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A. Legislation and rules

A.1 Legislation

International arbitration in Turkey continues to be governed by the International Arbitration Law of 2001 (IAL),[6] to which no legislative amendment has been made in the past decade.

However, the Code of Civil Procedure of 2011 (CCP),[7] which contains a part dealing with arbitrations seated in Turkey, was adopted very recently. It was modelled to a great extent on the UNCITRAL Model Law and levelled rules relating to Turkish seated domestic and international arbitrations. Further, the Law on International Private Law and Procedural Law of 2007[8] revised and updated the principles and procedure relating to recognition and enforcement of foreign arbitral awards.

In addition to the above, in 2014, an amendment was made to the Law on the Formation, Duties and Powers of Civil Courts of First Instance

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[6] International Arbitration Law No. 4686 of 21 June 2001.
[7] Code of Civil Procedure No. 6100 of 12 January 2011.
[8] Law on International Private Law and Procedural Law No. 5718 of 27 November 2007 (IPLPL), Articles 60 to 63.

and District Courts of 2004[9] concerning first instance courts' establishment, formation and duties, which seems to have aimed for the elimination of doubts as to the competent court with respect to arbitration matters. Prior to the amendment, different laws determined different courts' competence for certain types of arbitration matters. For instance, the IAL — applicable to international arbitrations seated in Turkey — identified the civil court of first instance (*asliye hukuk mahkemesi*) as being competent with respect to matters arising in relation to it.[10] The CCP determined that the district courts (*bolge adliye mahkemesi*) are competent.[11] With respect to recognition and enforcement proceedings, the IPLPL pointed to the court of first instance (*asliye mahkemesi*).[12] A further uncertainty was whether the stipulation in the Turkish Commercial Code of 2011[13] that commercial courts of first instance are competent with respect to commercial disputes prevailed over the above references where the dispute was of commercial character. Although case law on the whole suggested that it did prevail,[14] the position was not entirely clear.[15]

To resolve such lack of uniformity, Article 5 of Law No 5235 now provides — although in somewhat unclear terms — that matters concerning jurisdictional objections against arbitration agreements, annulment actions, and appointment and challenge of arbitrators, as

[9] Law on Formation, Duties and Powers of Civil Courts of First Instance and District Courts No. 5235 of 26 September 2004 (Law No 5235), Article 5.
[10] Article 3(1).
[11] Article 410(1).
[12] Article 60(2).
[13] Turkish Commercial Code No. 6102 of 13 January 2011 (TCC), Article 5(1).
[14] See, Supreme Court 15th Civil Division, File No. 2014/3330, Decision No. 2014/4607; Supreme Court 11th Civil Division, File No. 2012/18274, Decision No. 2013/16901; Supreme Court 11th Civil Division, File No. 2012/16024, Decision No. 2013/14728; Supreme Court 11th Civil Division, File No. 2000/3992, Decision No. 2000/4704; Supreme Court Legal General Assembly, File No. 2011/13-568, Decision No. 2012/47; Supreme Court 11th Civil Division, File No. 2012/2110, Decision No. 2012/3915.
[15] See Supreme Court 19th Civil Division, File No. 2015/3212, Decision No. 2015/17128; Supreme Court 19th Civil Division, File No. 2014/111, Decision No. 2014/2806.

well as recognition and enforcement lawsuits generally, are to be resolved by commercial courts with a panel of three judges. Despite the legislature's aim in implementing the amendment, it seems there is still room for uncertainty. For instance, which court will be regarded as competent where the dispute concerns an application to extend the arbitration period under Article 10B(2) of the IAL (something not contemplated by Article 5)? Should the commercial court have competence in such cases, nevertheless? Further, should the provision (Article 5) be interpreted as providing competence to commercial courts on matters listed or is it the case that the purpose of the amendment is to ensure that such listed disputes that do in fact fall within the competence of commercial courts should be heard by a panel of three judges? All in all, given the legislature's desire to resolve the uncertainty that existed prior to the enactment, it is generally acknowledged that all matters listed in Article 5 should be determined by the commercial courts. With respect to disputes that do not fall within the wording of Article 5, the previous rules should apply. Uncertainty with respect to the latter component, at the minimum, appears to continue.

Finally, the Law on the Istanbul Arbitration Center 2014 (LIAC) was enacted directing the establishment of the Istanbul Arbitration Center (ISTAC).[16] The institution is intended to act as a supervisor of arbitral proceedings for both international and domestic disputes. LIAC entered into force on 1 January 2015. It set forth the organs of the center, including their functions and duties, but did not specify any procedural rules; the center has been entrusted with the task of drafting the rules. ISTAC's Arbitration and Mediation Rules were drafted and, after a period of consultation, entered into force on 26 October 2015.

Consistent with the general principles of arbitration, the law imposes a confidentiality obligation on the center's employees. LIAC also provides that with the exception of members of the board of advisors,

[16] Law on the Istanbul Arbitration Center No. 6570 of 20 November 2014 (LIAC).

ISTAC organ members and personnel cannot act as arbitrators or mediators in disputes before the institution, unless expressly approved by the parties (Article 14). LIAC also foresees the establishment of national and international courts of arbitration, each with three members, appointed by the board of directors, in addition to the chairman of the board of directors and the ISTAC general secretary (Article 12).

A.2 Institutions, rules and infrastructure

The most significant development regarding local arbitration institutions in Turkey in the last decade has been the establishment of ISTAC through legislation[17] and the revision by the Istanbul Chamber of Commerce Arbitration Center of its rules on arbitration and mediation.

In its first year of operation, ISTAC administered six arbitrations, five of which were international arbitrations. One of these arbitrations was subject to the Fast Track Arbitration Rules.[18] The figures are expected to rise rapidly in the next few years given the government's efforts to boost ISTAC's profile and caseload, and make Turkey a more attractive place to invest. In a recent circular, the Turkish prime minister instructed public institutions to insert ISTAC arbitration clauses into their national and international contracts, citing the advantages of arbitration over litigation.[19] This is all part of plans to make Istanbul first a regional, and then a global financial center.[20]

[17] *Id*.
[18] Statistics verbally obtained from the office of ISTAC Secretary General.
[19] Circular No 2016/25 of 19 November 2016 (Official Gazette No 29893) (Circular 2016/25).
[20] See Istanbul International Finance Center Strategy and Action Plan of October 2009.

B. Cases

B.1 Public policy redefined

The 13th Civil Division of the Supreme Court annulled an ICC award for violating Turkish public policy.[21] In its decision the appellate court redefined the public policy concept:

> "*…the complete set of rules that protect the fundamental interests of society and designate the fundamental structure of the society, within a specific period of time, from political, social, economic, moral and legal perspectives…. For instance, since customs and tax laws concern public policy, an award that orders the payment of a receivable that contravenes tax laws will cause public policy intervention for conflicting with fundamental principles that are deemed indispensable by Turkish law.*"

The court stated that the public policy concept must be attributed different meanings in the national and international private law contexts, noting that "a circumstance that may be deemed as a breach of public policy in domestic law does not necessarily mean a breach of public policy in international law."

This decision is important in that it redefines the public policy exception, although slightly in an all-encompassing manner. Relying on the wide definition, the appellate court annulled the ICC award primarily on the basis that it concerned payments to the Turkish treasury and that this concerned public policy, given its effect on state finances.

B.2 Validity of hybrid jurisdiction clauses

The 11th and 15th Civil Divisions of the Supreme Court rendered two contrasting decisions regarding the validity of hybrid jurisdiction clauses. With respect to a provision that provided for the resolution of

[21] Supreme Court 13th Civil Division, File No. 2012/8426, Decision No. 2012/10349.

disputes through arbitration, but that: "In the case of dispute, the Courts and Execution Offices of Bursa shall have jurisdiction," the trial court opined that the arbitration clause was valid. On appeal, the trial court's decision was upheld, although on different grounds.[22]

Concerning a similar provision, the 11th Civil Division declared such a clause to be invalid as the clause lacked clear and definitive intent to arbitrate, a requirement under Turkish arbitration law arising from the exceptional character of arbitration.[23]

Consequently, it is as yet unclear whether a clause that includes both a reference to arbitration and a reference to courts will be valid. It seems that all will turn on the wording of the provision. It may be the case that in the former decision, the stipulation: "In the case of dispute" was not opined to have negated the intent to arbitrate, but that the stipulation in the latter decision that: "In the event the disputes cannot be resolved by arbitration" did negate such intent. In any event, without expressly stipulating the reason and circumstances in which courts have jurisdiction, one would be taking a risk in including a reference to the courts in an arbitration agreement.

B.3 The fate of carve-out clauses

The 15th Civil Division of the Supreme Court held that clauses that direct resolution of disputes by arbitration, but which state that disputes that cannot be resolved through arbitration (inarbitrability or circumstances requiring court intervention) must be submitted to courts, are valid.[24] In essence, provided that the attempt to carve out is clear and unambiguous, the court seems to opine that the carve out will be valid and will not negate the intent to arbitrate.

Consequently, carve outs of disputes are permitted under Turkish arbitration law. However, as reasoned by the appellate court, the

[22] Supreme Court 15th Civil Division, File No. 2014/3330, Decision No. 2014/4607.
[23] Supreme Court 11th Civil Division, File No. 2012/18274, Decision No. 2013/16901.
[24] Supreme Court 15th Civil Division, File No. 2014/2153, Decision No. 2015/918.

clause must be clear, give rise to no ambiguities and not negate the intent to arbitrate.

B.4 Validity of arbitration clauses in articles of associations

The 11th Civil Division of the Supreme Court ruled that it was not possible to include an arbitration clause into the articles of association of a company, given that commercial courts have exclusive jurisdiction with respect to disputes arising therefrom.[25] In this respect, the court noted that: "Arbitration is only admissible with respect to disputes that are subject to the will of both parties; in other words, to disputes that are capable of being settled between the claimant and the respondent without a court decision."

The dispute in that case concerned a shareholder's request for the cancellation of a general assembly resolution. The jurisdictional objection raised by the respondent, contending that the dispute should be resolved through arbitration, given the arbitration clause in the company's articles, was granted by the trial court, but dismissed by the appellate court.

This decision is significant. It is now clear that disputes regarding the validity of general assembly resolutions are inarbitrable. However, whether the decision of the Supreme Court should be interpreted as a total prohibition on the inclusion of arbitration clauses in articles of associations is unclear. Corporate lawyers should be conscious of this uncertainty when drafting, and lawyers generally when advising.

B.5 Timely issuance of awards

In an unreported decision, the Kadikoy 2nd Civil Court of First instance held that where arbitrations are governed by the IAL, the award must be rendered within the applicable time limit or it will be set aside. The IAL provides for a 1 year time limit for the issuance of awards, unless otherwise agreed (Article 10B). Failure to issue an

[25] Supreme Court 11th Civil Division, File No. 2011/13485, Decision No. 2012/19915.

award within such time period is a ground for annulment (Article 15A(1)(c)).

Although overturned on appeal, this was done on another ground (that the annulment action had not been lodged with the competent court). The first instance court's reasoning therefore remains valid and in compliance with the IAL. Counsel should therefore be observant and communicate this risk to the arbitral tribunal where and when deemed appropriate, and take swift action to seek court's intervention to extend the time limit, should parties fail or appear unlikely to agree and the arbitral tribunal or another competent body or institution does not possess such authority to extend.

B.6 Availability of interim measures post-award

The 6th Civil Division of the Supreme Court held that interim attachment orders may be sought after the issuance of an award but before its enforcement.[26]

Article 6(1) of the IAL provides that parties may seek interim attachment orders or injunctions from state courts before or during arbitral proceedings. The question was whether such entitlement continued once arbitral proceedings had been concluded. The appellate court answered in the positive.

With respect to the facts, the commercial court had ordered the enforcement of an award rendered by a tribunal seated in Moscow, against which an appeal was brought. Before the appeal was concluded, the claimant requested an interim attachment order so as to prevent the debtor from dissipating its assets, arguing that the debtor was at that time in pursuit of such actions.

B.7 Payment of proportionate court fees for enforcement

In a total of four decisions, the 15th[27] and 19th[28] Civil Divisions of the Supreme Court held consistently that proportionate court fees

[26] Supreme Court 6th Civil Division, File No. 2014/3906, Decision No. 2014/4941.

(decision announcement fees) must be paid when making an application to enforce a foreign arbitral award, as opposed to the payment of a fixed nominal fee. However, the 11th Civil Division, contrary to these decisions, declared that fixed nominal fees must be paid and that such was the "consistent practice" of the Division.[29] The position therefore is not entirely clear.

Proportionate court fees are calculated in accordance with the tariff annexed to the Law on Fees of 1964.[30] Currently, an applicant must pay a quarter of 6.831% of the amount in dispute as a decision announcement fee, the remainder to be paid by the defendant should the action succeed (Article 28(1)(a)). In such a case, the amount already paid by applicant will be reimbursed by the counter-party (Article 326, CCP). In contrast, the nominal fixed fee is approximately USD 9.

B.8 Timing of jurisdictional objections

The 11th Civil Division of the Supreme Court, holding that jurisdictional objections raised before Turkish courts requesting the dismissal of the case due to the existence of an arbitration agreement must be properly defined as a "tool of defense," as opposed to initial objections in the technical sense, permitted a jurisdictional objection to be raised despite the expiration of the time period stipulated by law.[31]

The IAL provides that where a jurisdictional objection ("arbitration objection") is to be raised, it must be done in accordance with the CCP (Article 5). The CCP provides that the objection must be raised together with the statement of answer, which is due within two weeks

[27] Supreme Court 15th Civil Division, File No. 2015/835, Decision No. 2015/1303; and Supreme Court 15th Civil Division, File No. 2015/1055, Decision No. 2015/1740.
[28] Supreme Court 19th Civil Division, File No. 2014/11188, Decision No. 2015/8132; and Supreme Court 19th Civil Division, File No. 2012/1885, Decision No. 2012/5598.
[29] Supreme Court 11th Civil Division, File No. 2015/3987, Decision No. 2015/10984.
[30] Law on Fees No. 492 of 2 July 1964.
[31] Supreme Court 11th Civil Division, File No. 2011/15015, Decision No. 2012/178.

from the date the statement of claim is notified (Articles 116, 117, 127 and 413).

In the dispute before the court, the jurisdictional objection had been raised during the hearing for the first time. Despite failure to comply with the express provisions of the IAL/CCP, the appellate court held that the objection could be validly raised where consented to by the counterparty. The court noted that consent may be express or implied (ie, failure to object when the jurisdictional objection is raised).

C. Trends and observations

The most significant developments have been the establishment of ISTAC and the enactment of the CCP, which brought domestic arbitration provisions in line with those relating to international arbitrations contained in the IAL. The increasingly positive attitude of the Turkish judiciary is also noticeable in the decisions rendered (see cases previously discussed).

As reflected in its efforts to establish ISTAC, the Turkish government has also been very positive about and has provided its support to the facilitation of arbitration. Circular 2016/25 is a concrete proof of such support. Undoubtedly, the circular will substantially increase arbitration awareness in Turkey, in particular among public institutions. A huge surge in arbitrations, domestic and international, is anticipated as a result of the confidence such circular will instill in Turkish companies and persons with respect to arbitration. The availability of a Turkish arbitral institution will also prove useful in easing any hesitations as to use of foreign arbitral institutions.

Furthermore, given that ISTAC has an international court of arbitration made up of eminent arbitration practitioners around the globe (Ziya Akinci, Jan Paulsson, Hamid Gharavi, Bernard Hanotiau and Candan Yasan), and the national court of arbitration of equal eminence from Turkey, in addition to a board of advisers consisting of very respectable and reputable lawyers and academics, international

players should have no reason to doubt the impartiality and independence of the institution.