

Turkey: Arbitration in Focus

Beril Yayla Sapan and Neslisah Borandı of Gün + Partners examine the Turkish International Arbitration environment.

November 20, 2014 saw the long-awaited Law on the Istanbul Arbitration Centre passed in Turkey, coming into force in early 2015. The law forms part of the government's over-arching plan to support the economy through financial reforms – all with the aim of promoting Turkey as an attractive international financial centre.

The new law establishes the Istanbul Arbitration Centre (IAC) and seeks to regulate the procedures and principles of the centre's operations and encourage the use of arbitration for both domestic and international disputes.

Arbitration is not commonly used for domestic disputes, and under Turkish law international and domestic arbitration are subject to different legislation. Turkey has been making progress to become more arbitration-friendly in making arbitration and ADR methods more 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, the IAC will soon become operational and provide arbitration and ADR services for all private disputes of both a foreign and domestic nature.

TURKISH ARBITRATION AGREEMENTS

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.

Following the International Arbitration Law, disputes arising from or relating 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 protection of the rights of creditors and employees, bankruptcy and labour law disputes are not deemed arbitrable either. In terms of labour law, only re-instatement cases can be arbitrable provided that parties agree to settle the re-instatement dispute after the termination of employment, however in practice almost all of the employees do not 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 a cancellation of an intellectual or industrial property right in Turkey are included in exclusive jurisdiction of the Turkish Courts.

“
Disputes arising from commercial matters and intellectual property rights are arbitrable under Turkish law with the exception of commercial matters concerning public order.
”

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.

ARBITRATION PROCEDURES

“
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.
”

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 counsel, witnesses and experts are under the obligation of confidentiality.

ARBITRATORS

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.

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, and 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.

CHALLENGE OF THE ARBITRATION AWARD

Arbitral awards cannot be appealed for a review of the dispute on the merits in 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, the others have to be proved by the applicant party. If the dispute in question is not appropriate for arbitration under Turkish law, or the award is against public order, the court will consider the two grounds ex officio and will set aside the 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.
- » 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 from the court to correct the award if there is a material error in computation or a clerical error in the award. Also, it may be requested from the court to interpret a specific point, a part or the whole of the award. These requests for correction and interpretation should be made within thirty days after receiving the award.

After receiving the other party's opinion on the request, the arbitral tribunal may make the



Top: The parties are free to appoint the arbitrator or the members of the arbitral tribunal

Above: A foreign judgment cannot be recognised and enforced by a Turkish Court without holding a hearing

correction or give the interpretation within thirty days of receipt 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 from 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 was ratified by Turkey on July 2, 1992. Additionally, the International Private and Procedural Law includes provisions on recognition and enforcement of foreign arbitral awards.

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.

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.

INVESTMENT ARBITRATION

Being a party to the International Centre for Settlement of Investment Disputes (ICSID) convention and the Energy Charter Treaty, Turkey signed bilateral investment treaties with 82 countries so far and 74 of them have come into force. Since 2002, there have been nine cases against the Republic of

Turkey before ICSID – seven of these cases have been concluded and two of them are still pending.

So far amongst the cases concluded by ICSID, *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* was the only investment arbitration case before ICSID that Turkey was found liable to pay compensation. As a result, Turkey has made the associated payments to the investors. Bearing in mind the importance of loans from the

World Bank, ICSID's membership to World Bank Group, and considering the risk of not getting loan from the World Bank for those states which do not perform their obligations arising out of ICSID award, it is expected that Turkey will continue acting in this manner in the future. 🇹🇷

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

membership to World Bank Group, and considering the risk of not getting loan from the World Bank for those states which do not perform their obligations arising out of ICSID award, it is expected that Turkey will continue acting in this manner in the future. 🇹🇷



Text by:

1. BERIL YAYLA SAPAN, senior associate, Gün + Partners
2. NESLİSAH BORAND, associate, Gün + Partners