur Zeit nicht begründet*). The court concluded that the applicant had not submitted a final claim for payment (*Schlussrechnung*) and that the interim claims submitted could not be recognised as a final claim (*Ihre Zwischenrechnungen sind nicht als Schlussrechnung anzuerkennen*). This judgment became *res judicata*.

4. Since the parties did not agree on the final amount of the fee owed to the applicant by the German State after the German authorities had drawn up the final statement of costs in the reconstruction project, it was up to the applicant to submit this new dispute to the competent court, that is to say, the Berlin court. Thus, the Turkish courts had no competence to rule on this new dispute, which concerned the applicant's final claim for payment. Nor could they even enforce the previous judgment of the Berlin court of 20 November 1990, since it was obviously not a final and enforceable judgment. Still less could they consider that judgment as "conclusive evidence" of the existence of a final fee owed to the applicant by the German authorities. In other words, section 42 of the Turkish Private International Law and Procedures Act was not applicable. The unavoidable conclusion to be drawn from the above is that there were no legal grounds for the Turkish courts to assess the applicant's new claim under the Turkish Code of Obligations and find it time-barred.

5. In any case, the applicant was not denied access to the Turkish courts and, what is more, even obtained a judgment in its favour (see paragraph 20). The case was examined and judgment was given on the merits. The applicant is not entitled to complain of the outcome of the proceedings, nor is the Court entitled to lay down guidelines concerning the reasoning of the Turkish Court of Cassation, which ruled differently from the first-instance court.

6. The majority found that the conclusion of the Turkish courts as to when the time-limit for bringing proceedings started running had denied the applicant the opportunity to have the merits of its claim examined (see paragraph 48). However, according to the established case-law of the Court, it is in the first place for the national authorities, and notably the courts, to interpret domestic law and the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. This applies in particular to the interpretation by the courts of rules of a procedural nature such as time-limits (see *Rodoplu v. Turkey*, no. 41665/02, § 23, 23 January 2007).

7. Finally, we agree with the finding of a violation of Article 6 on account of the excessive length of time it took the Turkish courts to reach a final decision on the applicant's claim. Nevertheless, no damages or costs and expenses should be awarded to the applicant, in view of the fact that he wrongfully initiated proceedings before the Turkish courts.