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## Turkey

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### A. Legislation and rules

#### A.1 Legislation

The International Arbitration Law of 2001 (“IAL”)<sup>5</sup> continues to govern international arbitration<sup>6</sup> in Turkey, while the Code of Civil Procedure of 2011 (“CCP”)<sup>7</sup> deals with domestic arbitrations seated in Turkey. Both acts were inspired by the UNCITRAL Model Law and contain fairly standard and arbitration-friendly provisions. Although these acts were arbitration friendly, there was no uniformity among the provisions as to the determination of competent courts to support and control arbitration. An attempt was made in 2014 to resolve this lack of uniformity through an amendment to the Code on the Formation, Duties and Powers of Civil Courts of First Instance and Regional Courts of 2004.<sup>8</sup> However, it failed to provide a clear picture

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<sup>5</sup> International Arbitration Law No. 4686 of 21 June 2001.

<sup>6</sup> The IAL is applicable to disputes with a “foreign element” and where the place (seat) of arbitration is Turkey. It is also applicable if the parties agreed to its application or if the arbitral tribunal determines that the arbitral proceedings should be conducted pursuant to the IAL.

<sup>7</sup> Code of Civil Procedure No. 6100 of 12 January 2011.

<sup>8</sup> Code on the Formation, Duties and Powers of Civil Courts of First Instance and Regional Courts No. 5235 of 26 September 2004.

to applicants. Finally, in 2018, an amendment<sup>9</sup> was made to the CCP<sup>10</sup> and long-untouched IAL<sup>11</sup> concerning the determination of the competent court for arbitration-related matters. Consequently, actions to set aside arbitral awards rendered pursuant to the CCP or IAL will be resolved by regional courts as courts of first instance, whereas other arbitration-related matters that require court involvement, such as jurisdictional objections and interim measures, will be resolved by either civil courts or commercial courts, depending on the merits of the dispute.

Further, the Law on International Private Law and Procedural Law of 2007<sup>12</sup> includes the principles and procedure concerning the recognition and enforcement of foreign arbitral awards, to which no legislative amendment has been made since its enactment. The New York Convention, which also regulates the same matter, has been in force in Turkey since 25 September 1992.

Lastly, the Turkish Public Procurement Authority amended its standard contracts annexed to the Regulations on the Implementation of Public Procurements effective as of 19 January 2018, providing an option for public administrations to choose between Turkish courts or arbitration for disputes arising out of the execution of a procurement agreement. As it stands, if arbitration is chosen by the administration, the Istanbul Arbitration Centre (“ISTAC”) will conduct domestic arbitrations; whereas for international arbitrations, public administrations can choose between *ad hoc* arbitration wherein the IAL is applied and ISTAC arbitration.

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<sup>9</sup> Code of Execution and Bankruptcy and Amendment on Certain Laws No. 7101 of 28 February 2018.

<sup>10</sup> Code of Civil Procedure No. 6100 of 12 January 2011, article 410 and 439.

<sup>11</sup> International Arbitration Law No. 4686 of 21 June 2001, article 15 and additional article 1.

<sup>12</sup> Law on International Private Law and Procedural Law No. 5781 of 27 November 2007, articles 60-63.



## A.2 Institutions, rules and infrastructure

Turkey hosts various arbitral institutions. The widely used one is the ISTAC, followed by the Court of Arbitration of the Union of Chambers and Commodity Exchanges of Turkey (“TOBB”) and the Istanbul Chamber of Commerce Arbitration Center (“ITOTAM”).

The ISTAC is one of the most prominent arbitral institutions in Turkey for both domestic and international arbitrations. Although it has been only a couple of years since the introduction of its arbitration rules, the ISTAC has managed to attract a number of disputes, both of national and international nature, with its modern and flexible rules with a fast-track option and competitive fees compared to international arbitral institutions. Statistics published by ISTAC show that most disputes referred to arbitration under ISTAC Rules in 2017 arose out of sales contracts (32%), construction contracts (20%) and service contracts (20%). 53% of 2017 referrals were for over USD 380,000. As for the type of arbitration, 47% of 2017 arbitrations were fast-track arbitrations.<sup>13</sup>

Another noticeable arbitral institution in Turkey is the TOBB. All firms, whether Turkish or foreign, may choose the TOBB as the acting arbitral institution and its rules (unchanged since 2016) as the course of dispute resolution.

Finally, the ITOTAM is another preferred arbitral institution in Turkey. The current ITOTAM Rules, although not bringing any material changes to its previous edition, came into force on 14 December 2017. To choose the ITOTAM as the arbitral institution, at least one of the parties must be a member of the Istanbul Chamber of Commerce. It is also possible to commence fast-track arbitration under ITOTAM Rules for disputes.

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<sup>13</sup> ISTAC Statistics of 26 October 2015 - 1 March 2018. Accessed 23 November 2018. [https://istac.org.tr/wp-content/uploads/2018/05/rakamlarla\\_istac\\_en.pdf](https://istac.org.tr/wp-content/uploads/2018/05/rakamlarla_istac_en.pdf).

## B. Cases

### B.1 The fees on the enforcement of foreign arbitral awards

The 14<sup>th</sup> Civil Chamber of the Istanbul Regional Court determined that pursuant to the Code of Fees of 1964,<sup>14</sup> the enforcement of foreign arbitral awards is subject to proportional fees.<sup>15</sup>

A dispute between parties arose from the enforcement of the arbitral award rendered under the Swiss Chambers' Arbitration Institution. Upon the plaintiff's application to the court of first instance, the arbitral award was deemed enforceable. In its decision, the court of first instance pointed out that the enforcement action is subject to the proportional fees pursuant to the Code of Fees. The defendant appealed the merits of the decision. The regional court did not review the merits of the case. Instead, the regional court, not limited to the scope of request on matters related to public law, reviewed the decision on fees. The regional court pointed out that the court of first instance was correct in its decision concerning proportional fees, but its calculation was incorrect. The regional court also clarified that the exemption from proportional fees granted to "arbitral proceedings" by Annex 1 of the Code of Fees is only applicable to the process of arbitration itself, and not to the enforcement of its award. Therefore, citing that actions cannot proceed without the complete payment of fees, the regional court decided on the rescission of the decision rendered by the court of first instance.

In sum, Annex 1 of the Code of Fees does not exempt actions for the enforcement of arbitral awards from proportional fees; these actions are subject to proportional fees. If the parties in a dispute do not fully pay the proportional fees, the action for enforcement cannot proceed.

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<sup>14</sup> Code of Fees No. 492 of 2 July 1964.

<sup>15</sup> Istanbul Regional Court's 14th Civil Chamber, File No: 2017/1008, Decision No: 2018/484.



## B.2 Complementary award exceeding its scope and its effect on the time limit

According to the CCP, a set-aside action should be initiated within one month of the notification date of the final award or the decision on a correction, interpretation or complementary award. Upon a party's request for a complementary award, if the arbitral tribunal renders a decision that exceeds the scope of a complementary award and can be considered as a new award, this will not affect the time limit for initiating a set-aside action that has started on the notification date of the final award.<sup>16</sup>

In an arbitration under the arbitration rules embodied in the CCP, a party requested a complementary award. However, the arbitral tribunal conducted thorough research, suspended the execution of the final arbitral award and added new parts to the final arbitral award.

The Court of Cassation considered this complementary award to be a new award and not a complementary award to the first award. Thus, it held that the two awards have their separate terms for initiating a set-aside action. As this decision illustrates, waiting for the issue of the complementary award to initiate an action to set aside the final award is risky, as the complementary award may have its own time limit for initiating a set-aside action that is not applicable to the set-aside action against the final award.

## B.3 Challenge of a domestic arbitral award

The General Assembly of Civil Chambers for Jurisprudential Unification of the Court of Cassation ("Unification GA") rendered a decision providing that all domestic arbitral awards delivered after 1

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<sup>16</sup> Court of Cassation, 11th Civil Division, File No: 2017/1992, Decision No: 2017/5518.

October 2011, the effective date of the CCP, will be challenged with a set-aside action, regardless of the date of the arbitration agreement.<sup>17</sup>

The former Civil Procedural Law of 1927<sup>18</sup> (“Former CCP”), which remained in force until the CCP’s effective date, provided that domestic arbitral awards could be challenged with an appeal, in which the appeals courts were entitled to review the substance of the arbitral award. The CCP stated that domestic arbitral awards must be challenged with a set-aside action, where the examination of the merits of arbitral awards in courts is precluded, thereby abolishing the appeal procedure. Some chambers held the view that the arbitral award would be subject to appeal under the Former CCP if the arbitration agreement was executed before the effective date of the CCP, even if the award was delivered after the effective date. Conversely, other chambers ruled that an annulment action under the CCP would be applicable regardless of the date of the arbitration agreement if the award was rendered after the effective date of the CCP. The Unification GA reviewed the matter to resolve the split and ruled that a domestic arbitral award is subject to annulment if it is delivered after the effective date of the CCP, regardless of the date of the arbitration agreement. According to the Unification GA, the reason for this is because an arbitration agreement is a procedural law agreement and such agreements are subject to the principle of immediate effect, which suggests a direct application of a legislative amendment unless otherwise stated in the law. That is, domestic arbitral awards delivered after 1 October 2011 can only be challenged with a set-aside action.

### C. Diversity in arbitration

Although the scope of diversity and inclusion is much wider, diversity in Turkey generally focuses on the gender gap. Important steps are being taken compared to the past. While law firms start to take

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<sup>17</sup> Court of Cassation, General Assembly of Civil Chambers for Jurisprudential Unification of the Court of Cassation, File No: 2016/2, Decision No: 2018/4.

<sup>18</sup> Code of Civil Procedure No. 1086 of 18 June 1927.



individual actions, there have also been some public events where this issue was openly discussed and voices were encouraged to be louder. “Women’s Empowerment in Business,” held in Istanbul on 14 November 2018, was one of the Firm events that Esin Attorney Partnership hosted. It was an important event as it raised awareness by highlighting successful women in the business and how much the business community needs them.

Moving on to events focusing on the arbitration community, “ICC Arbitration Day,” held in Istanbul on 9 February 2018, was one of the public events focusing on diversity. In this event, one of the sessions was a debate on gender diversity in international dispute resolution. The speakers addressed gender diversity in their respective businesses and jurisdictions. They provided examples of female/male employee ratios, female/male partner/manager ratios and their own experiences when it comes to dispute resolution. They also discussed real-life examples of how diversity, or a lack thereof, can affect dispute resolution. A conference on “Women in Arbitration” was held at Koc University in Istanbul on 30 November 2018, pointing out the paramount importance of diversity. During the conference, the role of women in business and arbitration was given emphasis and suggestions on how to increase the presence of women, especially as arbitrators, were discussed.

In addition, some statistics provide a better view of the progress in Turkey. Since its establishment, the ISTAC has always been supportive of young lawyers and women through the platform of Young ISTAC and networking events. In 2017, women constituted the majority in 30% of the arbitral tribunals in ISTAC arbitrations, and female arbitrators acted as the chair in 30% of the cases.<sup>19</sup>

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<sup>19</sup> ISTAC Booklet (2017), 34, accessed 23 November 2018. [https://istac.org.tr/wp-content/uploads/2018/06/istac\\_en\\_web.pdf](https://istac.org.tr/wp-content/uploads/2018/06/istac_en_web.pdf)

Contrastingly, in ICC arbitrations, appointed and confirmed female arbitrators constitute only 16.7 % of all arbitrators.<sup>20</sup>

To conclude, while the progress in Turkey cannot be denied, there are many more steps to take in order to reach a diverse, inclusive and balanced arbitration world. All in all, there is room for improvement to boost diversity in arbitration.

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<sup>20</sup> ICC Dispute Resolution Bulletin (2018), Issue 2, 59: “In 2017, the number of appointments and confirmations of female arbitrators rose to 249, representing 16.7% of all appointments and confirmations.”