



Arbitration Bulletin 2022

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Developments in Türkiye

Important Court Decisions

1. The Court of Cassation General Assembly of Civil Chambers Decided that a Bankruptcy Case was not Arbitrable ^[1]

General Assembly of Civil Chambers mainly concluded the following:

- Execution proceedings through general bankruptcy, removal of objection and bankruptcy request should be evaluated together.
- A bankruptcy case bears public policy consequences and concerns all creditors.
- It is against good faith to assert an arbitration agreement when a claimant has chosen to litigate by filing a lawsuit before the Turkish courts.
- It is a fundamental principle of procedural law to conclude the proceedings in the shortest possible time and with due regard to procedural economy. Bankruptcy cases are subject to simple procedure and the case must be examined and decided

by commercial courts.

- It is not appropriate to dismiss the lawsuit on procedural grounds by relying on an arbitration agreement that restricts the freedom to seek justice.

2. Court of Cassation Decided that Contradictory Arbitral Awards on the Same Dispute are Against Public Policy ^[2]

The 11th Civil Chamber mainly concluded the following:

- Unless there is a joint request of the parties consolidation of arbitration proceedings is incompatible with the nature of arbitration.
- A decision to stay the proceedings is at the discretion of the arbitrator in the second arbitration.
- Merits of arbitral awards cannot be reviewed per the principle of revision au fond.
- Contradictory decisions can harm the principle of legal security and public policy.

Read more about the decision:

Decision of the Court of Cassation General Assembly Allowing Bankruptcy Proceedings Before Turkish Courts Despite the Existence of an Arbitration Agreement

[Duygu Öner Ayçiçek, June 2022](#)

- In the second arbitration, points of whether the arbitral award of the first arbitration and material facts thereunder were final and conclusive and the effects of these points should have been evaluated. As such evaluations did not take place the arbitral award should be set aside.

3. Court of Cassation Decided that Asserting the Invalidity of the Arbitration Agreement is an Abuse of Right ^[3]

The 11th Civil Chamber of the Court of Cassation upheld the following findings of the Regional Court of Appeal:

- It is contradictory to good faith for the Claimant to assert that the arbitration agreement was not valid by stating that it was not a signatory to the same agreement and that the agreement was rendered invalid due to breaches of the agreement by the Defendant, while claiming that the Defendant acted in breach of the agreement and making claims against the defendant pursuant to the agreement.
- The commercial relationship between the parties continued after the date of the agreement, the Claimant did not use a right of action or objection regarding the invalidity of the agreement until the lawsuit, the Claimant is under the obligation to act prudently, it was determined

that the Claimant consented to the agreement in good faith, and it is appropriate to dismiss the lawsuit on procedural grounds by relying on arbitration objection.

Important Developments Regarding Legislation and Arbitration Rules

1. Rules on Istanbul Arbitration Center's ("ISTAC") Costs and Fees Tariff are Updated

Through the Board of Directors' decision of ISTAC dated 21.03.2022 the costs of the proceedings were determined to be less than or equal to the local court costs, including three-judge cases. A reduction was made for cases with a claim amount of less than TRY 1,000,000. In order to expand the scope of application of Fast Track Arbitration, the upper limit for the value of the dispute was increased from TRY 300,000 to TRY 1,000,000.

2. Ability to Request the Enforceability Annotation through UYAP has been Introduced

In October 2022, ISTAC announced that, upon the application made to the Ministry of Justice, the enforceability annotation required under paragraph B of Article 15 of the International Arbitration Law numbered 4686 can now be requested through UYAP.

Developments in the World

Important Court Decisions and Arbitral Awards

European Court of Human Rights (“ECHR”) Decisions

■ **BTS Holding v. Slovakia**

In *BTS Holding v. Slovakia*^[4], dated 30.06.2022, the ECHR decided that Slovakia violated the applicant's right to property because the Slovakian courts arbitrarily and in contravention of the New York Convention refused to enforce the arbitral award rendered against the Slovak National Property Fund as a result of an International Chamber of Commerce (“ICC”) arbitration.

■ **Xavier Lucas v. France**

In *Xavier Lucas v. France*^[5], dated 09.06.2022, the ECHR considered the rejection of the physical application by the French Court of Appeal, without considering the actual difficulty of the electronic application and the obstacles faced by the applicant, as an excessive formalist interpretation. It decided that the balance between compliance with the procedural rules and the applicant's right to access the court and to be heard, in particular, was disturbed to the detriment of the applicant and therefore

the applicant's right to a fair trial was violated.

Investment Arbitration Decisions

■ **Decision on the Jurisdictional Objection Arising from the Violation of the Inter-State Negotiation Clause**

In its decision dated 19.04.2022 in the dispute *Nasib Hasanov v. Georgia*^[6] before the International Center for Settlement of Investor Disputes (“ICSID”), the arbitral tribunal evaluated the jurisdictional objection of the Defendant Georgia based on the violation of the inter-state negotiation clause.

Defendant Georgia argued that, pursuant to the Azerbaijan-Georgia Bilateral Investment Treaty (“BIT”), before an investor-state dispute is submitted to arbitration, negotiations must be conducted between the two parties to the BIT for the purpose of resolving the dispute, and that the arbitral tribunal lacked jurisdiction as this condition of inter-state negotiations was not met in the concrete dispute.

The Claimant, on the other hand, claimed that the competent authorities of Azerbaijan, the source state, had contacted Georgia in writing, but that

Read more about the relevant matter:

European Courts’ Diverging Approach over Intra-EU Investment Arbitrations
Tilbe Birengel, May 2022



these attempts at negotiations had not yielded results.

The Arbitral Tribunal rejected Georgia's jurisdictional objection on the grounds that the BIT did not include details on the negotiation procedure and that the written submission of the demands by Azerbaijan to Georgia fulfilled the minimum negotiation requirements.

Investment Disputes Related to Intra-EU Jurisdictional Challenges ^[7]

■ Decision of the Paris Court of Appeal ^[8]

In the arbitration proceeding of Strabag and Others v. Poland (ICSID), dated 04.03.2020 which was initiated by Poland before the Paris Court of Appeal to set aside the arbitral award, the Court^[9] set aside the arbitral award by adopting the principles of the Court of Justice of the European Union in 2018, which established that arbitration of intra-European Union ("EU") investment disputes is contrary to EU law in the Achmea decision.^[10]

■ Decision of the Arbitral Tribunal in the Stockholm Chamber of Commerce Arbitration ("SCC") on Spain's Intra-EU Jurisdictional Objection

Green Power Partners K/S and SCE Solar

Don Benito APS v. Spain (SCC)^[11], dated 16.06.2022, was the first decision in which an arbitral tribunal accepted a so-called intra-EU jurisdictional objection, based on the view that it is contrary to EU law to arbitrate where both parties to the dispute are EU members; Spain's objection was accepted.

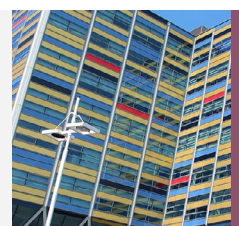
■ Decision of the Higher Regional Court of Berlin on the Decision of an Arbitral Tribunal on an Intra-EU Jurisdictional Objection

In *Mainstream Renewable Power and others v. Germany* (ICSID), dated 16.06.2022, the arbitral tribunal rejected Germany's claim that arbitration of intra-EU investment disputes is against EU law in light of *Achmea* and *Komstroy*.^[12]

Subsequently, Germany applied to the Berlin courts for a declaration that the dispute was not arbitrable due to its intra-EU nature. The Higher Regional Court of Berlin emphasized that the decisions of the CJEU have no binding effect on the international law system to which Germany is a party under international treaties such as the ICSID, and that this system is independent of the national court decisions, thus rejected Germany's request.^[13]

Read more about the relevant rules:

The Impact of the Achmea Decision on Investment Arbitration
Tilbe Birengel, October 2018



Important Developments Regarding Arbitration Institutions and Rules



February 18, 2022

ICC Published the Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings

The ICC Commission on Arbitration and Alternative Dispute Resolution published the Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings ^[14] (“Report”) on 18.02.2022.



The Report assesses technologies commonly used in arbitration, useful procedural practices, aspects to be avoided, and technological methods and tools that can be utilized to improve the efficiency and development of arbitration.



March 21, 2022

Dubai International Arbitration Center (“DIAC”) Arbitration Rules Entered into Force

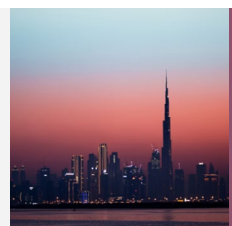
DIAC amended the 2007 Arbitration Rules on 25.02.2022 (“Rules”).^[15]

The amendments introduced by the Rules generally relate to the electronic submission of documents, the place of arbitration, the powers of the arbitral tribunal, the appointment of arbitrators, intervention, joinder of cases, the substitution of legal representatives, expedited proceedings, emergency arbitration, third party financing and costs.



Read more about the rules:

2022 DIAC Arbitration Rules
Mehveş Erdem Kamiloğlu, May 2022





April 21, 2022

Kyrgyzstan ratified the ICSID Convention



May 1, 2022

The Arbitration Rules of the South China International Arbitration Centre (SCIAHK) Entered into Force



May 4, 2022

Turkmenistan became a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards



June 1, 2022

The International Council of Commercial Arbitration (“ICCA”) Published the General Report on the Right to a Physical Hearing in International Arbitration

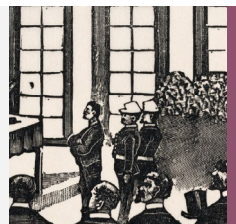
Many arbitration hearings have been held online due to the Covid-19 pandemic and many of the rules of arbitral institutions have allowed hearings to be held online. Nevertheless, many legal questions have arisen regarding online hearings. Accordingly, on September 4, 2020, ICCA launched a survey on whether the right to a physical hearing exists in international arbitration. As a result of the project, a General Report ^[16] was published on 19.05.2022, including responses from 78 parties to the New York Convention, as well as assessments from arbitrators and related parties.



Read more about the report:

ICCA General Report on the Right to a Physical Hearing in International Arbitration

Melissa Balıkcı Sezen, May 2022





June 24, 2022

Negotiations on the Renewal of the Energy Charter Treaty (ECT) in line with Current Needs are Finalized

The ECT has long been criticized for protecting investors in the fossil fuel sector against environmental regulations by governments aiming to reduce carbon emissions. With countries such as Spain, Germany, the Netherlands, Luxembourg, Poland and Slovenia recently announcing their plans to withdraw from the ECT, negotiations to revise the treaty in line with current needs have accelerated.

The new ECT text, which was expected to be submitted for ratification by the states parties in April 2023, was finalized on 24 June 2022. Meanwhile, the European Parliament called on the EU to withdraw from the ECT.



July 1, 2022

The New International Commercial Arbitration Rules of Procedure of the Vancouver International Arbitration Centre Entered into Force



July 1, 2022

The Amended ICSID Rules Entered into Force

ICSID approved the 2022 ICSID Rules and Regulations^[17] (“Rules”) on 21.03.2022 and entered into force on 01.07.2022, after 5 years of work. ICSID also published the Guidelines on the Rules on 22.07.2022 providing guidance on the application of the Rules.

The amendments introduced by the Rules are aimed at improving accessibility to ICSID as well as increasing time, cost and environmental efficiency of proceedings, enhancing transparency and disclosure procedures, with the main objective of facilitating foreign investment for economic growth.





July 12, 2022

African Arbitration Academy Published the Model Bilateral Investment Treaty for African States



July 14, 2022

Angola signed the ICSID Convention



July 21, 2022

The Hague Court of Aviation Arbitration Commenced Operations



July 25, 2022

The Fourth Draft of the Code of Conduct for Adjudicators in International Investment Disputes is Published

The fourth draft of the Rules of Conduct for Adjudicators in International Investment Disputes (the "Rules")^[18] developed in cooperation with ICSID and the United Nations Commission on International Trade Law (UNCITRAL), is published on 25.07.2022.



The Rules aim to provide rules and principles applicable to the independence and impartiality of adjudicators and to the conduct of proceedings with integrity, fairness, efficiency and civility.



Sources

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13. **Fisher, Toby:** German Court Refuses to Block Intra-EU Claim, Global Arbitration Review, 26.05.2022.
14. ICC Commission Report: Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings, <https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf>
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Key Contacts



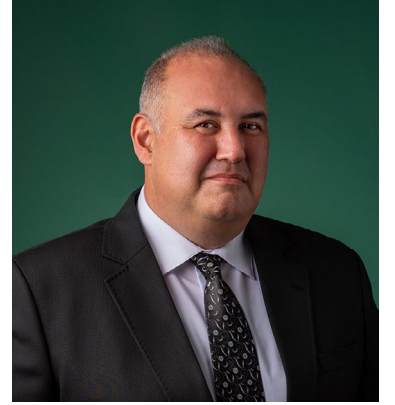
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