

THE INTERNATIONAL
ARBITRATION
REVIEW

NINTH EDITION

Editor
James H Carter

THE LAWREVIEWS

THE INTERNATIONAL
ARBITRATION
REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
James H Carter

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGERS

Thomas Lee, Joel Woods

ACCOUNT MANAGERS

Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCHER

Arthur Hunter

EDITORIAL COORDINATOR

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Anna Andreoli

SUBEDITOR

Janina Godowska

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-40-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAWREVIEWS

THE ACQUISITION AND LEVERAGED FINANCE REVIEW
THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW
THE ASSET MANAGEMENT REVIEW
THE ASSET TRACING AND RECOVERY REVIEW
THE AVIATION LAW REVIEW
THE BANKING LITIGATION LAW REVIEW
THE BANKING REGULATION REVIEW
THE CARTELS AND LENIENCY REVIEW
THE CLASS ACTIONS LAW REVIEW
THE CONSUMER FINANCE LAW REVIEW
THE CORPORATE GOVERNANCE REVIEW
THE CORPORATE IMMIGRATION REVIEW
THE DISPUTE RESOLUTION REVIEW
THE DOMINANCE AND MONOPOLIES REVIEW
THE EMPLOYMENT LAW REVIEW
THE ENERGY REGULATION AND MARKETS REVIEW
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW
THE EXECUTIVE REMUNERATION REVIEW
THE FINANCIAL TECHNOLOGY LAW REVIEW
THE FOREIGN INVESTMENT REGULATION REVIEW
THE FRANCHISE LAW REVIEW
THE GAMBLING LAW REVIEW
THE GOVERNMENT PROCUREMENT REVIEW
THE HEALTHCARE LAW REVIEW
THE INITIAL PUBLIC OFFERINGS LAW REVIEW
THE INSOLVENCY REVIEW
THE INSURANCE AND REINSURANCE LAW REVIEW
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW
THE INTELLECTUAL PROPERTY REVIEW
THE INTERNATIONAL ARBITRATION REVIEW
THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW
THE INTERNATIONAL TRADE LAW REVIEW
THE INVESTMENT TREATY ARBITRATION REVIEW
THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW
THE LABOUR AND EMPLOYMENT DISPUTES REVIEW
THE LENDING AND SECURED FINANCE REVIEW
THE LIFE SCIENCES LAW REVIEW
THE MERGER CONTROL REVIEW
THE MERGERS AND ACQUISITIONS REVIEW
THE MINING LAW REVIEW
THE OIL AND GAS LAW REVIEW
THE PATENT LITIGATION LAW REVIEW
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW
THE PRIVATE COMPETITION ENFORCEMENT REVIEW
THE PRIVATE EQUITY REVIEW
THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW
THE PRODUCT REGULATION AND LIABILITY REVIEW
THE PROJECTS AND CONSTRUCTION REVIEW
THE PUBLIC COMPETITION ENFORCEMENT REVIEW
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW
THE REAL ESTATE LAW REVIEW
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW
THE RESTRUCTURING REVIEW
THE SECURITIES LITIGATION REVIEW
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW
THE SHIPPING LAW REVIEW
THE SPORTS LAW REVIEW
THE TAX DISPUTES AND LITIGATION REVIEW
THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW
THE THIRD PARTY LITIGATION FUNDING LAW REVIEW
THE TRADEMARKS LAW REVIEW
THE TRANSFER PRICING LAW REVIEW
THE TRANSPORT FINANCE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALLEN & OVERY LLP

ANJARWALLA & KHANNA

ANWALTSBÜRO WIEBECKE

AS & ASSOCIATES

ATTORNEYS AT LAW RATIOLEX LTD

BAKER BOTTS LLP

BAKER MCKENZIE

COURTENAY COYE LLP

DE BERTI JACCHIA FRANCHINI FORLANI

DENTONS

DESIERTO AND DESIERTO

DR COLIN ONG LEGAL SERVICES

ERDEM & ERDEM LAW OFFICE

FTI CONSULTING

HERBERT SMITH FREEHILLS

KIM & CHANG

LEVY & SALOMÁO ADVOGADOS

LINKLATERS LLP

MAQS ADVOKATBYRÅ

MARKIDES, MARKIDES & CO LLC

MARXER & PARTNER RECHTSANWÄLTE

MIRANDA & AMADO, ABOGADOS

MULLA & MULLA & CRAIGIE BLUNT & CAROE

PROF. HILMAR RAESCHKE-KESSLER LL.M. RECHTSANWALT BEIM
BUNDESGERICHTSHOF

QUEVEDO & PONCE

RAJAH & TANN SINGAPORE LLP

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SRS ADVOGADOS, SOCIEDADE REBELO DE SOUSA & ADVOGADOS
ASSOCIADOS, SP, RL

THORNDON CHAMBERS

VON WOBESER Y SIERRA, SC

WILMER CUTLER PICKERING HALE AND DORR LLP

WOLF THEISS

YKVN

CONTENTS

PREFACE.....	vii
<i>James H Carter</i>	
Chapter 1	IMPACT OF CORPORATE TAXATION ON ECONOMIC LOSSES 1
<i>James Nicholson and Toni Dyson</i>	
Chapter 2	AFRICA OVERVIEW 9
<i>Jean-Christophe Honlet, Liz Tout, Marie-Hélène Ludwig and Lionel Nichols</i>	
Chapter 3	ASEAN OVERVIEW 20
<i>Colin Ong QC</i>	
Chapter 4	BRIBERY ALLEGATIONS IN ARBITRATION 40
<i>Anne-Catherine Hahn</i>	
Chapter 5	AUSTRIA..... 56
<i>Venus Valentina Wong</i>	
Chapter 6	BANGLADESH 67
<i>Mohammad Hasan Habib</i>	
Chapter 7	BELIZE 75
<i>Eamon H Courtenay SC and Stacey N Castillo</i>	
Chapter 8	BRAZIL..... 84
<i>Angela Di Franco and Rafael Zabaglia</i>	
Chapter 9	BULGARIA..... 99
<i>Anna Rizova-Clegg and Oleg Temnikov</i>	
Chapter 10	CANADA..... 109
<i>Rachel Howie, Chloe Snider and Barbara Capes</i>	

Chapter 11	CHINA.....	121
	<i>Keith M Brandt and Michael K H Kan</i>	
Chapter 12	COLOMBIA.....	131
	<i>Ximena Zuleta, Paula Vejarano, Juan Camilo Fandiño, Daniel Jiménez Pastor, Álvaro Ramírez and Natalia Zuleta</i>	
Chapter 13	CYPRUS.....	141
	<i>Alecos Markides</i>	
Chapter 14	ECUADOR.....	151
	<i>Alejandro Ponce Martínez</i>	
Chapter 15	ENGLAND AND WALES.....	155
	<i>Duncan Speller and Tim Benham-Mirando</i>	
Chapter 16	EUROPEAN UNION.....	173
	<i>Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova</i>	
Chapter 17	FINLAND.....	182
	<i>Timo Ylikantola and Tiina Ruohonen</i>	
Chapter 18	FRANCE.....	192
	<i>Jean-Christophe Honlet, Barton Legum, Anne-Sophie Dufêtre and Annelise Lecompte</i>	
Chapter 19	GERMANY.....	201
	<i>Hilmar Raeschke-Kessler</i>	
Chapter 20	HUNGARY.....	217
	<i>Zoltán Faludi and Enikő Lukács</i>	
Chapter 21	INDIA.....	226
	<i>Shardul Thacker</i>	
Chapter 22	INDONESIA.....	241
	<i>Theodoor Bakker, Sabat Siahaan and Ulyarta Naibaho</i>	
Chapter 23	ITALY.....	250
	<i>Michelangelo Cicogna and Andrew G Paton</i>	

Contents

Chapter 24	JAPAN	271
	<i>Christopher Hunt, Elaine Wong, Ben Jolley and Yosuke Homma</i>	
Chapter 25	KENYA.....	283
	<i>Aisha Abdallah and Mohamed Karega</i>	
Chapter 26	LIECHTENSTEIN.....	293
	<i>Mario A König</i>	
Chapter 27	MALAYSIA	304
	<i>Avinash Pradhan</i>	
Chapter 28	MEXICO	320
	<i>Adrián Magallanes Pérez and Rodrigo Barradas Muñiz</i>	
Chapter 29	NETHERLANDS	328
	<i>Marc Krestin and Marc Noldus</i>	
Chapter 30	NEW ZEALAND.....	341
	<i>Derek Johnston</i>	
Chapter 31	NIGERIA	355
	<i>Babajide Ogundipe, Lateef Omoyemi Akangbe and Benita David-Akoro</i>	
Chapter 32	PERU.....	358
	<i>José Daniel Amado, Cristina Ferraro and Martín Chocano</i>	
Chapter 33	PHILIPPINES	367
	<i>Jan Vincent S Soliven and Lenie Rocel E Rocha</i>	
Chapter 34	POLAND	378
	<i>Michał Jochemczak and Tomasz Sychowicz</i>	
Chapter 35	PORTUGAL.....	387
	<i>José Carlos Soares Machado</i>	
Chapter 36	ROMANIA	394
	<i>Tiberiu Csaki</i>	
Chapter 37	RUSSIA	406
	<i>Mikhail Ivanov and Inna Manassyan</i>	

Chapter 38	SINGAPORE.....	419
	<i>Kelvin Poon, Paul Tan and Alessa Pang</i>	
Chapter 39	SOUTH KOREA	444
	<i>Joel E Richardson and Byung-Woo Im</i>	
Chapter 40	SPAIN.....	452
	<i>Virginia Allan, Ignacio Madalena and David Ingle</i>	
Chapter 41	SWEDEN.....	466
	<i>Pontus Ewerlöf and Martin Rifall</i>	
Chapter 42	SWITZERLAND	474
	<i>Martin Wiebecke</i>	
Chapter 43	TURKEY.....	493
	<i>H Ercüment Erdem</i>	
Chapter 44	UKRAINE.....	502
	<i>Ulyana Bardyn, Christina Dumitrescu and Victor Marchan</i>	
Chapter 45	UNITED ARAB EMIRATES	518
	<i>Stephen Burke</i>	
Chapter 46	UNITED STATES	527
	<i>James H Carter, Sabrina Lee and Stratos Pahiş</i>	
Chapter 47	VIETNAM.....	547
	<i>K Minh Dang, Do Khoi Nguyen and Luan Tran</i>	
Appendix 1	ABOUT THE AUTHORS.....	561
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	597

PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

Wilmer Cutler Pickering Hale and Dorr LLP

New York

June 2018

TURKEY

*H Ercüment Erdem*¹

I INTRODUCTION

In 2017, the momentum gained in Turkey in recent years with regard to the use of arbitration as an alternative dispute resolution mechanism continued. 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 sectors.

With the establishment of the Istanbul Arbitration Centre (ISTAC), which is the newest local arbitration institution in Turkey, an independent arbitration institution able to compete with other similar arbitration institutions in the international arena, has been put into operation. It has been reported that ISTAC has 15 cases in its portfolio as of February, 2018.²

The ISTAC and the 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 over the 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.

i Legal framework

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

The main legislation regulating international arbitration is International Arbitration Act No. 4686 (IAA). The IAA applies to arbitrations in which there is a foreign element, and which 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 No. 6100 (CCP). These provisions also apply for arbitrations with no foreign element that are seated in Turkey.

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

1 H Ercüment Erdem is a senior partner at Erdem & Erdem Law Offices.

2 A statement made by the President of the Board of Arbitration of the ISTAC, Professor Dr Ziya Akinci, in a joint meeting organised with Türkiye İhracatçılar Meclisi (Turkish Exporters' Council (TIM)). Source: <https://www.sondakika.com/haber/haber-yazilan-her-istac-maddesi-tahkim-dunyasinda-10534193/>.

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, that are considered to be commercial under national laws. Considering that 159 states are parties to the New York Convention,³ it may be concluded that most of the 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 issue of a foreign element, the IAA was the first legislation to clarify the concept of ‘international arbitration’ under Turkish law.⁴ 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 the 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 different countries;
- 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

3 www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

4 Ziya Akıncı, *Milletlerarası Tahkim*, Istanbul, 2016, p. 55.

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.⁵

An important element thoroughly analysed by the Turkish courts is whether the arbitration institution has been clearly distinguished 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.⁶

With regard to the intention to arbitrate, clauses stipulating that the courts would also have competence, in addition to arbitrators, also render the arbitration agreement invalid. In practice, this issue manifests itself usually 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.⁷

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 on the principal, and the general authorisation that may be found in powers of attorney, such as the general ones granted to attorneys-at-law for representation before courts, is 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 Turkish Code of Obligations No. 6098, 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 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.⁸

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.⁹ 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.¹⁰

5 H Ercüment Erdem, *Milletlerarası Ticaret Hukuku*, Istanbul, 2017, No. 1612 et seq.

6 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.

7 Decision of the 11th Civil Chamber of the Court of Cassation dated 24 October 2017 No. 2016/3383 E., 2017/5688 K.

8 Erdem, *Milletlerarası Ticaret Hukuku*, No. 1631.

9 Decision of the General Assembly of Civil Chambers of the Court of Cassation, dated 22 February 2012 No. 2011/11-742 E, 2012/82 K.

10 Decision of the 11th Civil Chamber of the Court of Cassation dated 9 April 2004 No. 2003/6774 E., 2004/3751 K., see also Erdem, *Milletlerarası Ticaret Hukuku*, fn. 1574.

Challenging arbitral awards

Under Turkish law, an appeal against an arbitral award may not be filed, and the 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* decision of arbitrators on a matter exceeding the scope of the arbitration agreement, or exceeding the scope of their authority;
- f* violation of procedural rules that has an effect on the substance of the award; and
- g* 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 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 very important grounds for refusal of the recognition and enforcement of 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 determination of the amount of lease payments, vacating of property, tax disputes, and labour law disputes are among non-arbitrable disputes.¹¹ 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.¹²

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 International Private and Procedural Law No. 5718, 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

11 Erdem, *Milletlerarası Ticaret Hukuku*, No. 1639; Decision of the 9th Civil Chamber of the Court of Cassation dated 20 January 2009 No. 2008/44630 E, 2009/537 K.

12 Decision of the 3rd Civil Chamber of the Court of Cassation dated 2 December 2004 No. 2004/13018 E, 2004/13409 K.

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.

The court may declare a foreign party exempt from providing a 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 declare the foreign party to be exempt from providing security.

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 its users. Firstly, 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 resolution before the Turkish courts, since it is quite 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 state courts, if there are issues that need to be decided 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 lira.

Another point where the ISTAC has an advantage over national courts is the fee structure. The ISTAC prides itself on a more reasonable fee structure than 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 may reach quite outrageous amounts concerning high-value transactions. As this percentage remains the same and does not decrease 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 in public sector front, and has been supported through many legislative and governmental 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 governmental 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 shall be analysed in greater detail below.

II THE YEAR IN REVIEW

i Legislative developments

Regarding the general legal framework in Turkey, the extension of the state of emergency for the seventh time since the attempted coup on 15 July 2016, is the recent highlight of political conjuncture. Pursuant to Article 121 of the Turkish Constitution, a state of emergency allows the Council of Ministers to issue decrees having the force of law on matters necessitated by the state of emergency.

These political developments aside, through the regional courts of appeal, which began to operate on 20 July 2016, the Turkish appellate review system has evolved into a three-tier system. The regional courts of justice are structured within seven of the larger cities in Turkey, and are responsible for each of their respective geographical areas.

Arbitration as a dispute resolution mechanism in public procurement contracts

As mentioned, above, within the promotion of arbitration as a dispute resolution mechanism, and also of the ISTAC as arbitration institution, the regulations on the agreements to be concluded pursuant to the Public Procurement Contracts Law have been amended.¹³ 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 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.

Amendments pertaining to competent courts in arbitration-related proceedings

As a change of legislation directly affecting arbitration-related proceedings, important amendments pertaining to the proceedings to be conducted by Turkish courts related to arbitration proceedings have been introduced through Law No. 7101 in the Amendment of the Enforcement and Bankruptcy Law and Certain Laws¹⁴ (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 Establishment, Jurisdiction and Competence of Civil Courts of First Instance and Regional Courts of Appeal (Law No. 5235) provide that set-aside actions shall be heard by a panel of judges comprising one chairman and two members, namely, the commercial courts of first instance.

Furthermore, pursuant to Law No. 7101, for the other arbitration-related proceedings to be conducted before state courts, such as objections to be made to the arbitration clauses, lawsuits pertaining to the appointment, or challenge of arbitrators, request of assistance from

¹³ Published in the Official Gazette dated 30 December 2017 and numbered 30286 (reiterated).

¹⁴ Published in the Official Gazette dated 15 March 2018 and numbered 30361.

state courts concerning collection of evidence, and lawsuits pertaining to the extension of duration of the term of arbitration, civil courts or commercial courts of first instance shall be competent, depending on the subject of dispute.

ii 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 is highly criticised in the doctrine and by practitioners, no initiative was taken in this regard in 2017.

Important decisions of the Court of Cassation for this year are summarised, below.

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.¹⁵

Decision pertaining to 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 before the regional court of appeal.¹⁶ In this decision, the Court of Cassation clarified that commercial courts of first instance should be competent to hear set-aside actions,¹⁷ 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 the 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.

15 Decision of the 11th Civil Chamber of the Court of Cassation dated 19 December 2017 No. 2016/6762 E, 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., 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., 2017/2355 K.

16 Decision of the 23th Civil Chamber of the Court of Cassation dated 11 May 2017 No. 2017/1040 E, 2017/1433 K.

17 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.

Clear intention to arbitrate

Again in 2017, the Court of Cassation granted decisions pertaining to arbitration clauses, which do not clearly reflect the parties' intention to arbitrate.¹⁸ 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.¹⁹

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.²⁰

ICSID cases currently pending against Turkey

*Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi*²¹

This case was filed against a state-owned pipeline company, BOTAS, and concerns a natural gas power plant in Ankara, which is operated by Baymina and supplied by BOTAS under a gas purchase agreement. The arbitral tribunal rendered its award on 28 July 2017. On 1 December 2017, an application for 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. The annulment proceedings are pending.

*Cascade Investments NV v. Republic of Turkey*²²

This case has been filed by Cascade Investments NV from Belgium against the Republic of Turkey on 28 February 2018, based on the BIT between Belgium, Luxembourg and Turkey, dated 1986. As of April 2018, no further procedural details on the case are available.²³

Apart from these cases, four more cases were filed by Turkish investors against other states in 2017 and in the beginning of 2018: *Mr Cem Selçuk Ersoy v. Republic of Azerbaijan* (ICSID Case No. ARB/18/6, filed on 14 March 2018), *Lotus Holding Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/17/30, filed on 22 August 2017), *Bursel Tekstil Sanayi Ve Dış Ticaret AŞ, Burhan Enuştekin and Selim Kaptanoğlu v. Republic of Uzbekistan* (ICSID Case No. ARB/17/24, filed on 19 July 2017) and *BM Mühendislik ve İnşaat AŞ v. United Arab Emirates* (ICSID Case No. ARB/17/20, filed on 28 June 2017). These cases are currently pending.

18 Please see the decision under Footnote 7.

19 Decision of the 15th Civil Chamber of the Court of Cassation dated 9 February 2017 No. 2016/5600 E., 2017/512 K.

20 Information provided on the official website of the Ministry of Economy: www.ekonomi.gov.tr.

21 ICSID Case No. ARB/14/35.

22 ICSID Case No. ARB/18/4.

23 Please see <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/4>.

III OUTLOOK AND CONCLUSIONS

In Turkey, in recent years, arbitration as an alternative dispute resolution mechanism has gained momentum, especially concerning the latest legislative developments, and the efforts of the ISTAC to promote arbitration, have been quite successful. This may help eliminate the apparent lack of interest in arbitration among middle-sized Turkish enterprises that have traditionally not elected arbitration as a dispute resolution mechanism.

In terms of legislative developments, important steps have been taken to promote arbitration, and to ensure a more efficient contribution from state courts in arbitration proceedings. On the other hand, an important problem remains unresolved in 2017: the lack of a specialised chamber in the Court of Cassation concerning arbitration matters.

The approach of local courts on arbitration matters is also very important for the advancement of arbitration in Turkey. Even though the courts, in some cities, may be unfamiliar with arbitration, in large cities, such as Istanbul, Ankara and Izmir, the courts are granting many qualified decisions. All of these issues are also crucial for the promotion of Turkey as an arbitral seat, since the courts located in Turkey must be considered arbitration-friendly for parties to select it as an arbitral venue. We hope that these objectives will be achieved in the near future.

ABOUT THE AUTHORS

H ERCÜMENT ERDEM

Erdem & Erdem Law Office

Professor H Ercüment 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 International Chamber of Commerce (ICC) arbitration, Swiss arbitration, Moscow arbitration, United Nations Commission on International Trade Law arbitration, Tehran arbitration, *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 task forces, drafting model contracts for international business (e.g., agency, distribution, confidentiality, mergers and acquisition, occasional intermediaries, Incoterms). He is the co-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 (ISTAC) and the Association Suisse de l'Arbitrage (ASA).

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

ERDEM & ERDEM LAW OFFICE

Valikonağı Caddesi

Başaran Apt No. 21/1-3

34367 Nişantaşı

Istanbul

Turkey

Tel: +90 212 291 73 83

Fax: +90 212 291 73 82

ercument@erdem-erdem.av.tr

www.erdem-erdem.av.tr

Law
Business
Research

ISBN 978-1-912228-40-9