LEGAL FRAMEWORK AND MAIN INSTITUTIONS OF ARBITRATION IN TURKEY

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Turkey, a bridge between the European and the Asian/Middle Eastern world, therefore welcoming considerable number of foreign commercial actors in its jurisdiction, has made substantive steps in establishing its domestic and international arbitration approach and practices. In this respect, Turkey deserves some attention to the recent developments regarding its new arbitration and foreign investment legislation as well as the national arbitration institutions that are seldom referred to.

This article is contemplated as a basic guide on the arbitration legislation and the arbitration institutions in Turkey that can be resorted where Turkey is an element of an international commercial or investment dispute.

I. Legal Framework

A. Laws on Arbitration

1. Turkish Code of Civil Procedure ("TCCP") *and the New Turkish Code of Civil Procedure* ("NTCCP")

TCCP has long been the sole legislation applicable to domestic arbitration and indeed the sole legislation related to arbitration in Turkey. Its old fashioned rules contained an appeal system against the domestic arbitral awards; they also favoured the national courts' competence over and interference to arbitral tribunals which overall encountered much criticism in the last decade.

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TCCP has been very recently replaced by NTCCP that has become effective as of October 1, 2011. NTCCP follows the system already adopted by the Turkish International Arbitration Law (as explained in further detail in the following Section) and therefore, is mainly based on the UNCITRAL Model Law on Arbitration; but it governs solely domestic disputes without any foreign element.

We believe that NTCCP goes beyond the Turkish International Arbitration Law and adopts a more arbitration friendly approach. A very significant example for such approach is Article 439 of NTCCP where it states that proceedings for setting aside an arbitral award do not, in principle, suspend the enforcement of such arbitral award. It may be interpreted that the arbitral award is therefore provisionally enforceable until its enforcement is suspended by a court decision where the reading and practice of Turkish International Arbitration Law have been the exact opposite. This provision, along with further similar examples serving the same purpose, expressly reflects that the Turkish legislator has now adopted a global and up-to-date understanding in terms of arbitration.

*2. Turkish International Arbitration Law ("**TIAL**")*

TIAL, enacted in 2001, is the main legislation in Turkey regarding international arbitration. It becomes applicable whenever it is chosen as the applicable procedural rules for the disputes. It also governs disputes with a foreign element (one of the parties may be from a different nationality than Turkish, the performance under the contract may be carried out outside Turkey, there may be international capital transfer involved in the transaction) and where the arbitration place is Turkey.

TIAL is the first legislation in Turkey to establish a modern arbitration system similar to the UNCITRAL Model Law. TIAL sets forth the competence-competence principle for the arbitral tribunal and therefore limits the national courts' role in arbitration. Its major innovation on the other hand, is the institution of the setting aside of an arbitral award instead of an appeal mechanism and therefore to abolish the principle of "*revision au fond*" for arbitral awards. Although it has initially issued contradictory decisions, Turkish Supreme Court recently seems to have fully adopted the above-mentioned institution.

*3. Turkish International Private and Procedural Law ("**TIPPL**")*

TIPPL, enacted in 2007, is the legislation governing the issues related to private law and having a foreign element; as well as the jurisdiction of Turkish courts and the enforcement and recognition of foreign court decisions and foreign arbitral awards. It is hereby appropriate to note that the provisions of TIPPL related to the enforcement and recognition of foreign arbitral awards are solely applicable when the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is not applicable. It is fair to state that the scope of TIPPL in this respect is considerably narrow as very few States still has not ratified the said Convention.

TIPPL involves the principle of reciprocity in the enforcement and recognition of court decisions and/or arbitral awards which in most of the cases result in long-lasting judicial proceedings while determining especially the "*de facto reciprocity*". TIPPL, although enacted quite recently, therefore may be described as a non-practical law.

*4. Law on the Principles Governing the Disputes Arisen out of the Concession Contracts Concerning Public Services and Submitted to Arbitration ("**Law No. 4501**")*

Law no. 4501 was enacted in 2000 as an outcome of the 1999 amendments of the Turkish Constitution which enabled arbitration as an option for disputes arising from concession contracts.

Prior to the amendments of the Turkish Constitution and the enactment of Law no. 4501, disputes in connection with the concession contracts, which were often concluded with foreign investors, could only be referred to national courts. This prior internal legislation was highly criticized as it was substantially contradictory to the international conventions to which Turkey was a party and therefore to international public law principles.

Law no. 4501 expressly allowed that disputes related to concession contracts with a foreign element may be referred to arbitration. In this respect, Law no. 4501 may be interpreted as a fundamental change in Turkish law towards an arbitration- friendly (and therefore foreign investor-friendly) approach.

*5. Direct Foreign Investments Law ("**DFIL**")*

DFIL, enacted in 2003, aims at promoting direct foreign investments, maintaining the rights of foreign investors and increasing the foreign investments through adopting international standards in this respect.

DFIL, besides providing flexible rules for foreign investors to establish companies and facilitating various issues such as international capital transfer, labor law exceptions for foreign investors, allows arbitration as a dispute resolution method for disputes arisen in connection with direct foreign investments. More importantly, DFIL sets forth the conditions to resort to the dispute settlement mechanism before the International Center for the Settlement of Investment Disputes.

B. International Conventions on Arbitration

*1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**")*

Turkey has ratified the New York Convention in 1991 with two reservations as set forth by Article I (3) of the same Convention. Accordingly, an arbitral award issued in a non-signatory state may not benefit from the provisions of the New York Convention. Furthermore, foreign arbitral awards on non-commercial private law issues may also not benefit from the provisions of New York Convention.

Turkish Supreme Court for long has been applying the New York Convention in relation with the recognition and enforcement of the foreign arbitral awards. A major obstacle in practice, however, has been the requirement of securities by the courts from foreign parties seeking for the enforcement of an arbitral award in Turkey. Although New York Convention (Article III) strictly states that signatory states should not impose substantially onerous conditions or higher fees or charges on the recognition and enforcement of

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arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards, in practice most first instance courts require securities from foreign parties at the initiation stage of the enforcement lawsuit. Such requirement remains as a burden on the foreign parties which should, in our opinion, urgently be removed to provide full compliance with the Convention in practice.

*2. European Convention on International Commercial Arbitration ("**European Convention**")*

The European Convention, which adopts the main role of supplementing the New York Convention by regulating the jurisdictional and procedural issues, was enacted in 1961. Turkey has ratified the European Convention in 1991. Although the scope of the European Convention is broader than the New York Convention, it is fair to conclude that the application of the European Convention is rather limited given that the signatory states are fewer in number. The application of the European Convention by Turkish courts is also significantly rare.

*3. The Convention on the International Centre for the Settlement of Investment Dispute ("**ICSID Convention**")*

The ratification of the ICSID Convention by Turkey dates back at 1988. However, the application of the Convention by Turkish investors or against Turkey could start only after the second half of the 90s where the Bilateral Investment Treaties have started to enter into force and become binding and therefore allowing the ICSID dispute resolution mechanism to be binding as well; as a result of the double consent requirement.

Turkish construction sector has experienced substantial developments especially after the 80's. Turkish contractors have massive record in construction field all over the world. Accordingly, the ratification of ICSID Convention has mainly served for Turkish contractors who have initiated 12 cases against various member states.

Meanwhile, there are 8 cases before ICSID (pending and completed) against Turkey. The claims in these cases mostly relate to the Turkish legislative provisions from the 90's which were not favouring arbitration nor foreign investors. However, as hereinabove mentioned and noted, Turkey has made some steps in adjusting the foreign investment and arbitration legislations which hopefully decrease the number of ICSID cases to be initiated against Turkey. Furthermore and as a last note, Turkey has followed a policy to observe the ICSID dispute resolution mechanism and therefore voluntarily complied with the terms of the ICSID awards rendered against Turkey.

*4. Bilateral Investment Treaties ("**BITs**") and Energy Charter Treaty*

Turkey has ratified the Energy Charter Treaty in 2000. In terms of ratification of this Treaty, disputes arising from foreign energy investments may be resorted to ICSID arbitration regardless of whether the state where the investment is made is a signatory to the ICSID Convention or not. Nevertheless, in our knowledge, there has not been significant resort to such treaty as of our day.

Additionally, numerous BITs have been ratified between Turkey and other states; the number of which exceeded recently 70[1]. In practice, it is an ordinary procedure that there is a time period between the ratification of the treaty between the states and the date of its actual entering into force[2], due to the exchange of notes procedure[3] between states. It is noteworthy to mention that such period recently significantly shortened. BIT that Turkey concluded with Yemen has entered into force 11 years after its ratification; BIT that Turkey has concluded with Libya has entered into force after 2 years of its conclusion.

In face of the above, we understand that the recent events in both countries may have an accelerating effect in the exchange of notes procedure and that in this respect Turkey may be deemed to have taken a very dynamic approach to provide the fastest protection of its investors in these countries.

*5. Agreement for Promotion, Protection and Guarantee of Investments among the Organization of Islamic Conference ("**OIC**") Member States:*

Turkey, being a member of the OIC since 1969, has signed the Agreement for Promotion, Protection and Guarantee of Investment among the OIC Member States in 1987; and such agreement was ratified in 1991.[4] Said agreement regulates the basic principles to be observed by the contracting states for the promotion and protection of capital transfers and investments against commercial risks. Furthermore, it also enables an investor of any signatory state to resort any dispute within the context of such agreement to either national courts of the host state or to arbitration. Article 17 further sets forth the rules and principles governing mediation and arbitration in case the investors of the signatory states intend to refer any disputes to be resolved through arbitration method as per Agreement, until a relevant organ is established.

It should be stated that in practice the very agreement has not been resorted to so far. However, it still remains as a unique structure providing and allowing arbitration method for the investors of the signatory states.

6. Judicial Cooperation Treaties

Besides being a signatory to and having ratified the Convention of Civil Procedure in 1954; the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in 1965; and the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters in 1970, Turkey has also signed over 20 bilateral judicial cooperation treaties.

In our opinion, the most significant role of said treaties is to serve as a tool for foreign parties wishing to initiate a lawsuit in Turkey to avoid depositing any securities. In this respect, it may also be fair to conclude that in case there is a treaty between the state of a foreign party and Turkey, such foreign party is not required to deposit any security to initiate a recognition and/or enforcement case for any arbitral award in its favour. Therefore these treaties fulfil the gap of practice due to the misapplication of Article III of the New York Convention in Turkey.

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II. Institutions

A. Current Institutions

1. Arbitration Court of Istanbul Chamber of Commerce

The principal arbitration institution that is active and considerably resorted to in Turkey is the Arbitration Court of the Istanbul Chamber of Commerce ("**ACICC**"). The ACICC provides services for not only for arbitration but also for mediation and arbitral expertise in accordance with its own respective regulations. In order to refer any dispute to arbitration under ACICC Rules, at least one of the parties shall be a member of the Istanbul Chamber of Commerce, the Istanbul Chamber of Industry, or the Istanbul and Marmara Region Chamber of Sea Commerce.

Currently ACICC is the most active arbitration institution in Turkey. However, the number of disputes before ACICC is fewer than contemplated due to various reasons. The very reason is that, such rules basically disregard the party autonomy to decide on procedural issues unlike the modern arbitration approach which allows the parties to be able to decide on most procedural matters. Furthermore, the ACICC Rules stipulates certain provisions that are not in conformity with the practical facts of arbitration, such as term of arbitration is regulated as two months, which obviously is high below the term necessitated for conclusion of an arbitral proceeding. Another criticism against the current ACICC is that, most of the nominated arbitrators have technical expertise instead of legal expertise which results in the awards to be problematic in terms of their enforcement. For the purpose of providing a modern set of rules regarding arbitration, the regulations governing arbitration of the ACICC are being revised and amended to match the needs of arbitration practice and to become more flexible.

2. Arbitration Court of Turkish Union of Chambers and Exchange Commodities ("TUCEC")

Another institution is the Arbitration Court established by the Turkish Union of Chambers and Exchange Commodities. The said Court is located in Ankara and deals with the settlement of commercial disputes between private parties. The very arbitration court is not active in practice; however it should be noted that under TUCEC, International Chamber of Commerce Turkey Branch is operating and providing a dynamic platform for its members to find advice on the arbitrators, organising nationwide seminars and conferences on international arbitration and national committees to discuss and draft facilitating rules and reports on various subjects on international arbitration.

3. Arbitration Court of Izmir Chamber of Commerce

Finally, Arbitration Court of Izmir Chamber of Commerce also appears to be another player as an arbitral institution with its adopted Principles of Commercial Conciliation and Commercial Arbitration aiming at regulating the rules and principles governing the settlement of disputes arising out of the contracts between the members of Izmir Chamber of Commerce and other contracts executed by the members of Izmir Chamber of Commerce. Such principles govern both arbitration and conciliation.

B. Istanbul Arbitration Centre

Although there are not any official data in this respect, the total number of domestic and international arbitration taking place in Turkey (whether through the above mentioned institutions or under different international arbitration institution rules or on an ad-hoc basis) is significantly less than expected. In contradiction with this, the number of disputes related to international commercial and/or investment matters has increased in line with the quickly developing Turkish economy and strengthened international relations.

Furthermore, the informal data give us the conclusion that trade capacity of Istanbul constitutes 45% of total trade capacity of Turkey. Turkey therefore intends to turn Istanbul into its financial and commercial headquarters. The official plan to move the Central Bank from Ankara to Istanbul is the first act to be taken in this respect. In addition and in accordance with such policy, another contemplated official plan is to establish the Istanbul Arbitration Center with very flexible and modern arbitration rules and logistic facilities.

A draft law with respect to the latter plan has been prepared almost more than a decade ago and is expected to be finalized shortly. The draft law initially faced many criticisms by Turkish scholars as it primarily was constituted the Istanbul Arbitration Center as a state entity rather than an independent private law actor; also attributing serious competence to the center[5]. The said draft law has been amended numerous times. Nevertheless, the fact that such center is regulated and established by law instead of by private initiative as in most of the European countries remains the same and therefore still faces considerable criticism.

III. Conclusion

Despite its rather short history of codifying the arbitral legislation, it may be observed that Turkey has built up and improved its approach in a more arbitration friendly manner in the last decade through the recently enacted and amended legislations. Furthermore, it may also be stated that Turkey aims at taking substantive steps with regards to the established and prospective institutions for the purposes of providing a flexible arbitration environment for arbitrations held in Turkey especially to attract foreign investors and commercial bodies. It may therefore be fair to conclude that the above-mentioned legislation adoptions and amendments along with the contemplated establishment of new arbitral institutions indicate a promising future for arbitration in Turkey.

1. http://www.ydy.gov.tr/anlasmalar/131.php , as of today, there are 73 BIT between Turkey and other states that have entered into force and another 13 BIT in the process of exchange of noted between the states.
2. Which may, in some cases exceed a decade, as in the BIT between Turkey and Yemen (ratified in 2000, entered into force in 2011).
3. Exchange of notes procedure is a procedure that is included under many of the BITs' "Entry Into Force" clause in order for such BIT to become effective upon the relevant contracting states. This procedure grants the contracting state some discretion regarding the date of entry into force of the relevant BIT.
4. http://www.oic-oci.org/english/convenion/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf
5. "Meeting on the Research Institute on Banking and Commercial Law dated May 14, 2001", published by the Research Institute on Banking and Commercial Law, Ankara 2001, p.44-50.

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