

## International report - Is withdrawal of appeal different from waiver of action?

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The withdrawal of an action allows the withdrawing party to re-file the same action. However, if a party waives an action, it also waives all of its rights to file the same action.

The action in the case at hand was filed for a declaration of non-infringement of a patent. The Istanbul 3rd Civil Court of Intellectual and Industrial Property (the 3rd IP Court) granted a decision in favour of the plaintiff, and held that the plaintiff's formulation did not infringe the defendant's patent after obtaining an expert report and an analysis report. The defendant then appealed before the 11th Civil Chamber of Court of Appeal stating that:

- the plaintiff has no legal interest in filing the declaratory action, as there was no concrete situation that might cause danger to its legal rights; and
- the 3rd IP Court did not respond to the defendant's technical objections through a new expert report.

The 11th Civil Chamber accepted the defendant's appeal request on the grounds that the 3rd IP Court should have obtained an expert opinion before rendering its decision in order to meet the defendant's objections and clarify the case.

When the case returned to the 3rd IP Court, the defendant requested the court to comply with the 11th Civil Chamber's decision and conduct an expert examination on the file. However, the 3rd IP Court decided not to follow the 11th Civil Chamber's reversing decision by using the procedural persistence right against the 11th Civil Chamber, stating that there was no need for further examination, as the defendant's objections had been evaluated in the reasoned judgment.

Following a decision of persistence by the 3rd IP Court, even though the defendant had appealed this decision before the Assembly of Civil Chambers of the Court of Appeal, it then decided to withdraw the appeal. Thus, the defendant filed a withdrawal request based on Article 123 of the Civil Procedural Code, wherein it stipulated that the plaintiff was entitled to withdraw the action until the decision became final with the clear consent of the defendant.

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However, the Assembly of Civil Chambers of the Court of Appeal did not accept the defendant's withdrawal and stated that it was not possible for a defendant to withdraw the appeal; rather, it could only waive the appeal.

Pursuant to Article 123 of the Civil Procedure Code, the plaintiff can withdraw its action until the judgment is finalised if the defendant gives its express consent. According to common opinion, the phase "until the finalization of the judgment" includes the appeal stages, as the action is still ongoing in the appeal phase. In the case at hand, as neither the 3rd IP Court decision nor the 11th Civil Chamber decision had been finalized, considering Article 123 of the code it was possible to withdraw an action at the appeal stage.

However, the Assembly of Civil Chambers of the Court of Appeal indicated that the appeal process is a legal proceeding depending on a peremptory time, and therefore it is not possible to withdraw an appeal in order to file the same later on. Thus, withdrawal of the appeal request and the action are different. In the assembly's opinion, only a waiver of the appeal is possible as it must be unconditional and final for the appeal.

### **Comment**

Did the assembly's decision constitute a new interpretation of Article 123 of the Civil Procedure Code? Will it change the way in which this article is applied and limit the will of the parties in an ongoing action? It is hoped that in the near future, jurisprudence and doctrine will shed some light on this matter.

In the authors' opinion, the reasoned decision of the Assembly of Civil Chambers of the Court of Appeal is not legally correct due to the fact that both the appeal request and many procedural steps (eg, filing evidence) have a peremptory time period. Provided that the defendant clearly consents to the withdrawal, there should be no problem, so at that time it does not matter whether the plaintiff withdraws the full action or just the appeal request. The meaning of Article 123 is clear and barely differentiates between withdrawal of the petition, the evidence petition or the appeal.

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