Chapter 43  

TURKEY

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I  INTRODUCTION

The use of arbitration as an alternative dispute resolution mechanism in Turkey has gradually increased. In practice, with regard to multinational transactions, arbitration has remained quite popular as a means of dispute resolution. Parties especially rely heavily on alternative dispute resolution in certain sectors, such as the construction, energy and maritime trades.

The Istanbul Arbitration Centre (ISTAC), which is the newest local arbitration institution in Turkey, is an independent arbitration institution, and is able to compete with other similar arbitration institutions in the international arena. It has been reported that ISTAC has over 30 cases in its portfolio as of April 2019.

The ISTAC and other local arbitration institutions aim to promote arbitration as a dispute resolution mechanism in Turkey through increasing the number of parties electing arbitration as the means to settle any disputes concerning agreements that they conclude. These institutions also promote the selection of Istanbul, or any other city in Turkey, by both Turkish and foreign parties as their arbitral seat. To this end, the ISTAC has been engaged with many organisations within Turkey and abroad. In 2018, the ISTAC provided an enhanced number of seminars to promote arbitration for not only practitioners, but also for stakeholders in several sectors.

ICC arbitration is also very popular for Turkish parties. The ICC reported 62 cases in 2018 having Turkish parties. This figure ranks Turkey as 10th in a table establishing the origin of parties to ICC arbitration.

i  Legal framework

The structure of arbitration-related laws in Turkey is based on the distinction between domestic and international arbitration.

The main legislation that regulates international arbitration is the International Arbitration Act (IAA). The IAA applies to arbitrations in which there is a foreign element, and that are seated in Turkey. Additionally, the IAA also applies if the parties or the arbitrators select it as the applicable law (Article 1/1).

On the other hand, the provisions pertaining to domestic arbitration are set forth under the Code of Civil Procedure (CCP). These provisions also apply to arbitrations with no foreign element that are seated in Turkey.

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1 H Ercüment Erdem is the senior and founder partner of Erdem & Erdem Law Offices.
2 International Arbitration Act No. 4686.
3 Code of Civil Procedure No. 6100.
An important part of this legal framework is formed by international conventions, such as the New York Convention, which serves as the legal basis for the majority of the recognition and enforcement proceedings in Turkey. Turkey has ratified the Convention with two reservations: it will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state; and the Convention will only be applied to differences arising out of legal relationships, whether contractual or not, which are considered to be commercial under national laws. Considering that 159 states are parties to the New York Convention, it may be concluded that most enforcement proceedings would be conducted pursuant to the Convention.

Distinctions between international and domestic arbitration law

The distinction between international and domestic arbitration law in Turkey is based on the issue of a foreign element being present.

On the matter of a foreign element, the IAA was the first legislation to clarify the concept of international arbitration under Turkish law. The issue of the foreign element has been clarified under Article 2 of the IAA. Accordingly, the presence of one of the circumstances below acknowledges that a dispute has a foreign element and, thus, the arbitration shall be qualified as international:

a the legal domicile or habitual residence, or the workplace of the parties, is in a different country;

b the legal domicile or habitual residence, or the workplace of the parties, is in a state different from that determined in the arbitration agreement, or different than the seat of the arbitration, if this is determined in accordance with the arbitration agreement; or in a state different from the place where an important part of the obligations arising out of the main agreement will be performed, or to which the matter in dispute has the closest connection;

c at least one of the shareholders of each of the companies that is party to the main agreement upon which the arbitration agreement relies has brought foreign capital to Turkey pursuant to legislation on incentives for foreign capital, or has entered into credit or guarantee agreements, or both, to provide capital from a foreign country for the performance of the agreement; or

d the main agreement or legal relationship upon which the arbitration agreement relies serves to transfer goods or capital from one country to another.

Accordingly, if the dispute falls within either one of the categories listed above, the dispute will be considered to have a foreign element, and the IAA shall be applied.

Arbitration agreements under Turkish law

The arbitration agreement is the essential element of arbitration, as it contains the parties’ intention to arbitrate. The arbitration agreement under Turkish law is further analysed below.
Written form and intention to arbitrate

Under Turkish law, the arbitration agreement must be in writing, as set forth both under Article 4/2 of the IAA and Article 412/3 of the CCP. Pursuant to both of these provisions, the written form requirement is fulfilled if the arbitration agreement exists in a written document signed by both parties, or in a means of communication or electronic format, such as a letter, telegraph, telex or fax exchanged between the parties. The written form is also deemed fulfilled if the respondent does not object in its statement of defence to the existence of an arbitration agreement raised by the claimant in its statement of claim.6

An important element thoroughly analysed by the Turkish courts is whether the arbitration institution has been clearly identified in the arbitration agreement. If not, there have been cases where Turkish courts have refused the enforcement of an arbitral award. On this issue, the Court of Cassation decided that the enforcement request should be rejected since the arbitration had not been conducted before the institution agreed upon by the parties.7

With regard to the intention to arbitrate, clauses stipulating that the courts would also have competence, in addition to arbitrators, also render an arbitration agreement invalid. In practice, this issue usually manifests itself in clauses stipulating that the disputes shall be resolved by courts if the arbitrators fail to do so. The Court of Cassation regularly considers such clauses to be invalid arbitration clauses.8

Special authority for entering into arbitration agreements under Turkish law

Another issue to keep in mind when entering into arbitration agreements with Turkish parties is that under Turkish law, an attorney needs to have special authority with regard to the conclusion of arbitration agreements on behalf of the principal, and the general authorisations that may be found in powers of attorney, such as the general ones granted to attorneys-at-law for representation before courts, are not sufficient.

Pursuant to Article 74 of the CCP, to conclude a valid arbitration agreement on behalf of the principal, a representative should have special authority on that matter. The same rule also exists under the Turkish Code of Obligations,9 and is found under Article 504/3. Both of these Articles lead to the conclusion that if an arbitration agreement is concluded by an attorney, the latter should have a specific power in its power of attorney entitling him or her to enter into an arbitration agreement on behalf of the principal. If this condition is not fulfilled, there will, without any doubt, be objections to the fact that the arbitration agreement has not been concluded by a duly authorised attorney.10

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7 Decision of the 19th Civil Chamber of the Court of Cassation, dated 7 June 2011, No. 2011/4149 E, 2011/7619 K. All of the decisions of the Court of Cassation referred to in this chapter may be accessed at www.kazanci.com.
8 Decision of the 11th Civil Chamber of the Court of Cassation dated 24 October 2017, No. 2016/3383 E. and 2017/5688 K.
9 Turkish Code of Obligations No. 6098.
10 Erdem, Milletlerarası Ticaret Hukuku, No. 1631.
Some decisions of the Turkish Court of Cassation set forth that arbitration agreements concluded by a representative who does not have special authority are invalid. However, in some cases, the Turkish Court of Cassation objects to the lack of special authority according to the principle of good faith and, in particular, where the contract is duly performed.

Challenging arbitral awards

Under Turkish law, an appeal against an arbitral award may not be filed, and awards are considered final and binding on the parties. Pursuant to Article 15 of the IAA, an arbitral award may be set aside if any of the following circumstances exist:

a. invalidity of the arbitration agreement or the incompetence of one of the parties;
b. non-compliance with the procedures set out in the arbitration agreement, or in the law, as to the appointment of arbitrators;
c. failure to issue an award within the agreed-upon period of time;
d. unlawful decision of the tribunal as to its competence;
e. a decision of the arbitrators on a matter exceeding the scope of the arbitration agreement, or exceeding the scope of their authority;
f. a violation of procedural rules that has an effect on the substance of the award; and

g. a violation of the principle of equality of the parties.

Additionally, there are two grounds that the court may take into consideration, ex officio, namely, non-arbitrability and public policy.

Recognition and enforcement of international arbitral awards

As previously mentioned, the recognition and enforcement of international arbitral awards is conducted mostly pursuant to the New York Convention.

Some of the issues that may cause problems before the Turkish courts in recognition and enforcement proceedings are further analysed below.

The first issue to be addressed with respect to enforcement proceedings to be conducted in Turkey is public policy. Public policy manifests itself as a very important ground for refusal to recognise and enforce foreign arbitral awards in Turkey. Turkish courts tend to have a rather vague interpretation of this notion, which sometimes leads to a review of the merits of the case.

Another important issue in enforcement proceedings is arbitrability. Under Turkish law, disputes pertaining to rights in rem on immovable property located in Turkey, or disputes arising out of issues that do not depend on the will of the parties, are not arbitrable. Accordingly, the precedents of the Court of Cassation set forth that disputes pertaining to the determination of the amount of lease payments, vacating of property, tax disputes and

labour law disputes are among non-arbitrable disputes. On the other hand, in some of the precedents of the Court of Cassation, a review of public policy is conducted when the Court of Cassation decides on the arbitrability of a subject matter.

Concerning recognition and enforcement cases filed by foreign parties in Turkey, the issue of cautio judicatum solvi should be kept in mind. Pursuant to Article 48/1 of the International Private and Procedural Law, foreign parties filing a lawsuit in Turkey should provide security to be decided upon by the court to compensate for any damages that may be suffered by the counterparty. Accordingly, the requirement to provide security exists if the claimant is a foreign real or legal person, if there is a lawsuit filed before the Turkish courts and if the provisions concerning exemption from providing security are not applicable.

A court may declare a foreign party exempt from providing security. If the foreign party comes from a state that is party to the Hague Convention on Civil Procedure of 1 March 1954, or if there is a bilateral agreement on this issue, the courts will declare the foreign party to be exempt from providing security.

ii Local arbitration institutions

The local arbitration institutions in Turkey, including the Istanbul Chamber of Commerce Arbitration Center (ITOTAM), the Union of Chambers and Commodity Exchanges of Turkey, and the Izmir Chamber of Commerce, have been active for many years, and have contributed to the arbitration culture. The ITOTAM Mediation Rules were adopted in January 2017, which will enable the ITOTAM to provide mediation services.

As the arbitration rules of the youngest local arbitration institution in Turkey, the ISTAC Arbitration Rules reveal important advantages for the ISTAC’s users. First, the ISTAC aims to provide more effective secretarial services, with fewer bureaucratic formalities. The ISTAC Arbitration Rules provide that the time limit for rendering an arbitral award is six months from the notification of approval of the terms of reference to the arbitral tribunal by the Secretariat, which may be extended by the court (Article 33 of the Rules). This time limit is also a great advantage in comparison with dispute resolutions before the Turkish courts, since it is virtually impossible to obtain a court decision within such a short time period. The ISTAC Rules also provide for emergency arbitrator proceedings that provide the possibility to obtain a decision from the arbitrators instead of the state courts if there are issues that need to be decided upon urgently. The ISTAC Rules also provide fast-track proceedings to be conducted pursuant to the Fast-Track Arbitration Rules, which are automatically applicable to disputes not exceeding 300,000 Turkish liras.

Another point where the ISTAC has an advantage over the national courts is its fee structure. The ISTAC prides itself on a more reasonable fee structure than the national courts, especially for disputes with a higher value. The court fee structure followed by the Turkish courts is based on a court fee tariff that is updated each year, and proportional court fees, which are calculated based on the amount in dispute, and which may reach quite outrageous amounts concerning high-value transactions. As this percentage remains the same

13 Erdem, Milli terarau Ticaret Hukuku, No. 1639; Decision of the 9th Civil Chamber of the Court of Cassation dated 20 January 2009, No. 2008/44630 E. and 2009/537 K.
14 Decision of the 3rd Civil Chamber of the Court of Cassation dated 2 December 2004, No. 2004/13018 E. and 2004/13409 K.
15 International Private and Procedural Law No. 5718.
and does not increase even when the disputed amount rises, fees will reach quite high levels in proportion to higher amounts in dispute. Within this framework, the ISTAC fee structure is more advantageous in disputes with higher values.

On another note, the ISTAC has been active on the public sector front, and has been supported through many legislative and government actions that promote the ISTAC as an arbitral institution. An important development in this regard is Prime Ministry Directive No. 2016/25, which aims to encourage government authorities to stipulate in their contracts that ISTAC arbitration is to be the dispute resolution mechanism. More recently, a provision pertaining to the possibility of including an arbitration clause in public procurement contracts, specifically including ISTAC arbitration, has been adopted, which is analysed in greater detail below.

II THE YEAR IN REVIEW

i Legislative developments

Regarding the general legal framework in Turkey, the state of emergency since the attempted coup on 15 July 2016 ended by 19 July 2018. Since then, political tension has decreased and the conjuncture has been normalised.

Throughout 2018, the Turkish appellate review system that evolved into a three-tier system through the regional courts of appeal from 20 July 2016 continued its efficient work. The regional courts of appeal are seated in seven of the larger cities in Turkey, and are responsible for each of their respective geographical areas. In 2018, there have been noteworthy amendments with regard to arbitration-related legislation.

Amendments on the Arbitration Proceedings via Law No. 7101

Law No. 7101 on the Amendment of the Enforcement and Bankruptcy Law and Certain Laws (Law) introduced important amendments for proceedings to be conducted by Turkish courts related to arbitration proceedings. Accordingly, the provisions regulating domestic and international arbitrations have been harmonised. Additionally, provisions reflecting current international arbitration practices have been adopted.

With the amendment made to Article 15/A/1 of the IAA through the Law, the regional court of appeal that is competent as per the location of the civil court of first instance pursuant to Article 3 of the IAA has been determined as the competent court for set-aside actions instead of the civil court of first instance. It has also been regulated that the set-aside actions pertaining to arbitration proceedings under the IAA shall be heard by a panel of judges comprising one chair and two members.

By the amendment of the Law, it has been clarified that the decisions given in set-aside actions may be subject to appeal proceedings before the Court of Cassation under the CCP. Pursuant to the provision prior to this amendment, it was possible to file an appeal against these decisions as per the fCCP, but it was not possible to file for a revision of decisions.

Through a new provision in the IAA adopted by the Law, it has been clarified that the competencies granted to the civil courts of first instance under the IAA would be undertaken by civil courts or commercial courts of first instance, depending on the subject of dispute.

This provision shall apply to competencies except for set-aside actions, which are within the jurisdiction of the regional courts of appeal. Accordingly, the following shall be within the jurisdiction of either civil courts or commercial courts of first instance:

- a objections made to arbitration clauses;
- b lawsuits pertaining to the appointment or challenge of arbitrators;
- c requests for assistance from the state courts concerning collection of evidence; and
- d lawsuits pertaining to the extension of the duration of the term of an arbitration.

With the amendment of Article 410 of the CCP, the competent court with regard to the lawsuits to be filed before the state courts concerning arbitral proceedings has been determined as either the civil court of first instance or the commercial court of first instance that are located within the place of arbitration, depending on the subject of the dispute.

Another amendment introduced by the Law is the provision pertaining to the jurisdiction of regional courts of appeal located within the seat of arbitration, with regard to set-aside actions to be initiated against arbitral awards that fall within the scope of Article 439/1 of the CCP. The provision prior to this amendment set forth that the court of first instance located within the place of arbitration was competent with regard to set-aside actions.

In summary, through the Law, the amendments made to the provisions regulating lawsuits pertaining to arbitration proceedings under the IAA and CCP have been harmonised. Under both pieces of legislation, the competent court with regard to set-aside actions against arbitral awards is the regional court of appeal. With regard to other lawsuits pertaining to arbitral proceedings, the civil court or commercial court of first instance shall be competent, depending on the subject of the dispute. The provision pertaining to the competence of the regional courts of appeal, instead of the courts of first instance in set-aside actions, is in line with international practice on this matter.

**Arbitration as a dispute resolution mechanism in public procurement contracts**

Within the promotion of arbitration as a dispute resolution mechanism, and also of the ISTAC as an arbitration institution, the regulations on agreements to be concluded pursuant to the Public Procurement Contracts Law have been amended. These regulations pave the way for the selection of arbitration as a dispute resolution mechanism in standard contracts to be found in the attachment of implementation regulations pertaining to framework agreement tenders, consultancy service procurement tenders, goods procurement tenders and construction work tenders.

Accordingly, for the resolution of disputes that may arise during a contractual relationship, a choice may be made between the Turkish courts and arbitration. If the parties decide in favour of arbitration, different provisions are to be applied, depending on whether the case at hand has a foreign element under the IAA. If there is no foreign element, the dispute shall be resolved through ISTAC arbitration. If there is a foreign element, the parties have discretion to select ISTAC arbitration, or arbitration within the provisions of the IAA, as the dispute resolution mechanism.

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17 Published in the Official Gazette dated 30 December 2017 and numbered 30286 (reiterated).
Amendments pertaining to competent courts in arbitration-related proceedings

As a change of legislation directly affecting arbitration-related proceedings, important amendments pertaining to proceedings to be conducted by the Turkish courts related to arbitration proceedings have been introduced through Law No. 7101 on the Amendment of the Enforcement and Bankruptcy Law and Certain Laws18 (Law No. 7101). Accordingly, the competent court in set-aside proceedings, under both the IAA and CCP, is the regional court of appeal. Prior to this amendment, Law No. 5235 on the Establishment, Jurisdiction and Competence of Civil Courts of First Instance and Regional Courts of Appeal (Law No. 5235) provided that set-aside actions shall be heard by a panel of judges comprising one chair and two members, namely, the commercial courts of first instance.

Furthermore, pursuant to Law No. 7101, for other arbitration-related proceedings to be conducted before the state courts, and depending on the subject of dispute, the civil courts or commercial courts of first instance shall be competent; for example:

a objections made against arbitration clauses;
b lawsuits pertaining to the appointment or challenge of arbitrators;
c requests for assistance from the state courts concerning the collection of evidence; and

d lawsuits pertaining to the extension of the duration of the term of an arbitration.

Arbitration developments in local courts

In Turkey, the Court of Cassation is structured through chambers that have certain areas of specialisation. However, there is no specialised chamber for arbitration-related matters, which causes some discrepancy in the decisions of the Court of Cassation. While the non-existence of a specialised chamber has been highly criticised in doctrine and by practitioners, no initiative was taken in this regard in 2018.

Salient decisions of the Court of Cassation for recent years, with a focus on 2018, are summarised below.

Decision of the General Assembly regarding arbitral awards subject to set-aside actions

The Court of Cassation General Assembly on the Unification of Judgments (General Assembly) rendered a noteworthy decision on 18 September 2018, where it discussed the legal remedies available in response to the arbitral awards derived from arbitration agreements concluded prior to 1 October 2011, the date of the entry into force of the CCP.19

The General Assembly ruled that the aforementioned arbitral awards shall be subject to set-aside actions under Article 439 of the CCP, instead of the appeal process regulated under Article 533 of the former Code of Civil Procedure (fCCP).20 The General Assembly reached this conclusion through a detailed assessment regarding the scope of the nature of the arbitration agreements, and the rule of immediate implementation of the procedural provisions.

In the decision, the nature of the arbitration agreements was analysed under the material law contract, the procedural law contract and the mixed contract arguments. The General Assembly

18 Published in the Official Gazette dated 15 March 2018 and numbered 30361.
20 Code of Civil Procedure No. 1086.
Assembly underlined that the results of the arbitration agreements are seen predominantly in procedural law, and arbitration agreements do not have the characteristics of a material law contract, such as the creation or abolition of a right. 21 In this respect, it was concluded that the arbitration agreements are predominantly procedural contracts.

In the decision, the difference between the *ratione temporis* application of the amendments on the material and procedural law was also discussed. In this context, it was emphasised that the amendments to the procedural law are subject to the principle of immediate implementation. As underlined in the preamble of the decision, no special transitional provision regarding the *ratione temporis* implementation of the arbitration clauses is regulated under the CCP. In this respect, the transition provisions not stipulated by the law cannot be stipulated by the will of the parties; hence, the parties are not given the freedom to choose the applicable legal remedies to the arbitral award.

Therefore, it was concluded that the provisions of the CCP shall be immediately applied to any incomplete transactions in arbitration proceedings as of the date of the entry into force of the CCP. Even if the arbitration agreement was concluded when the CCP was still in force, in the event the arbitral award is issued after the entry into force of the CCP, the arbitral award may only be subject to an annulment action as per the CCP.

In conclusion, in the disputes stemming from an arbitration agreement that was concluded while the CCP was still in force, arbitral awards issued after 1 October 2011 shall be subject to the setting-aside procedure.

**Numerus clausus nature of annulment grounds**

The Court of Cassation ruled in a recent decision that the annulment grounds regulated under Article 15 of the IAA are *numerus clausus*. 22

A share purchase agreement was concluded between the parties in which the parties agreed to settle the dispute through arbitration. The arbitration proceedings were initiated due to non-payment of the due amount as per the agreement; meanwhile, the execution proceedings were initiated by the respondent against the claimant. The execution proceedings were halted upon the objection of the claimant. Accordingly, the respondent filed a counterclaim in the arbitration, and requested cancellation of the objection to the execution proceeding. The award rendered by the sole arbitrator became subject to an action for annulment. The reasons for this action were, among other things, that the annulment of the objection on the execution proceeding could not be subject to arbitration, and the arbitrator had incorrectly applied the material law and had lost impartiality.

In its review of the annulment request, the Court of Cassation underlined that no objection was made during the arbitration proceedings regarding the impartiality of the arbitrator, and this claim was only asserted in the annulment phase without good faith. It affirmed that:

- the reasons for annulment have been counted as *numerus clausus* in Article 15 of the IAA;
- the misapplication of substantive law is not regulated as a reason for annulment;

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21 The same opinion is adopted in the decision of the Court of Cassation dated 22 February 2012, No. 2011/19-735 E. and 2012/93 K.

there is no regulation prohibiting a request for cancellation of the objection to the execution proceeding and it cannot be subjected to arbitration; and

d) that the execution of a denial of compensation can be ruled by an arbitrator.

**Turkish language requirement on the validity of arbitration agreements**

The Court of Cassation has previously declared that in respect of a contract signed in a foreign language, the validity of the contract should be examined pursuant to the Law on the Mandatory Use of the Turkish Language in Commercial Enterprises (Law No. 805).\(^{23,24}\) Law No. 805 was accepted on 10 April 1926, and introduced several obligations on Turkish commercial enterprises as to the usage of the Turkish language. It requires Turkish companies and enterprises to use the Turkish language in all transactions, agreements, correspondences, accounts and books. This old law contains only nine articles, and its application does not extend to contracts that are to be performed outside of Turkey.

The Court of Cassation declared that a party could not rely on an arbitration agreement contained in a contract pursuant to Law No. 805 as the clause was not written in Turkish. Briefly, the dispute arose from a contract for licensing and distribution of certain products in Turkey, signed between a Turkish party and a Swiss company, and was signed in English. The contract included an arbitration clause, which was drafted only in English.

The Swiss party initiated a lawsuit before the Turkish courts for a declaration of the rightfulness of its termination of the contract due to breaches of the Turkish party. The Turkish Commercial Court accepted this objection. However, the Swiss party appealed the decision of the Commercial Court. The Court of Cassation ruled that Law No. 805 should have been considered in determining the validity of the arbitration agreement when deciding on the rightfulness of the jurisdictional objection and remanded the file to the lower court.\(^{25}\) The Commercial Court decided that the Turkish party should not be allowed to base its jurisdictional objection on an arbitration agreement drafted in English.

The decision was re-appealed by the Turkish party, who alleged that Law No. 805 was not applicable to agreements where only one of the parties was Turkish. However, this allegation was not accepted by the Court of Cassation. On 26 September 2017, the Court of Cassation upheld the Commercial Court’s decision.\(^{26}\)

The decision of the Court of Cassation makes a passing mention of Law No. 805, which reads as follows: ‘in light of the fact that the contract has been drafted in English, contrary to Article 4 of Law No. 805, the defendant cannot rely on an arbitration clause drafted in English’.

This decision of the Court of Cassation has raised debates regarding Turkish arbitration practice.

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\(^{23}\) 11th Civil Chamber of the Court of Cassation decision dated 4 December 2007, No. 2006/89 E. and 2007/15338 K.

\(^{24}\) Law No. 805 entered into force through publication in the Official Gazette dated 22 April 1926 and numbered 353.

\(^{25}\) 11th Civil Chamber of the Court of Cassation decision dated 4 March 2013, No. 2012/4088 E. and 2013/3972 K.

\(^{26}\) 11th Civil Chamber of the Court of Cassation decision dated 26 September 2017, No. 2016/5836 E. and 2017/4720 K.
Decisions pertaining to the competent court for arbitration-related matters

As analysed above, prior to the recent amendment in March 2018 with Article 5 of Law No. 5235, it had been regulated that lawsuits related to arbitration proceedings shall be brought before the commercial courts. Despite this provision, various decisions have been granted on arbitration matters by the civil courts of first instance. Accordingly, the Court of Cassation has granted many decisions emphasising the competent court in arbitration-related matters, and has reversed decisions of the civil courts of first instance that were not given in accordance with the applicable legal provision.27

Clear intention to arbitrate

In 2018, the Court of Cassation granted decisions pertaining to arbitration clauses that do not clearly reflect the parties’ intention to arbitrate.28 In these cases, the Court of Cassation clarified once again that authorising state courts, in addition to arbitrators, does not indicate a clear intention to arbitrate, and these arbitration clauses were deemed invalid by the Court of Cassation.29

Even number of arbitrators

In another decision of the Court of Cassation granted in 2018, it was assessed whether an award drafted by two arbitrators would be valid. In the dispute at hand, the arbitration agreement signed among the parties regulated the appointment of two arbitrators.30

During the annulment proceedings, it was underlined by the Court of Cassation that Article 415 of the CCP regulating that the number of arbitrators must be odd is of a compulsory nature. Even if two arbitrators rendered the award on the dispute, unanimously, this does not change the fact that the decision was not made via an odd number of arbitrators. Hence, an award rendered by an even number of arbitrators is invalid, and the annulment of the award is correct.

Decision pertaining to the appeal of a decision granted in a set-aside action

In a decision granted prior to the amendments in March 2018 on the competent court for set-aside actions, the Court of Cassation ruled that the decisions granted in a set-aside action may be directly subject to appeal proceedings before the Court of Cassation, and not

27 Decision of the 11th Civil Chamber of the Court of Cassation dated 19 December 2017, No. 2016/6762 E. and 2017/7372 K. In another case, the Court of Cassation analysed whether the regional court of appeal or the commercial court of first instance should have jurisdiction in an enforcement lawsuit, and ruled that the relevant lawsuit should be heard before the commercial court. Please see the decision of the 20th Civil Chamber of the Court of Cassation dated 2 October 2017, No. 2017/7998 E. and 2017/7167 K. In parallel, the Court of Cassation decided that the courts of first instance, and not the regional courts of appeal, are competent to hear set-aside actions. Please see the decision of the 15th Civil Chamber of the Court of Cassation dated 31 May 2017, No. 2017/745 E. and 2017/2355 K.


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before the regional court of appeal. In this decision, the Court of Cassation clarified that commercial courts of first instance should be competent to hear set-aside actions, and the appeal of a decision granted in a set-aside action shall be directly appealed before the Court of Cassation, and not the regional court of appeal. The Court of Cassation emphasised that proceedings before the regional court of appeal would cause delays in the finalisation of set-aside decisions, which would be far from reflecting the purpose of the legislator.

iii Investor–state disputes

Turkey is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). It is reported that subsequent to the entry into force of this Convention, arbitration through the ICSID has been included in all of the agreements on reciprocal promotion and protection of investments concluded by Turkey.

ICSID cases currently pending against Turkey

Westwater Resources, Inc v. Republic of Turkey

This case, filed by a US company on 21 December 2018 before the ICSID, concerns a dispute regarding a mining concession. The Turkey–United States of America bilateral investment treaty (BIT) dated 1985 was invoked.

The case is pending. On 4 March 2019, the arbitrator appointed by the respondent accepted the appointment.

Ipek Investment Limited v. Republic of Turkey

This case, filed by a British company on 29 May 2018 before the ICSID, concerns a dispute regarding a mining and telecommunications enterprise. The Turkey–United Kingdom of Great Britain and Northern Ireland 1991 BIT was invoked.

The case is pending. As of 13 March 2019, the tribunal issued Procedural Order No. 3.

Cascade Investments NV v. Republic of Turkey

This case, filed by a Belgian company on 28 February 2018 before the ICSID, concerns a dispute over media services. The Belgium–Luxembourg–Turkey 1986 BIT was invoked.

The case is pending. On 13 March 2019, the tribunal issued Procedural Order No. 2.

32 It should be noted that subsequent to the amendments introduced through Law No. 7101, the regional courts of appeal shall have jurisdiction with regard to set-aside actions, both under the IAA and the CCP.
33 Information provided on the official website of the Ministry of Economy: www.ekonomi.gov.tr.
34 ICSID case No. ARB/18/46.
35 ICSID case No. ARB/18/18.
36 ICSID case No. ARB/18/4.
Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi

The Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi case was filed against a state-owned pipeline company, Boru Hatları ile Petrol Taşıma Anonim Şirketi (BOTAŞ), and concerns a natural gas power plant in Ankara, operated by Baymina and supplied by BOTAŞ, under a gas purchase agreement.

The arbitral tribunal rendered its award on 28 July 2017. On 1 December 2017, an application for the annulment of the award was filed by Boru Hatları ile Petrol Taşıma Anonim Şirketi, and the parties were notified of the provisional stay of enforcement of the award. By 28 January 2019, the parties had filed a request for the discontinuance of the proceedings pursuant to ICSID Arbitration Rules 53 and 43(1). By 18 March 2016, the ad hoc committee issued an order taking note of the discontinuance of the proceedings pursuant to ICSID Arbitration Rules 53 and 43(1).

Other cases

Apart from the above cases, four more cases were filed by Turkish investors against other states in 2017 and at the beginning of 2018:

- Mr Cem Selçuk Ersoy v. Republic of Azerbaijan, filed on 14 March 2018;
- Lotus Holding Anonim Şirketi v. Turkmenistan, filed on 22 August 2017;
- Bursel Tekstil Sanayi Ve Ticaret AŞ, Burhan Enuştekin and Selim Kaptanoğlu v. Republic of Uzbekistan, filed on 19 July 2017; and
- BM Mühendislik ve İnşaat AŞ v. United Arab Emirates, filed on 28 June 2017.

These cases are currently pending.

III OUTLOOK AND CONCLUSIONS

Arbitration as an alternative dispute resolution mechanism continues to gain momentum in Turkey. The legislative amendments made in line with international practices, as well as the proactive approach of the ISTAC in promoting arbitration in diverging sectors, are fruitful developments.

In terms of legislation, important steps have been taken to ensure an arbitration-friendly approach, and the more efficient contribution of the state courts in arbitration proceedings. However, the system still lacks a specialised chamber in the Court of Cassation concerning arbitration matters, which has been an ongoing concern of practitioners for many years.

With the training programmes and legislative changes in support of ISTAC arbitration, the sector observes the benefits of arbitration in every aspect. Hence, an arbitration-friendly approach in Turkey is on the continual rise among practitioners and stakeholders.
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Professor H Erçüment Erdem is the founder of and senior partner at Erdem & Erdem. He has more than 30 years’ experience in arbitration, international commercial law, competition and antitrust law, mergers and acquisitions, privatisations and corporate finance. He serves international and national clients in a variety of industries, including energy, construction, finance, retail, real estate, aerospace, healthcare and insurance.

He has acted as chair and sole or party-appointed arbitrator in many international and national arbitrations under different rules, including the International Chamber of Commerce (ICC) arbitration, Swiss arbitration, Moscow arbitration, United Nations Commission on International Trade Law arbitration, Tehran arbitration and ad hoc arbitrations, and is distinguished in this field.

He has collaborated for many years with the ICC, and has actively participated in several ICC taskforces, drafting model contracts for international business (e.g., agency, distribution, confidentiality, mergers and acquisitions, occasional intermediaries, consultancy, Incoterms). He is Chair of the ICC Commission on Commercial Law and Practice, a member of the ICC International Court of Arbitration, the ICC Arbitration Commission, the ICC Incoterms Experts Group, a council member of the ICC Institute of World Business Law, and a member of the ICC Turkish National Committee Arbitration, the Istanbul Arbitration Centre and the Association Suisse de l’Arbitrage.

He has been selected as one of the leading individuals in dispute resolution by The Legal 500.

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