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Turkey

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A. Legislation and rules

A.1 Legislation

The International Arbitration Law of 2001,⁴ unamended in the past decade, governs international arbitration in Turkey. The IAL is applicable to disputes with a “foreign element” and where the place (seat) of arbitration is Turkey. The IAL is also applicable if the parties agreed to its application or if the arbitral tribunal determined the arbitral proceedings should be conducted pursuant to the IAL.

The Code of Civil Procedure of 2011 (CCP)⁵, which contains a section dealing with domestic arbitrations seated in Turkey, was modeled to a great extent on the UNCITRAL Model Law and leveled rules relating to Turkish-seated domestic and international arbitrations.

Further, the Law on International Private Law and Procedural Law of 2007⁶ includes the principles and procedure concerning the recognition and enforcement of foreign arbitral awards. Turkey acceded to the New York Convention on 2 July 1992. The New York Convention entered into force in Turkey on 25 September 1992. Turkey made two reservations. First, Turkey declared it would apply

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⁴ International Arbitration Law No. 4686 of 21 June 2001.

⁵ Code of Civil Procedure No. 6100 of 12 January 2011.

⁶ Articles 60-63 of the Law on International Private Law and Procedural Law No. 5718 of 27 November 2007.

the Convention only if the award was granted in a state signatory to the New York Convention. Second, Turkey limited the applicability of the New York Convention to conflicts arising from relationships categorized as commercial under Turkish law.

In addition, with regard to the judicial functions in support and control of arbitration, different national laws prescribed different courts as competent for certain arbitration matters. However, in 2014, an amendment⁷ was made to the Law on the Formation, Duties and Powers of Civil Courts of First Instance and District Courts of 2004 (Law No. 5235)⁸ concerning the first instance courts' establishment, formation and duties, which aimed to eliminate doubts as to the competent court for arbitration matters. To resolve this lack of uniformity, Article 5 of Law No. 5235 now provides — although in somewhat unclear terms — that matters concerning jurisdictional objections against arbitration agreements, set-aside actions, and the appointment and challenge of arbitrators, as well as recognition and enforcement lawsuits generally, are to be resolved by commercial courts of first instance with a panel of three judges. Despite the amendment's intention for uniformity, there is lingering uncertainty because similar provisions still exist in both the IAL and CCP. Given the legislature's desire to resolve the uncertainty that existed prior to the enactment and recent precedents of the Supreme Court, 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.

A.2 Institutions, rules and infrastructure

The Istanbul Arbitration Centre (ISTAC) is currently the most prominent arbitral institution in Turkey for domestic and international

⁷ Law No. 6545 of 28 June 2014.

⁸ Law on the Formation, Duties and Powers of Civil Courts of First Instance and District Courts No. 5235 of 26 September 2004, Article 5.



arbitrations. The ISTAC Arbitration and Mediation Rules entered into force on 26 October 2015. The ISTAC Rules are modern and flexible and include fast-track arbitration rules. In its first two years of operation, ISTAC administered 12 arbitrations, four of which were subject to the fast-track arbitration rules.

Another prominent arbitral institution in Turkey is the Istanbul Chamber of Commerce Arbitration Center (ITOTAM). Arbitration proceedings under ITOTAM are regulated under the ITOTAM Arbitration Rules. To choose ITOTAM as the arbitral institution, at least one of the parties must be a member of the Istanbul Chamber of Commerce.

B. Cases

The following is an overview of the most interesting decisions rendered by the Supreme Court in 2017.

B.1 Challenge of an unfavorable award based on an invalid arbitration clause

The Supreme Court decided it would be contrary to the rule against contradictory acts and the principle of good faith to allow a party to argue that arbitration is invalid in circumstances where that party actively participates in the arbitration proceedings. The court decided the party cannot be permitted to challenge an unfavorable award.⁹

The parties executed an agreement for the sale of real property in 2009, that contained an arbitration clause. A dispute arose between the parties, and the plaintiff commenced court proceedings. The defendant raised a jurisdictional objection on the basis that the dispute was subject to arbitration in accordance with the parties' agreement. The trial court accepted the defendant's jurisdictional objection and dismissed the action on procedural grounds.

⁹ Supreme Court, 23rd Civil Division, File No: 2015/8611, Decision No: 2016/5319.

On appeal, the Supreme Court upheld the trial court’s decision. The Supreme Court noted that the arbitration clause lacked the conclusive character required under Turkish law of definite and unambiguous intent to arbitrate. However, the Supreme Court held it would be contrary to the rule against contradictory acts and Article 2 of the Turkish Civil Code (principle of good faith) to allow the plaintiff to argue the invalidity of the arbitration clause, given that the defendant had commenced arbitral proceedings following its jurisdictional objection and participated in such proceedings by appointing its arbitrator. The plaintiff applied for a correction of the Supreme Court’s decision, and the application was reviewed by the same court. The request for correction was dismissed as none of the statutory grounds for correction were present.

B.2 The competent court for the action to set aside an award

The Supreme Court ruled the competent court to decide on the setting aside of an award is the commercial court of first instance, not the regional court.¹⁰

The plaintiff sought to set aside an arbitral award by applying to the commercial court. The commercial court ruled it was not competent to hear the case, reasoning the regional courts are competent. The claimant appealed to the Supreme Court for a declaration that the commercial court was competent.

The Supreme Court granted the appeal and overruled the commercial court’s decision, stating commercial courts are competent to set aside actions relating to arbitral awards. The Supreme Court based its decision on three grounds.

Firstly, Article 5(2) of Law No. 5245 was amended granting commercial courts the competence regarding arbitration matters. It is clear from Article 410 of the CCP¹¹ that competency of regional

¹⁰ Supreme Court, 15th Civil Division, File No: 2017/1666, Decision No: 2017/2907.

¹¹ Article 410 of the CCP: “*Regional courts are competent for the aforementioned disputes that arise during arbitration.*”



courts applies to disputes that arise “during arbitration.” Set-aside actions do not arise during arbitration, but after the arbitration process.

Secondly, the Article 361(1) of the CCP¹² differentiates between certain decisions of the regional courts. Were the regional courts the competent court, the legislator would not have differentiated between certain decisions of the regional courts.

Lastly, it is clear from Article 439 of Code No. 6100¹³ that the legislative intention is that the competent courts are the commercial courts of first instance and not the regional courts.

B.3 Set-aside actions and legal remedies against the judgment of a commercial court

The Supreme Court held that commercial courts of first instance must resolve set-aside actions and any appeals against these decisions should be made directly to the Supreme Court, avoiding any regional court proceedings.¹⁴

The plaintiff initiated a set-aside action against an arbitral award and the commercial court dismissed the case on the basis that it did not have jurisdiction over the subject matter. The plaintiff referred the case to the regional court which, in turn, dismissed the case and referred it to the Supreme Court on the basis that the Supreme Court must review the appeal.

The Supreme Court overruled the judgment of the commercial court. It reasoned that in 2014, Law No. 5235 was amended¹⁵ to regulate the competent court for set-aside actions. The relevant provision clearly indicates the competent courts are the commercial courts.

¹² Article 361(1) of CCP: “An appeal may be brought before the Court of Cassation against the regional civil courts’ appealable final decisions and decisions concerning the setting aside of arbitral awards.”

¹³ Article 439 of CCP: “In the event the competent first instance court does not find a reason to set aside, the award may be executed even where it was appealed.”

¹⁴ Supreme Court, 23rd Civil Division, File No: 2017/1040, Decision No: 2017/1433.

¹⁵ Law No. 6545 of 28 June 2014.

Furthermore, although the competent court is the commercial court, which is the court of first instance, the parties should skip regional court proceedings and apply directly to the Supreme Court. The court reasoned the post-arbitration process requires expert review and acceleration. Therefore, a three-tier system (commercial court, regional court and Supreme Court) would delay the judgment's finalization.

B.4 Suspension of execution proceedings upon application to set aside the award

The Supreme Court held that an application to set aside an arbitral award would automatically suspend the execution of the arbitral award.¹⁶

The plaintiff commenced execution proceedings before the execution office following the issuance of a final award. The defendant objected on the basis the award was not finalized, because they had issued an application to set aside the award. The execution court ruled on behalf of the plaintiff, reasoning that according to Article 367 of the CCP, the subject matter of the execution proceedings was a monetary payment; therefore, there was no need for the award to be finalized for execution to be possible. On the defendant's appeal, the court of cassation overruled the execution court's judgment, holding that under Article 15(A)(2)(b) of the IAL, an application to set aside an arbitral award automatically suspends execution. The execution proceedings were suspended until the set-aside action was finalized.

B.5 Validity of arbitration clauses in interrelated contracts

The court of cassation held that for an arbitration clause to be applicable to a dispute, the dispute must arise from an agreement containing an arbitration clause.¹⁷

¹⁶ Supreme Court, 8th Civil Division, File No: 2017/12500, Decision No: 2017/8827.

¹⁷ Supreme Court, 15th Civil Division, File No: 2017/776, Decision No: 2017/2981.



The parties terminated a construction agreement. The construction agreement included an arbitration clause for disputes arising out of the agreement. After the agreement's termination, the parties entered into a settlement agreement for their unpaid payments arising out of the construction agreement. A dispute arose out of the settlement agreement, which the plaintiff brought before a Turkish court. The defendant raised a preliminary objection based on a valid arbitration clause. The lower court accepted the preliminary objection.

On the plaintiff's appeal, the court of cassation overruled the lower court's judgment, holding that the arbitration clause was inapplicable to the dispute. The court of cassation reasoned that although the construction agreement included an arbitration clause, the agreement was terminated and the settlement agreement, although it included an arbitration clause, only covered damages arising from certain disputes.

C. Funding in international arbitration

Arbitration funding is not a matter that is expressly regulated in Turkey. Furthermore, rules of local arbitral institutions, such as ISTAC and ITOTAM, do not regulate or refer to third-party funding of arbitral proceedings. Moreover, to our knowledge, there are currently no recognized professional third-party funders operating in Turkey. In other words, for the time being, third-party funding in Turkey is not part of usual practice in arbitration, or similarly in commercial litigation.

Given the absence of any specific rule prohibiting third-party funding of disputes, one could perhaps say, unless and until otherwise declared by courts or other administrative bodies, third-party funding could be lawfully carried out in Turkey. However, given the lack of clarity as to the applicable rules, there is little in terms of guidance for practitioners. It would therefore seem that, so long as public policy grounds and the like (eg, usury is prohibited under Turkish law) are not triggered, parties are at liberty to have third parties fund their disputes, whether litigation or arbitration, and whether domestic or international. For instance, contingency fee arrangements between

lawyers and their clients are permitted, provided that the fee agreed upon does not exceed 25% of the dispute amount. Note that agreements to transfer disputed rights or properties to lawyers in lieu of the attorney's fee payable are invalid.¹⁸ Thus, a third-party funder should be careful in adhering to this and other similar local bar rules and regulations.

With respect to a party's insolvency or inability to fund arbitration proceedings and the effect of this on the agreement to arbitrate, again there is no specific regulation relating to the matter and we are not aware of any court decision relating to this issue in the context of arbitration. As to what would happen where a party fails to pay the advance on costs and the proceedings are terminated as a result of such failure (see ISTAC Rules, Article 42), although difficult to contemplate in advance, perhaps constitutional issues, such as the right to a fair hearing and access to justice, may be triggered and courts may have to address the validity and enforceability of the arbitration agreements under such circumstances.

¹⁸ Article 146 of the Attorneyship Law No. 1136 of 7 April 1969.