Arbitration in Turkey

Editors: Ali Yeşilırmak and İsmail G. Esin

Although Turkey has been comparatively slow to develop an arbitration culture, today – befitting its rapid rise to sixteenth among the world's national economies – arbitration has become the norm there in both domestic and international commercial disputes. To meet the prodigious increase in Turkish transnational transactions since the turn of the 21st century, the legislature has created a powerful legal framework regarding arbitration, and a sophisticated arbitration expertise has come to the fore. The pending Istanbul Arbitration Centre, envisaged to be governed by private stakeholders and to be an autonomous institution subject to private law, will fill whatever need remains for a centralized and effective arbitration culture in Turkey.

This book provides a comprehensive analysis of the law and practice of international arbitration and other alternative dispute resolution mechanisms in Turkey. It has been prepared with the contributions of twenty experienced Turkish practitioners and academics, all of whom are experienced experts in the field. Among the factors discussed that manifest the emergence of world-class arbitration in Turkey are the following:

– the legal infrastructure regarding arbitration in Turkey;
– the regulatory framework governing foreign direct investment in Turkey;
– differences between Turkey's Code of Civil Procedure (CCP) and International Arbitration Law (IAL);
– Turkey's Mediation Law;
– Turkey's reservations in relation to the New York Convention;
– compliance with the ICSID Convention and the Energy Charter Treaty;
– investor rights and protections under Turkey's bilateral investment treaties;
– the role of Turkey's main arbitral institutions;
– real rights concerning immovable property;
– principles governing judicial intervention;
– language of arbitration;
– arbitration costs;
– setting aside claims and applicable procedure;
– the merger and acquisition transition process; and
– Internet domain name arbitration.

In addition, there is the great promise of Turkey's investment agreements with the 57 States Parties to the Organisation of the Islamic Conference to be considered. For this and many other reasons, this book will be of inestimable value to institutional and private investors worldwide.

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Summary of Contents

Foreword

There has been an explosion in the amount of international arbitration taking place around the world over the past thirty years. This is because of the globalization of international business transactions, the breaking down of national barriers and time zones through electronic communications, and the accepted view that national courts are not best suited to determine disputes arising out of international commercial arrangements of a complex nature. This has been further supported and encouraged by looser and more flexible national and international regulations, backed by treaty arrangements where necessary or appropriate, all in support of not just trade related contracts, but more particularly new and varied types of international business transactions. Participants in international arbitrations include not only ordinary businesses, but also governments, state entities and multinational corporations, and involve all economic sectors.

Commensurate with and perhaps partly driving the expansion of international arbitration has been the increasing economic strength of countries which may previously have been considered as developing countries. Some of the emerging economies are today major economic power-houses competing fully with the traditional western and capitalist countries. The playing fields have changed with respect to participants, venues and rules.

Pivotal to these developments has been the embracing by so many countries around the world of international arbitration as a preferred or at least an accepted dispute resolution method. This is illustrated by the 150 countries which are now party to the 1965 Washington Convention on the Settlement of Disputes between States and Nationals of Other States and have accepted the jurisdiction of the International Centre for the Settlement of Investment Disputes, the 149 countries which have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the 68 national jurisdictions which have enacted arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration. Also, around the world more international arbitration centres offer their institutional arbitration services and rules to the international legal community.

Turkey has developed into a strategically important political and economic power. It is geographically well situated, on the borders of Asia, Europe and the Middle

East and is viewed as an important country in all of these areas. The Turkish economy has expanded almost every year since 2001 and annual GDP growth has been as high as 8.8% within the past few years. The industry and service sectors are increasingly more important within the Turkish economy. As Turkish business has expanded along with its foreign trade transactions, both import and export, inevitably so too has the number of transactions involving Turkish parties being involved in international arbitration. Turkish civil and commercial law is based on Swiss law; Turkish corporate law is heavily influenced by German law, so there is a very sound continental law orientation.

Turkey's attitude to arbitration has not always been positive, but it has changed dramatically since the late 1980s and 1990s. Turkey became party to the ICSID Convention in 1989. It ratified the New York Convention in 1992. It adopted up-to-date arbitration legislation in 2001 based on the UNCITRAL Model Law. It has entered into bilateral agreements regarding the recognition and enforcement of civil and commercial judgments and arbitral awards. More and more Turkish parties are involved in arbitration with contracting parties from outside Turkey.

For all of these reasons, Turkish law on arbitration is of great importance. Parties agreeing to submit to arbitration or involved in an arbitration with a Turkish party will be concerned that the arbitration agreement will be respected and enforced under Turkish law and by the Turkish courts. When considering Turkey as a seat of arbitration, parties will want to understand the supporting law including when and in what circumstances the Turkish courts will support or intervene in the arbitral process. Finally, parties will want to know that that the Turkish law and courts will recognize and enforce foreign arbitration awards in accordance with New York Convention standards.

For all these reasons we are delighted to welcome and endorse this excellent book on Arbitration Law in Turkey by Dr Ali Yeşilimirak and Dr Ismail Esin. Written by two outstanding young scholars and practitioners, it will provide a great tool to all those interested in or involved with arbitration in Turkey and with Turkish parties.

We are privileged to have had the authors as our students in earlier years, and are touched by their decision to dedicate this work to us.

Professor Dr Julian D M Lew QC
Professor Dr Gerhard Wegen
London and Stuttgart
September 2014

Preface

Turkey, particularly in the last decade, has demonstrated an economic growth that is incredible in pace which has become one of the 20 largest economies in the world. International transactions and foreign direct investments, inflow and outbound, have increased immensely within this period. Such developments have had tremendous impact on the increase in use of international arbitration and other ADR mechanisms where Turkey and/or Turkish parties have been involved. ADR mechanisms, particularly with regards to arbitration, have started to flourish in Turkey. The need to provide a 'guide' to foreign users of arbitration and other ADR mechanisms has thus arisen. This book aims to provide a comprehensive analysis of the law and practice on international arbitration and other ADR mechanisms in Turkey.

This book has been prepared with the contributions of experienced academics and practitioners who are experts in the field of arbitration and/or other ADR mechanisms. The book has incorporated these experts' knowledge and unique perspective on certain matters. We believe this diversified approach has greatly enriched the content of the book, and hope that such is the perceived view of those who use this book for guidance and direction.

The editors hereby thank all contributors for their diligent work and cooperation.

The editors are also thankful to Eleanor Taylor of Kluwer Law International for her encouragement and assistance in the preparation of this book; and to Doğan Gültutan, LLM, Attorney at Law, and Michael J. Curtis for their assistance in editing the book.

This book reflects the law and practice of international arbitration and other ADR mechanisms as of August 2014.

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CHAPTER 11
Arbitrating Intellectual Property Disputes

Mehmet Gün, Hande Hançer & Başak Gürbüz

§11.01 INTRODUCTION

Intellectual property rights (IPRs (IPR in the singular meaning)) have become the most valuable assets in the modern times of the global economy. The strength and financial importance of IPRs has also been well recognized in Turkey since 1995, the year of 'Turkish IPR revolution'; the Turkish legal system relating to IPRs was amended to ensure conformity with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[1] and other international treaties.

As the number of IPR disputes is continuously growing, the demand for more expedient and rapid resolution methods is at an increase. It is true that some particular characteristics of IPR disputes, such as its international character, technical aspects, urgency (limited protection of time) and confidentiality requirements may be better addressed by means of arbitration.[2] Nevertheless, the difficulties in the enforcement of arbitral awards and also the territorial nature of IPRs are amongst some reasons which prevent the parties from applying to arbitration as often as it could be.

The aim of this chapter is to describe both the legal framework and the practice of arbitration in relation to IPR disputes in Turkey. For this purpose, first of all the scope of IPRs in Turkey and the disputes arising from IPRs will be portrayed and the arbitrability of IPR disputes will then be discussed. Second, the principal arbitral institutions that operate to resolve IPR disputes and related case-law will be considered. The chapter then concludes with the analysis of the difficulties and with some suggestions for the most effective application of arbitration in IPR disputes.

1. TRIPS is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for national legislation for various types of IP. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.
2. www.wipo.int/amc/en/arbitration/why-is-arb.html, August 2014.

§11.02 ARBITRABILITY OF DISPUTES ARISING FROM IPRS

[A] IPRs and Their Importance

IPRs are legal property rights over creations of the mind, both artistic and commercial, and the corresponding fields of law.

IPRs have been covered within their broadest description under TRIPS. Article 1(2) of the TRIPS lists IPRs as copyright and related rights, trademarks, geographical indications, industrial designs, patents and layout designs (topographies) of integrated circuits as well as undisclosed information, including trade secrets.

Since Turkey is a party to most of the intellectual property (IP) international treaties, including TRIPS, Turkish IPRs legislations are mostly compatible with international legislations.

Accordingly, copyrights, trademarks, geographical indications, industrial designs, patents and integrated circuit topographies and trade secrets are also protected under Turkish IP legislations. A very brief definition of these IP rights and the principal legislations relating to those are as follows:

- **Artistic and Intellectual Work:** All types of intellectual and artistic works that bear the original features of the creator and which can be categorized under the 4 categories (*numerus clausus*) foreseen under the Law on Intellectual, Artistic and Literary Works (Law No. 5846),[3] which are (i) scientific and literary works, (ii) musical works, (iii) fine art and (iv) cinematic works.

  Intellectual and artistic works are protected under Law No. 5846. The law covers both moral and economic rights on intellectual and artistic works of authors, as well as those of performers who perform or interpret such works, phonogram producers who make the first fixation of sounds, producers who make the first fixation films and radio-television organizations, the rules and procedures regarding legal transactions on such rights, ways of legal actions and sanctions.
- **Trademark:** All kinds of signs that enable the goods or services of an undertaking to be distinguished from the goods or services of other undertakings. These may include personal names and especially reference to words, shapes, letters, numbers and signs that can be viewed in the form of drawings or which can be expressed by similar means with regard to the shape or cover of the goods, and published and reproduced by publication.

  Trademarks are protected by the Decree Law on the Protection of Trademarks (Decree Law No. 556).[4] The aim of Decree Law No. 556 is to protect trademarks registered in conformity with the provisions thereof. The Decree Law No. 556 establishes the principles, rules and conditions for the protection of trademarks.

3. Law on Intellectual, Artistic and Literary Works, Law No. 5846 of 5 December 1951, published in the Official Gazette Numbered 7981 and dated 13 December 1951.
4. Decree Law on the Protection of Trademarks, Decree Law No. 556 of 24 June 1995, published in the Official Gazette Numbered 22326 and dated 27 June 1995.

- **Patent:** Inventions which are novel, which surpass the current standard for state-of-the-art in a particular industry, and which are applicable in that industry are protected by patents.

  Patents are protected by the Decree Law on the Protection of Patent Rights (Decree Law No. 551).[5] The purpose of the Decree Law No. 551 is to protect the inventions by granting patents or utility model certificates in order to promote inventive activities and contribute to technical, economical and social developments by implementing the inventions in the industry. The Decree Law No. 551 contains the principles, the rules and the conditions/ requirements for issuing patents or utility model certificates to inventions qualifying for grant of industrial property rights.
- **Industrial Design:** The entirety of the various features such as lines, colours, textures, shapes, sounds, elasticity, materials and other characteristics perceived by human senses of the appearance of the whole or part of a product or its ornamentation.

  Industrial designs are protected by the Decree Law on the Protection of Industrial Designs (Decree Law No. 554).[6] The Decree Law No. 554 aims to protect designs conforming to the provisions of the Decree Law No. 554 and facilitate the formation and development of the industry and of the competitive environment. The Decree Law No. 554 encompasses the principles, rules and conditions for the protection of registered designs. For non-registered designs, the general provisions shall prevail. The rights conferred by the Decree Law No. 554 do not in any way invalidate the protection conferred by Law No. 5846.
- **Geographical Indication:** Indications which identify a good as originating from an area, region, locality or country, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

  Geographical indications are protected by the Decree Law on the Protection of Geographical Indications (Decree Law No. 555).[7] The Decree Law No. 555 aims to protect the natural, agricultural, mining and industrial products and handicrafts under geographical signs when they are in conformity with the provisions of the Decree Law No. 555.
- **Topographies for Integrated Circuits:** The fixed series of images in any format which are prepared for production and which indicate the three dimensional array of layers which constitute the integrated circuit as well as the partial or entire image of a surface within any stage of the production of an each integrated circuit image.

5. Decree Law on the Protection of Patent Rights, Decree Law No. 551 of 24 June 1995, published in the Official Gazette Numbered 22326 and dated 27 June 1995 (comprising of both the patent and utility model protections).
6. Decree Law on the Protection of Industrial Designs, Decree Law No. 554 of 24 June 1995, published in the Official Gazette Numbered 22326 and dated 27 June 1995.
7. Decree Law on the Protection of Geographical Indications, Decree Law No. 555 of 24 June 1995, published in the Official Gazette Numbered 22326 and dated 27 June 1995.

They are protected under Law on the Protection of Topographies for Integrated Circuits (Law No. 5147).[8] The Law No. 5147 aims to provide protection for integrated circuit topographies for the purpose of creating a competitive atmosphere in the field, and, thereby enable the development of the industry. It comprises principles, rules and conditions pertaining to the protection of registered integrated circuit topographies.

The IPRs provide owners with an economic incentive to develop and share ideas through a form of temporary monopoly. It would not be wrong to say that the modern economic markets operate on the basis of IPRs such as well-known trademarks, patented technologies and copyrights. The trademark most well-known, the technology most handy and most preferred and the movie most watched are the winners of the market competition. It is not very rare that a very small sized company is acquired by a giant technology company for astronomic amounts because of the value of IPRs, for instance software or an online game system owned by that small company.

Thus, IPRs are quite important values in a market economy as they are indispensable to maintain a competitive edge as well as to form strategic alliances. For this reason, the protection of IPRs is quite important and is one of the top duties of governments in developed and emerging markets.

The World Intellectual Property Organization (WIPO) lists two reasons as to need to protect IPRs through intellectual property laws: 'to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations' and 'to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.'[9]

[B] Relations Arising from IPRs

As IPRs are the most valuable economic assets of modern market economy, they are the key element of almost all commercial relations. The parties may enter into relations with respect to the creation, development, use, marketing or transfer of IPRs.

In general, most relations arising from IPRs are 'contractual relations' and are governed in principle under the general provisions of contract law, while at the same time there are also rules that are specific to IPRs. Such rules are mostly special arrangements of the general provisions so that they fit to the characteristics of IPRs.

The contractual relationship may be commenced before or after an IPR is created. Indeed the parties may enter into an agreement for the creation of an IPR and start the relationship at such an early stage. For instance, the parties may sign a contract for the development of computer software which would then be recognized as a scientific work under Law No. 5846.

8. Law on the Protection of Topographies for Integrated Circuits, Law No. 5147 of 22 April 2004, published in the Official Gazette Numbered 25448 and dated 30 April 2004.
9. www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf, August 2014.

Following the creation of IPRs, there may be different forms of relationships between the parties. An IPR may be partially or totally transferred or the owner of the IPR may grant the right to use the IPR to a third party or may have a third party exploit the IPR on its behalf. For instance, a musical work owner can transfer its economic rights on its work to a third party. Furthermore, a patent owner can also transfer its patent right(s) to a third party perpetually or for a specific period of time. Likewise, the owner of a computer software program can license the copyrights on the software to various third parties for copying and using the software.

There may be more than one party in a legal IPR transaction, depending on the nature and subject of the legal transaction. For instance, if the subject matter of the legal transaction is a musical or cinematographic work, then there may be more than one party involved i.e. the composer, the songwriter, the arranger and the production company for musical works and the scriptwriter, director, dialog writer, producer, film music composer and the production company (as well as the post production company most of the times).

Finally, in addition to all these contractual/wilful relationships, there may also be unwilled relations which would arise as a result of an infringement of IPRs. In such cases, the relationship between the parties will be created upon tort and will have its own legal consequences.

[C] Disputes Arising from IPRs and Arbitrability of IPR Disputes

Disputes arising from IPRs may either be in the form of (i) contractual disputes (i.e., breach of contract) or (ii) disputes based on tortious liability (more specifically referred to as infringements). Arbitrability of disputes are mainly determined either depending on the property nature of the claims brought to arbitration or depending on whether the parties are free to use their right of disposal freely on the subject matter of the dispute.

IPRs are classified as a sort of 'property right'; thus, in principle the parties can freely dispose of the subject matter of the dispute, although there are a few exceptions where the rights of the IP owner are restricted on the basis of public interest, e.g. the author of an intellectual or artistic work not being able to totally assign moral rights. Even in this rare example, a dispute arising from an author's moral rights has been accepted as being arbitrable in recent EU practices.[10] Accordingly, it is accepted that regardless of its nature, IPR disputes that can be settled between the parties are generally regarded as being arbitrable.[11]

10. See, A.P. Mantakou, 'Part II Substantive Rules on Arbitrability, Chapter 13 – Arbitrability and Intellectual Property Disputes', in *Arbitrability: International and Comparative Perspectives*, edited by L.A. Mistelis & S.L. Brekoulakis (Alphen aan den Rijn: Kluwer Law International, 2009), 266-272.
11. www.wipo.int/amc/en/arbitration/why-is-arb.html, August 2014: 'Any right of which a party can dispose by way of settlement should, in principle, also be capable of being the subject of arbitration since, like a settlement, arbitration is based on party agreement. As a consequence of the consensual nature of arbitration, any award rendered will be binding only on the parties involved and will not as such affect third parties'.

In most jurisdictions, including Turkey, certain IPRs, such as trademarks and patents, come into existence on the basis of registration by national authorities.[12] However, even this registration principle is not a ban as to the arbitrability of disputes on IPR ownership. Any arbitral award granting the ownership on a certain IPR may also be enforceable before the national authorities after the recognition of the award by national courts following an application for the recognition and enforcement of the award pursuant to the New York Convention or the TPIL.[13]

It is observed from practice that IPR arbitration address principally contractual rights and obligations, as well as breaches and infringements under license agreements.[14] Nevertheless, it can also arise from non-contractual relations. As for contractual relations, the most common types of disputes that can be referred to arbitration are disputes that are commercial in nature which stem from the violation of private law relations. For example, in case of a breach of contract, there is a violation of a contractual relationship and the parties may prefer to settle this dispute by way of arbitration, instead of initiating legal proceedings before the competent courts. Accordingly, in such disputes, given the mutual relationship between the parties, the parties may insert an arbitration clause in their agreement(s) agreeing to settle any and all potential future disputes by way of arbitration. Alternatively, a separate additional arbitration agreement or protocol can be executed providing that any dispute arising from the underlying agreement will be settled via arbitration whereby the terms of arbitration for the possible disputes may be regulated.

As for non-contractual relationships, the disputes arise from tortious acts committed against third parties. Once the tortious act is committed, a legal relationship would then arise as between the wronged (the victim) and the wrongdoer (the party at fault). However, provided that there is no contractual relationship between the parties executed before the dispute that covers the tortious act(s) concerned, it would not be possible to designate and agree on an arbitration mechanism between the parties before the dispute arises. However, after the tortious act is committed, the parties may choose to settle the dispute by way of arbitration and enter into an arbitration agreement. We should hereby note that the IAL explicitly permits the execution of arbitration agreements by parties and provides mechanisms for its adherence to it. Under Article 5 of the IAL, in case an action is filed before the court despite the existence of an arbitration agreement between the parties to the dispute, then either party can raise an arbitration objection.[15]

It should additionally be underlined that arbitration can be resorted to both for civil and criminal results of contractual and tortious disputes. Indeed, with respect to criminal matters, which is in fact a public law area, there may be an arbitration clause in the agreement stating that the parties will not make any criminal complaints against

12. In most of jurisdictions, IPRs are granted through registration by national authorities. Although registrations in some cases are not decisive as to ownership, registration is a strong legal presumption in favour of ownership.
13. See, Chapter 8 for more detail.
14. Mantakou, *supra* n. 10, 270.
15. See, Chapter 3 for more detail.

each other until the dispute is settled by way of arbitration and an arbitral award is rendered.

§11.03 ARBITRAL INSTITUTIONS AND CASE LAW

There are no arbitral institutions in Turkey that are specific to IPR disputes. However, there are various worldwide and territorial arbitral institutions operating in intellectual property disputes. Taking an overview of the practice in Turkey, most disputes arising from intellectual property law and that are subject to arbitration are in relation to domain names. Nearly all academic papers concern the arbitration of domain name disputes; more than disputes arising other IPRs matters or regarding arbitrability. Nonetheless, conflicts stemming from license contracts in the film and television sector are also remarkable.

In this section, the most significant institutions that are preferred by Turkish parties will be considered, together with some case-law analysis.

[A] WIPO

WIPO was established in 1967 in Geneva and is a global platform for intellectual property services, policy, information and cooperation.[16] It is self-funding agency of the United Nations and currently has 187 Member States, including Turkey.

WIPO has an Arbitration and Mediation Center (Center) which provides neutral, international and non-profit dispute resolution options.

The Centre offers mediation, arbitration, expedited arbitration and expert determination services enabling parties to effectively resolve their IPR disputes. The Center also offers domain name dispute resolution services, which is a service frequently used by Turkish parties.

Under this part, the functions of the Center will be examined under two headings, namely arbitration and mediation services and domain name dispute resolution services.

[1] Arbitration and Mediation Services

The Center deals with software arbitrations, trademark arbitrations, pharma patent license arbitrations, copyright mediations followed by expedited arbitration, expedited arbitrations relating to artistic production finance agreements, arbitration of biotech/pharma disputes, expedited arbitration of patent license disputes, arbitration of information technologies/telecom disputes, expedited arbitration of trademark co-existence disputes, patent license arbitrations, arbitration relating to artist promotion disputes, arbitration of telecom infrastructure disputes, expedited arbitration relating to banking software disputes, broadcast rights distribution agreement arbitrations,

16. www.wipo.int/about-wipo/en/, August 2014.

medical device related patent arbitrations and expedited arbitration of software disputes.[17]

Regarding the involvement of Turkish parties, it is reported that so far the Center has administered only one dispute. The dispute related to an IT agreement between a company domiciled in England and a company domiciled in Turkey, which included a WIPO Mediation /WIPO Expedited Arbitration clause. The place of arbitration was London. The parties were represented by English and Turkish lawyers and settled their dispute in the course of the mediation with the assistance of a WIPO-appointed mediator.

[2] Uniform Domain Name Dispute Resolution Policy (UDRP) Proceedings (Domain Name Arbitration)

Center also offers domain name dispute resolution services under the UDRP since 1999.[18] The UDRP sets out the legal framework for the resolution of disputes between a domain name registrant and a third party (i.e., a party other than the registrar) over the abusive registration and use of an internet domain name in the generic top level domains or gTLDs (i.e., .biz, .com, .info, .mobi, .name, .net, .org), and those country code top level domains or ccTLDs that have adopted the UDRP on a voluntary basis.[19]

It is important to note that the Rules of UDRP (UDRP Rules) are approved by the Board of Directors of ICANN.[20] Therefore, a panel decision needs to be implemented by the registrar with which the contested domain name is registered at the time the decision is rendered.

The domain name arbitrations can be mentioned as being the most common types arbitration preferred in Turkey. Five panellists from Turkey are listed amongst the WIPO Domain Name Panelists.[21]

With respect to the most significant cases relating to Turkey that has been ruled by WIPO Domain Name Panelists, the following can be shown as noteworthy examples:[22]

- *Cem Yılmaz v. Roman Club International*[23] – The complainant, Cem Yılmaz, is very well-known in Turkey as a stand up comedian, caricaturist and motion picture actor and the respondent is a company located in New York, USA. The complainant performed in a show in New York City in April 1999. The respondent had registered the domain name 'cemyilmaz.com' on 15 April

17. www.wipo.int/amc/en/arbitration/case-example.html, August 2014.
18. www.wipo.int/amc/en/domains/gtld/, August 2014.
19. www.wipo.int/amc/en/domains/guide/#b, August 2014.
20. ICANN (Internet Corporation for Assigned Names and Numbers) is a civil institution established in 1998 and is located in Los Angeles.
21. www.wipo.int/amc/en/domains/panel/panelists.html#172, August 2014.
22. S. Bozbel, *İnternet Alan Adlarının (Domain Names) Korunmasında ICANN Tahkim Usulü* (ICANN Arbitration Procedure in the Protection of Domain Names) (Istanbul: Seçkin Publishing, 2006).
23. Case No: D2000-1541, www.arbiter.wipo.int/domains/decisions/html/2000/d2000-1541.html, August 2014.

1999. Following the commencement of arbitral proceedings by the complainant, the sole arbitrator (Tony Willoughby) found that the domain name concerned is identical to a trade mark/service mark in which the complainant has unregistered rights and that therefore the respondent has no right or legitimate interest with respect to the domain name and that the subject matter domain name was registered in bad faith and was consequently being used in bad faith. An order was therefore made for the transfer of the domain name 'cemyilmaz.com' to the complainant.

- *Beko (UK) Limited v. N&K Danışmanlık A/S*[24] – The complainant, Beko (UK) Limited, is a company that owns several 'Beko' trademarks and that are registered in the UK and in Turkey and the respondent is N&K Danışmanlık Limited AŞ, a company registered in Bursa, Turkey. The complainant contended that the respondent had registered the domain name 'beko.com', identical to the complainant's 'Beko' trademarks, and that the respondent possessed no right or legitimate interest with respect to the subject matter domain name and that the domain name was registered and used in bad faith. The respondent failed to submit a defence/response to the allegations raised. The sole arbitrator (Geert Glas) rules that the domain name 'beko.com' that was registered by the respondent is identical to the trademark of the complainant, that the respondent possessed no right or legitimate interest in respect of the domain name, and that the respondent's domain name was registered and used in bad faith. An order was therefore made for the transfer of the domain name 'beko.com' to the complainant.
- *Genelkurmay Başkanlığı v. Genelkurmay Inc.*[25] – The complainant was the Chief of the General Staff ('*Genelkurmay*') who is the commander of the armed forces of the Republic of Turkey. The expression *genelkurmay* is also contained in the Turkish Constitution and in the Law on the Authority and Duties of the Chief of General Staff,[26] as an official institution independent from any ministries, working under the supervision of the Prime Minister. On the other hand, the respondent is Genelkurmay Inc., a company with its address in Denver, USA. The respondent registered the domain name 'genelkurmay.net' on 4 September 1999, and according to the complainant, entertained under the subject matter domain name a website in the Turkish language. The sole arbitrator (Dr. Gerd F. Kunze) decided that the complainant had not proven that it had rights in a mark, to which the domain name 'genelkurmay.net' might be identical or confusingly similar. Therefore, the complainant's request for the transfer of the domain name to itself was denied.

24. Case No. D2000-0316, www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0316.html,August 2014.
25. Case No: D2001-1279, www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1279.html, August 2014.
26. Law on the Authority and Duties of the Chief of General Staff, Law No. 1324 of 31 July 1970, published in the Official Gazette Numbered 13572 and dated 7 August 1970.

- *Koç Holding A.S. v. MarketWeb A.S.*[27] – The complainant was Koç Holding AŞ, a company having its registered office in Istanbul, Turkey. The Koç Group, controlled by Koç Holding and the Koç family, is one of the largest industrial and commercial corporations in the world with a combined turnover of USD 13 billion (Several Fortune 500 rankings). It is also the leading private sector conglomerate in Turkey and operates in 9 different business sectors with over a hundred individual companies. The respondent, on the other hand, is MarketWeb AŞ, a company with its address in Ankara, Turkey. The respondent registered the domain name 'koc.com'. The complainant commenced arbitration proceedings and contended that the respondent had no right or legitimate interest in the domain name and relied on the respondent's bad faith. The respondent resisted the claim and argued that the complainant had not trademarks for 'koc' or 'koç' in the online database 'uspto.gov' or 'patent.gov.uk' and that its claim was therefore groundless. Further, the respondent claimed that in Turkey there are lots of 'koç' trademarks and that the only trademark the complainant has is the logo comprised of a ram head which the respondent had not used; it had only used a ram head from a real photo instead. The sole arbitrator (Thomas H. Webster) held that the burden on the complainant under paragraph 4(a) of the Policy was to prove that the domain name registered by the respondent is identical or confusingly similar to a trademark or service mark in which the complainant had right but that despite its statements in the complaint, the complainant had failed to prove that it has a trademark. Therefore, the Panel held that the dispute did not fall within paragraph 4(a) of the Policy and that the domain name 'koc.com' can remain as being registered to the respondent.
- *Vakko Holding Anonim Sti. v. Esat Ist*[28] – The complainant Vakko Holding Anonim Şirketi is a corporation organized and existing under the laws of Turkey whereas the Respondent is Esat ist, with an address in Istanbul, Turkey. The domain names at issue are 'vakkorama.com' and 'vakkorama-.net'. The complaint was based on the trademark VAKKORAMA, which is registered as a figurative mark by the Turkish Patent Institute for the goods and services, with which the complainant is currently using with the mark, primarily clothing and related articles. The respondent did not file a formal response in accordance with the UDRP Rules but the Panel nevertheless decided that it will take into account the e-mails sent by the respondent to the WIPO Center. The sole arbitrator (Knud Wallberg) determined that the domain names registered by respondent were confusingly similar to the trademarks in which the complainant has rights, that the respondent failed to show that it possesses any right or legitimate interest with respect to the domain names, and that the respondent's domain name rights were therefore registered and

27. Case No. D2000-1764, www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1764.html, August 2014.
28. Case No. D2001-1173, www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1173.html, August 2014.

used in bad faith. An order was therefore made for the transfer of the domain name to the complainant.

– *Vestel Elektronik Sanayi ve Ticaret AS v. Mehmet Kahveci*[29] – The complainant was Vestel Elektronik Sanayi ve Ticaret AŞ, a corporation operating under the laws of Turkey with its principal place of business in Manisa, Turkey whereas the respondent was Dr. Mehmet Kahveci, an individual with an address in Boston, MA, USA. The disputed domain name was 'vestel.com'. The complainant, owning worldwide rights to the VESTEL trademark and service mark, stated that the VESTEL mark was identical to the domain name in dispute, that the complainant had been using the VESTEL trademark, with rights, since 1984 whereas the respondent had registered the domain name 'vestel.com', and that it is clear beyond doubt that the domain name was identical or confusingly similar to the trademark used by complainant. The respondent did not file any defence/response to the complaint. The sole arbitrator (R. Eric Gaum) decided that the complainant had established that the respondent engaged in abusive registration of the domain name 'vestel.com' within the meaning of paragraph 4(a) of the Policy and that therefore the domain name 'vestel.com' should be transferred to the complainant.

[B] Independent Film & Television Alliance (IFTA)

Independent Film & Television Alliance (IFTA) Arbitration is used for domestic and international media and entertainment law based disputes, such as those arising out of production agreements, motion picture, television and multimedia licensing agreements and film exhibition agreements, to name a few.[30]

IFTA arbitration is available to both IFTA members and non-members for both domestic and international arbitrations, provided that the parties have stipulated in writing to use this dispute resolution mechanism[31] either in a clause in the contract under dispute or by a separate written agreement. Parties can identify the forum and the governing law for the arbitration at the time of signing the contract containing a clause for IFTA Arbitration. If no forum or governing law is selected, the arbitration will be held in Los Angeles pursuant to the laws of California. However, it is possible to hold hearings in another country, or by telephone, or to submit written materials instead of holding a hearing.[32]

The IFTA arbitrators who are independent are vetted and approved by the Arbitration Advisory Committee which updates the Arbitrators Panel annually depending on the expertise and availability of the arbitrators. The arbitrators must qualify each

29. Case No. D2000-1244, www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1244.html, August 2014.
30. www.ifta-online.org/arbitration, August 2014.
31. www.ifta-online.org/sites/default/files/Guide%20to%20IFTA%20Arbitration%202009.pdf, August 2014.
32. www.ifta-online.org/sites/default/files/Guide%20to%20IFTA%20Arbitration%202009.pdf, August 2014.

year on the grounds of on-going expertise and availability in order to remain on the Arbitrators Panel. IFTA arbitrators are located in USA and also in fifteen countries around the world.[33]

As to the conflicts in film and television sector, parties (usually media and entertainment companies, and media and advertisement agencies) may prefer to use the IFTA arbitration.[34]

Recently, claimant Nu Image Inc. (licensor) filed a claim before IFTA against Ares Film of Turkey[35] where the final award (numbered 12-26 and issued on 8 January 2013) ordered the respondent to pay to the claimant the final instalment of minimum guarantees due, pursuant to the agreement, after mitigation of damages. The agreement was thus terminated.[36]

In another case, the claimant Nu Image Inc. (licensor) filed a claim against Horizon Film International[37] (distributor) domiciled in Turkey, where the final award (numbered 12-92 and issued on 25 February 2013) ordered the respondent to pay to the claimant the remainder of the license fee due, pursuant to the distribution agreement, and terminated the agreement.[38] Finally, again the claimant Nu Image Inc (licensor) filed a claim against Horizon Film International and Sinetel Filmcilik (distributors) both domiciled in Turkey, where the final award (numbered 12-91 and issued on 26 March 2013), ordered the respondents to pay to the claimant the balance of the minimum guarantee due under the distribution agreement and terminated the agreement. The award further ordered the respondents to provide to the claimant copies of all license agreements respondents had entered into with third parties and the amounts received under those license agreements.[39]

§11.04 CONCLUSION

Arbitration is mostly compatible with the particular characteristics of IPR disputes. Nevertheless, arbitration is not applied as often as it could be for the settlement of IPR disputes. One of the most important reasons for this is that an arbitration culture has not yet been properly established in Turkey with respect to the IPR disputes. If the culture becomes established in Turkish legal practice; we believe that arbitration is likely to become the preferred dispute resolution mechanism for the resolution of IP disputes. Considering the huge work load of the Turkish courts and the low volume of settlements reached in disputes before the courts, arbitration should be encouraged and supported both by the government and the legal practitioners. Another reason is

33. www.ifta-online.org/panel-arbitrators, August 2014.
34. Please see below for detailed information.
35. Ares Film Yapım ve Dağıtım Ltd. Şti.
36. www.ifta-online.org/sites/default/files/2013%20Arbitral%20Award%20Summaries_posted%209.25.13.pdf, August 2014.
37. Horizon International Film Müzik Bilgisayar Elektronik ve Dış Tic. San. ve Tic. Ltd. Şti.
38. www.ifta-online.org/sites/default/files/2013%20Arbitral%20Award%20Summaries_posted%209.25.13.pdf, August 2014.
39. www.ifta-online.org/sites/default/files/2013%20Arbitral%20Award%20Summaries_posted%209.25.13.pdf, August 2014.

that arbitration may not be the fastest and most effective solution in resolving an IPR infringement case. In particular the lack of an arbitral institution and the inapplicability of preliminary injunction orders in arbitral proceedings, make arbitration proceedings less advantageous when compared with national court proceedings. Last but not least, the difficulties in the enforcement are also amongst the significant problems in arbitral proceedings. For instance any arbitral award deciding on the ownership on an IPR will not be recorded in the national registry and therefore will be in force until that award is recognized by the national courts and thereafter enforced by national authority. That recognition and enforcement usually process takes much longer than the arbitration process. Indeed the recognition and approval action filed before the authorized courts can generally last between 6 months to 1 year depending on the nature of the case and work load of the court.

In addition to this, there may be some problems with the notarization processes of the arbitral documents in terms of payment of high amounts of stamp taxes. One of the problems that may arise is the authorized court issue. In IPR disputes, there may sometimes be conflict of authority between IP courts and commercial courts especially in cases where the subject matter both relates to commercial law and intellectual property law. As there are no settled Court of Appeal precedents on this matter, it might be challenging for foreign arbitral awards concerning IPRs in Turkey. Such difficulties may be resolved through the establishment of an arbitral institution in Turkey specifically for the resolution of IPR disputes. As in the ICANN example, an agreement between the right holder and the national authorities for the direct recognition of arbitral awards would overcome such difficulties. The new developments in Turkey, such as the legislator's attempt to adopt the Istanbul Arbitration Centre Draft Law and the adoption of the Mediation Law are all positive developments to raise the awareness for arbitration practice in Turkey and make Turkey more arbitration friendly. This positive trend may also affect the arbitration practice for IPR disputes. The creation of an institution dealing with the arbitration of IPR disputes and the enforcement of arbitral awards would also help raise awareness of arbitration with respect to IP disputes in Turkey.