GLOBAL LEGAL INSIGHTS

International Arbitration

First Edition

Contributing Editor: Joe Tirado
Published by Global Legal Group

CONTENTS

Turkey

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Introduction

International arbitration and domestic arbitration are subject to different legislation under Turkish law. The main legislation regulating international arbitration is the International Arbitration Law numbered 4686, which is essentially based on the UNCITRAL Model Law. The Civil Procedural Law numbered 6100 regulates domestic arbitration and it is not applicable to international arbitration, unless stated otherwise in International Arbitration Law.

Turkey is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the ICSID Convention and the European Convention on International Commercial Arbitration of 1961.

Furthermore, Turkey has been showing progress in becoming more arbitration-friendly through legislative drafting focused on making arbitration and ADR methods accessible.

There are two major bodies which currently provide services for domestic arbitration in Turkey: the Istanbul Chamber of Commerce and the Union of Chambers of Commerce, Industry, Maritime Trade and Commodity Exchanges of Turkey. In addition to these, the Istanbul Arbitration Centre ("IAC") which was recently established with the Law numbered 6570 on January 1, 2015, will soon become operational and provide arbitration or ADR services for all private disputes of both foreign and domestic nature.

Arbitration agreement

In order for an arbitration agreement or arbitration clause to be valid under Turkish law, the mutual consent of the parties to settle the dispute through arbitration and be bound by the arbitral award must be explicit and clear. In principle, the arbitration agreement must be in writing. However, the written form requirement shall also be deemed as fulfilled, if the existence of an arbitration agreement is stated in the plaint petition of the plaintiff and it is not opposed with the response petition of the defendant. The arbitration agreement further needs to satisfy the formalities provided under the law governing the arbitration agreement.

Pursuant to the International Arbitration Law, disputes arising from or relating to rights *in rem* in immovable properties which are located in Turkey, and disputes which cannot be subject to the parties' will, such as disputes relating to criminal, administrative or family law, are not arbitrable. According to the precedents of the Supreme Court, for the sake of protection of the rights of creditors and employees, in principle bankruptcy and labour law disputes are not deemed arbitrable either. In terms of labour law, only re-instatement cases can be arbitrable, provided that the parties agree to settle the re-instatement dispute after the termination of employment; however, in practice, employees almost never agree to arbitration.

On the other hand, disputes arising from commercial matters and intellectual property rights are arbitrable under Turkish law, with the exception of commercial matters concerning public order. In this respect, claims pertaining to the registration, deregistration or cancellation of an intellectual or industrial property right in Turkey are included within the exclusive jurisdiction of the Turkish Courts.

Under Turkish law there is no restriction preventing state entities from entering into arbitration agreements with other parties as long as the matter is arbitrable. Moreover in 1999 the Turkish Constitution was amended to make concession contracts arbitrable. By this change, instead of the exclusive jurisdiction of the administrative courts, the parties were allowed to conclude a private law contract with an arbitration clause. This was particularly important for privatisation projects and build-operate-transfer (BOT) contracts.

The principles of competence-competence and separability are also applied under Turkish law. Accordingly, an arbitrator or arbitral tribunal may decide its own jurisdiction including oppositions to the existence or validity of the arbitration agreement. The arbitration clause is considered separately from the main contract and the invalidity of the contract does not extend to the validity of the arbitration clause.

Arbitration procedure

The parties may determine the arbitral procedure either directly or by reference in the arbitration agreement. Otherwise, the parties and the arbitrators determine the procedural rules after the arbitration is commenced. In this regard, the IBA Rules on Taking of Evidence in International Commercial Arbitration can also be applied if the parties agree on their application.

Arbitration proceedings are commenced with a request for settlement of the dispute through arbitration, unless agreed otherwise by the parties. If both parties are to appoint arbitrators according to the agreement, then the proceedings are deemed to be commenced on the date that the claimant notifies the respondent of the appointment. If the names of the arbitrators are stated in the agreement, then the commencement date will be the date on which the counter party receives the request for arbitration. The parties may also determine the commencement date of the arbitration proceeding in the arbitration agreement.

The seat of arbitration can be freely designated by the parties or by the arbitration institution that they have chosen. With a prior notice to the parties, the arbitrator or the arbitral tribunal may also decide to meet in a place other than the designated seat of arbitration, as it may be required for the arbitration proceeding, for instance in order to save time and reduce costs. In such a case, it should be noted that the award should state the place of arbitration which was agreed upon in the first place.

During the proceedings, the arbitral tribunal may decide to appoint an expert or an expert committee. The arbitral tribunal can also decide to conduct on-site examinations if need be.

Confidentiality of arbitral proceedings is a general principle in Turkish practice. Based on this principle, in addition to the parties, other attendees such as counsels, witnesses and experts are under the obligation of confidentiality. The arbitration rules of the Istanbul Chamber of Commerce and the Union of Chambers of Commerce, Industry, Maritime Trade and Commodity Exchanges of Turkey also provide that the arbitration proceedings are confidential and all attendees in the proceedings are obliged to keep all the information confidential.

Arbitrators

In principle, the parties are free to appoint the arbitrator or the members of the arbitral tribunal.

The number of arbitrators can also be determined by the parties as long as it is an uneven number. If the number of arbitrators is not decided by the parties, then it shall be three.

Only natural persons can be appointed as arbitrators. If the parties cannot agree on the sole arbitrator to be appointed, then the arbitrator will be appointed by the civil court of first instance upon the request of one party.

If three arbitrators are to be appointed, each party will appoint one arbitrator and then these two arbitrators will determine the third arbitrator. In this case, the third arbitrator will act as the chairman.

If one party does not appoint an arbitrator within 30 days of the delivery of the other party's request, or the two arbitrators appointed by the parties do not appoint the third arbitrator within 30 days of the appointment, then the appointment of the arbitrator shall be made by the civil court of first instance upon the request of one party.

The civil court of first instance's decisions are final in this respect and the court takes the agreement of the parties, the independence and impartiality of the arbitrators and the diversity of the nationality of the parties into consideration on the appointment of the arbitrators.

The International Arbitration Law provides the grounds for challenging the arbitrators as: (i) lack of the qualifications determined by the parties; (ii) grounds for challenge provided under the arbitration procedure determined by the parties; or (iii) conditions casting reasonable doubt of impartiality.

Parties are free to determine the procedure for challenging an arbitrator. Unless the parties agree otherwise, an arbitrator must be challenged within 30 days starting from date of the appointment or the date that the challenging party became aware of the grounds for challenging.

The party requesting the challenge of one or more arbitrators from the arbitral tribunal should notify the arbitral tribunal about the request of challenge and the reasons. If the tribunal rejects the request, the challenging party may apply to the civil court of first instance for the reversal of the decision and the challenge of the arbitrator(s) within 30 days from receiving the decision. The parties may only apply to the civil court of first instance for the challenge of the sole arbitrator, or the whole or the voting majority of the arbitrators. The decision of the court shall be final in this respect. In the event that the civil court of first instance decides to challenge the sole arbitrator or the whole or the voting majority of the arbitrators, the arbitration shall be terminated. However, if the names of the arbitrators are not determined in the arbitration agreement, then a reappointment shall be made.

In the event that an arbitrator does not perform his duties, the arbitrator's mandate may be terminated with the voluntary withdrawal of the arbitrator or with the agreement of the parties. Each party may request the civil court of first instance to decide on the termination of the arbitrator's mandate, in case of a dispute with regard to the grounds for the termination of the arbitrator's mandate. The decision of the civil court of first instance shall be final on this matter.

In principle, arbitrators are provided with immunity and cannot be held liable for their wrong interpretation and application of the law. The arbitrators may be held liable only if they cause damages due to gross negligence. Also unless agreed otherwise by the parties, arbitrators are obliged to compensate the losses incurred by the parties, if they avoid performing their duties without any valid reason.

Interim relief

All types of interim relief available to litigation under Turkish laws such as interim attachments, conservation of evidence, and securities for the amount of dispute can also be ordered by the court during the arbitration proceedings in order to guarantee rights of the requesting party. The court decides on the type of interim relief according to the circumstances of the case.

Pursuant to the International Arbitration Law, parties can apply to courts for interim measures and attachments before or during the arbitration proceedings; the said application shall not constitute contradiction of the arbitration clause or agreement between the parties. In addition, the applicant party should make a request for the commencement of arbitration within 30 days from the date of the decision on interim relief; otherwise the decision automatically becomes ineffective.

At the same time, the arbitrator or arbitration tribunal may also decide to grant an interim measure or attachment upon the request of either party during the arbitration proceedings, unless otherwise agreed. The said competence of tribunals is limited by the law. The arbitrator or arbitration tribunal cannot render a decision of interim relief that binds third parties or that needs to be executed by the official authorities or execution offices. If a party fails to abide by the restrictions imposed by an interim measure or attachment, then the other party may request the assistance of the competent court.

It should be also noted that, most recently, the Supreme Court, having relied on the provision of International Arbitration Law providing for the preliminary injunction to be given during arbitration proceedings, found no legal obstacle to request a preliminary injunction even after the arbitral award had been rendered. This decision is significant in that it protects the rights of a party seeking the enforcement of an arbitral award in Turkey in the case of the enforcement proceedings lasting up to four years.

On the other hand, there is no example of anti-suit injunctions granted by the Turkish courts. Nonetheless, foreign decisions should be binding and final in order to be enforced. It is very unlikely that the Turkish courts would enforce an anti-suit injunction, since such decision would not be deemed as binding and final.

Arbitration award

The International Arbitration Law requires the arbitral awards to include the full names, titles and addresses of the parties and the parties' attorneys or representatives, legal reasons and justification of the award, the amount of compensation, place of arbitration, date of the award, full names, signatures and counter votes of the arbitrator or arbitration tribunal, and finally the right to request the setting aside of the arbitral award.

Parties may agree on a time in which the arbitral award shall be rendered. Otherwise, the award needs to be rendered within one year from the date of the arbitrator's appointment or the recording date of the arbitral tribunal's initial meeting minutes. The time can be extended by the agreement of parties; otherwise either party may request an extension from the court of first instance. However, it is not possible to receive an extension from the court if time is already expired. An arbitral award which is not rendered in time will be set aside and parties may not request arbitration again, relying on the existing arbitration agreement or clause executed between them.

The award should indicate the cost of arbitration. Unless otherwise agreed, arbitration costs shall be paid by the losing party. In case both parties are deemed partially right, the arbitration cost shall be apportioned between both parties by the arbitration tribunal. The award may

include interest, however, and in order to avoid any ambiguity during the enforcement process, the starting date of the interest calculation should be included together with the amount decided.

Challenge of the arbitration award

Arbitral awards cannot be appealed for a review of the dispute on the merits in the Turkish legal system; they can only be set aside with an application of the defendant to the competent court of first instance. The decision on setting the award aside can be appealed.

The grounds for setting aside an arbitral award are specified under the International Arbitration Law. While some grounds shall be considered *ex officio* by the court, others have to be proved by the applicant party. If the dispute in question is not appropriate for arbitration as per Turkish law or the award is against the public order, the court will consider the two grounds *ex officio,* and will set aside the arbitral award.

The party requesting the setting aside of the award must prove that:

- the other party of the arbitration agreement is incapable or the arbitration agreement is invalid;
- the arbitral tribunal is not constituted in accordance with the arbitration agreement or the International Arbitration Law;
- the arbitral award was not rendered in time;
- the arbitral tribunal or the sole arbitrator does not have jurisdiction;
- the arbitral tribunal rendered an award on a dispute which falls beyond the scope of the request, or exceeded their competence, or did not decide on the whole claim;
- the arbitral proceedings are not in compliance with the procedure and the said incompliance affects the substance of the award; or
- the principle of equality of arms was not complied with during the arbitral proceedings.

Arbitral awards cannot be modified under Turkish law, however they can be completed, interpreted and corrected upon the request of one party. Either party may request the court to correct the award if there is a material error in computation or clerical errors in the award. Also, it may be requested for the court to interpret a specific point, part or whole of the award. These requests for correction and interpretation should be made within 30 days of receiving the award.

After receiving the other party's opinion about the request, the arbitral tribunal may make the correction or give the interpretation within 30 days of receipt of the request if it finds the said request justified. In addition, it should be noted that the arbitral tribunal may correct any error *ex officio* within 30 days of the date of the award. The decision concerning the correction, interpretation and the additional award will be notified to the parties and it shall form a part of the award.

Enforcement of the arbitration award

Foreign arbitral awards can be recognised and enforced pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is ratified by Turkey on July 2, 1992. Additionally, International Private and Procedural Law numbered 5718 includes provisions on recognition and enforcement of foreign arbitral awards. The ratified international treaties have the same effect as domestic legislations and take precedence over the domestic laws under Turkish law; thus in case of conflict between the International Private and Procedural Law and the New York Convention, the latter will apply. Turkey has two reservations on the New York Convention, which provide that the Convention will apply:

(i) only to recognition and enforcement of awards made in the territory of another contracting state; and (ii) to differences arising out of legal relationships that are considered commercial under the national law. Therefore recognition and enforcement of foreign arbitral awards which do not satisfy these criteria are subject to the provisions of International Private and Procedural Law.

The arbitration agreement or clause and the final arbitral award are required for the enforcement of the foreign arbitral award. The plaintiff party shall submit either the original or the certified copy of the arbitration agreement or clause to the court with its certified translation.

An arbitral award should be binding and final in order to be enforced. Therefore, an arbitral award which has been set aside, in principle, cannot be enforced. If the procedure on setting aside the award is started at the state where the award was rendered, the court will suspend the enforcement proceedings until the procedure of setting aside is completed and the decision on setting aside the award becomes final. However, it is also widely accepted that the courts have the discretion to evaluate whether the grounds for setting aside constitute an obstacle to enforcement. The approach of the courts on this issue has yet to be determined since there is no reported decision enforcing an award that was set aside in the country of origin.

A foreign judgment cannot be recognised and enforced by a Turkish Court without holding a hearing. Hearings in enforcement disputes are extremely short because the courts do not review the substance of the dispute but only the enforceability of the award.

The decision of the first instance court may be submitted to the appeal before the Supreme Court. In this respect, it should be noted that there is no specialised Chamber of the Supreme Court on such appeal requests. It should also be kept in mind that even the same Chamber of the Supreme Court may render two contradictory awards within two days. This clearly reveals that Turkish Courts do have a way to go in adopting a consistent and foreseeable case law, especially when it comes to setting aside and enforcement actions.

Yet there are significant common practices established by the Supreme Court. Accordingly, if local courts make a determination on the merits of the case, then the decision would be overruled by the Supreme Court. Even though Turkish Courts are very sensitive on the involvement of non-contractual parties in the proceedings, the Supreme Court recently ruled that the objection that one is not a party to an existing arbitration agreement cannot be evaluated by the court of first instance, since it relates to the merits of the case. This decision is seen as a significant development because it may make it possible to extend the application of arbitration agreements to third parties by leaving the issue to the discretion of the arbitral panel.

Over the years the Turkish courts have been very sensitive on awards being contrary to public order, which is deemed an exception to the principle that the courts cannot review the case on the merits. Some examples of a contradiction with public order are violations of the right to be heard, judgments without merits, judgments against good morals, and judgments violating foreign trade, customs or tax regulations. It should be noted that the mere misapplication or infringement of Turkish mandatory rules is not in itself sufficient to constitute a violation of public order.

On the other hand, the concept of public order is changing over time, embracing a trend towards an enforcement-friendly approach. For instance, the Supreme Court determined that the ICC's scrutiny of draft awards was an interference with the arbitral tribunal's independence, thereby violating Turkish public order. The domestic rules governing the execution of arbitral awards at that time were similar to the rules of current Code and the

Convention, but still this didn't have any impact on the Supreme Court's approach on the subject matter. However, in another decision of the Supreme Court, it was held that the obligation of submitting the draft award to the International Court of Arbitration does not violate the public order.

Similarly, the General Assembly of the Supreme Court has rendered "unification of decisions" in 2012 and ruled that failure to give a reasoned judgment by a foreign court or an arbitral tribunal cannot be regarded as a breach of public order, notwithstanding Turkish law's mandatory requirement of a written legal justification for domestic courts. This is especially important for awards rendered under the expedited procedure of the Swiss rules, where reasons may be given in summary form or dispensed with altogether if the parties have so agreed.

Nevertheless, despite the softer approach, in practice there are still examples of excessively broad interpretations of contradiction with public order when it comes to arbitrability issues.

Investment arbitration

Being a party to the ICSID convention and the Energy Charter Treaty, Turkey has signed bilateral investment treaties with 82 countries so far, and 74 of them have entered into force. Since 2002 there have been nine cases against the Republic of Turkey before ICSID, especially in the energy sector. Seven of these cases have been concluded and two of them are still pending.

So far amongst the cases concluded by ICSID, the *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey* case was the only investment arbitration case before ICSID where Turkey was found liable to pay compensation. As a result of that case, Turkey has made the associated payments to the investors. Bearing in mind the importance of loans from the World Bank for Turkey, ICSID's membership of the World Bank Group, and considering the risk of not getting loans from the World Bank for States which do not perform their obligations arising out of the ICSID award, it is expected that Turkey will continue acting in this manner in the future as well.

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