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Choosing the proper court for provisional attachments in relation to international arbitration seated in Turkey

Turkish international arbitration law (IAL) governing disputes with a foreign element, where the seat of arbitration is Turkey,[1] contains a provision (article 6) which paves the way for the parties' application before Turkish courts for provisional attachments. The IAL widens the scope of Turkish courts' jurisdiction to render provisional attachments by stating that this particular provision is applicable not only for arbitrations seated in Turkey but also for those seated abroad.

Access to provisional attachments to be granted by the local courts is crucial for the parties seeking indemnification in arbitration because of the ambiguity as to when exactly an arbitral award subject to the IAL becomes enforceable. The IAL, providing that the cancellation action (set aside) automatically suspends the enforcement of the arbitral award, implies that arbitral awards are enforceable as soon as they come into existence. The same law, on the other hand, stipulates that a party can enforce an arbitral award provided that it obtains a certificate which can only be granted by the state court after the cancellation action is dismissed or the 30-day period to file a cancellation action has expired. As seen, enforcement of an arbitral award is left pending in mid-air until Turkish court's certification after an array of post-arbitral proceedings. Considering that scholars[2] are unanimously of the opinion that an arbitral award cannot be enforced by use of state authority without the enforceability certificate, provisional attachments remain the only tool in this interim period for those seeking fulfilment of the arbitral award.

Although the IAL, similarly to the UNCITRAL Model Law, principally aims at lessening the involvement of state courts, it still remains as an undeniable fact that the court's support and supervision may be a lifeline, at least for one of the parties, even after the arbitral award has been rendered. Yet, the effort exerted in the course of the arbitral proceedings does not come to an end for the party which applies for provisional attachment from the state court. The hardship starts before anything else

when choosing the proper court for such assistance. The Grand National Assembly, as the state's legislative branch, tried to address this issue on many occasions and enacted a number of laws in order to ascertain the court having jurisdiction over international arbitration related matters. As a new law had already been in the pipeline at the time of writing, it is clear that the lawmaker's endeavour has not yielded the desired result. On 6 March 2018, the Law on *Amendments on Execution and Bankruptcy Code and Some Other Codes for the Purpose of Improving the Investment Environment* ('Omnibus Law') was approved, which, among others, regulates the courts' jurisdiction over arbitration-related matters. The Omnibus Law was published in the Official Gazette and became effective as of 15 March 2018. To understand what the Omnibus Law has introduced in this matter, a brief overview of the past developments is necessary.

The IAL (2001) points to civil courts as the courts having jurisdiction over all arbitration-related matters including but not limited to provisional attachments (article 3). This was far from promoting clarity given that the term 'civil courts' had a broad meaning[3] which also comprised commercial courts until the amendment dated 26 June 2012 of the Turkish Commercial Code. With the amendment, civil courts and commercial courts were separated as two distinct branches of first instance jurisdiction.

Although this distinction had driven the jurisprudence[4] to point to civil courts instead of commercial courts as the courts having jurisdiction over arbitration related matters at that time, this did not last for long as a new amendment was introduced in 2014. According to this amendment, made in law number 5235, *Concerning Establishment, Duty and Authority of Courts of First Instance and Regional Appellate Courts* (the 'Law no 5235'), commercial courts had jurisdiction on:

- cancellation (set aside) actions;
- actions to challenge the validity of arbitration agreements;
- appointment or dismissal of arbitrators; and
- enforcement and recognition of foreign arbitral awards.

The amendment goes further in a very interesting way, providing that provisional injunctions and attachments that are filed before or after the lawsuits enumerated above shall also fall within the jurisdiction of commercial courts composed of a panel of three judges, provided that the provisional injunction/attachment requested is relevant to these lawsuits.

As the law's intention behind the term 'relevance' is not defined, the endeavours to ascertain jurisdiction over arbitration-related matters seem to have increased the ambiguity further. The preamble[5] of the relevant provision merely states that the enumerated lawsuits are considered extremely significant in terms of content and legal consequences and, therefore, required to be examined by a panel of judges under the roof of commercial courts. The argument to the contrary (*argumentum a contrario*), especially in the presence of the IAL designating civil courts as the courts having general jurisdiction, concluded that provisional injunction/attachment requests that are not related with the above listed lawsuits shall be examined by civil courts instead of commercial courts.

According to this distinction, provisional injunctions/attachments requested from state courts before and/or during the arbitration proceedings shall be examined by civil courts (given that there is not one of the enumerated lawsuits which can be deemed 'relevant'), whereas a request of a similar nature shall be examined by commercial courts if, for instance, this request is filed after the arbitral award was rendered and if the counterparty has initiated a cancellation action. The issue, however, was even more complex and unanswered in case of a provisional injunction/attachment request filed in the 30-day period[6] following the arbitral award (ie, the period when it is not known whether the losing party will file a cancellation action).

In the absence of any guiding jurisprudence, there were credible scholars trying to solve this everlasting ambiguity. Professor Dr Ziya Akinci , for instance, having adopting a pragmatic approach, opined that civil courts referred to by the IAL should still be deemed to include commercial courts and, therefore, all arbitration-related matters including provisional attachments should always be brought to commercial courts.[7] Professor Dr Sema Taspinar Ayvaz reached the same conclusion with a criticism as to the double entendre narration of legislation, stating that the real intention of the lawmaker was to categorise all arbitration-related matters as 'commercial transactions/lawsuits' and to appoint commercial courts for all arbitration-related matters without any distinction.[8] Accordingly, the lawsuits enumerated by Law no 5235 and relevant

provisional injunctions/attachments shall be dealt with by commercial courts composed of a panel of judges, whereas the rest of the arbitration-related matters shall be dealt by commercial courts composed of a sole judge.

As suggested by Ayvaz,[9] this ambiguity could have been solved by abrogating the relevant provision of the IAL designating civil courts as the courts having jurisdiction in general. However, the lawmaker adopted a different solution by enacting the Omnibus Law, which, among others, regulates the courts' jurisdiction over arbitration-related matters.

The Omnibus Law, effective as of 15 March 2018, amends Law no 5235 by removing cancellation actions from the enumerated lawsuits and designates Regional Appellate Courts[10] as the courts having jurisdiction over cancellation actions. As a result, provisional injunctions/attachments relevant to cancellation actions can no longer be examined by commercial courts composed of a panel of judges. This ultimately gives rise to the question whether provisional injunctions/attachments from now on fall within the scope of commercial courts composed of a sole judge, as per certain scholarly opinions, or within the scope of civil courts referred to by the IAL. The Omnibus Law – finally – provides an answer for this question, too. Accordingly, the civil courts referred to by the IAL shall be understood to include commercial courts. The Omnibus Law concordantly stipulates that all arbitration-related matters (except for cancellation actions) shall be examined by commercial courts given that the underlying dispute subject to arbitration is a 'commercial transaction/lawsuit'.

Notes

1 The IAL also applies where the parties so agree or the arbitral tribunal determines that the arbitral proceedings should be conducted according to IAL.

2 Ergin Nomer/Nuray Ekşi/Günseli Öztekin Gelgel, *Milletlerarasi Tahkim Hukuku (International Arbitration Law)* (Istanbul: Beta Publishing, Vol 1, 2013), 49, 50. Ziya Akinci, *Milletlerarasi Tahkim Kanunu (Arbitration Law)* (Istanbul: Vedat Publishing, 2016), 260–261.; Hakan Pekcanıtez, *Milletlerarasi Tahkim Kanunu'na Göre Verilen Hakem Kararlarının Icrasi (Enforcement of Arbitral Awards Under International Arbitration Law),* (Tribute to Prof Dr Hamdi Yasaman, 2017), 585.

3 Court of Appeals, 15. Civil Chamber, 2010/4040 E, 2010/4663, 21.09.2010.

4 Court of Appeals, 19. Civil Chamber, 2014/111 E, 2014/2806 K, 12.02.2014.

5 The Law no 5235 and its preamble are available in Turkish at the official web page of Ministry of Justice: http://www.kgm.adalet.gov.tr/Tasariasamalari/Kanunlasan/2014Yili/6545%20s%C4%B1ra%20say%C4%B1s%C4%B1.pdf.

6 This period shall be prolonged if one of the parties' requests for correction of calculation, spelling or other errors in the award from the arbitral tribunal.

7 Akinci; 92, 93.

8 Sema Taşpınar Ayvaz; *Asliye Ticaret Mahkemelerinde Yapılan Değişikliler* Çerçevesinde *Tahkimde Görevli Mahkeme* (*Competent Court in Arbitration As Per The Developments Concerning Commercial Courts*), Dokuz Eylül University Law Faculty Journal, Volume 16, Special Edition. Tribute to Prof D. Hakan Pekcanıtez, 479, 480.

9 Ayvaz; p 480.

10 Regional Appellate Court is the court of second instance in three-tier system of adjudication that was established by the Law no 5235 and came into operation as of 20 July 2016. As the Omnibus Law comes into force, cancellation actions are to be examined by Regional Appellate Courts, as a court of first instance and are subject to appellate review by the Supreme Court as the court of last resort.