

A Year in Arbitration: Recent Court Decisions and Developments

In course of the past year, the Turkish courts have issued various decisions in relation to arbitration matters, which may be of interest to arbitration practitioners, and parties who have or considering to choose arbitration as a dispute resolution mechanism. Furthermore, as arbitration becomes a choice of dispute resolution mechanism for wider audiences, arbitration institutions take action to better cater to the needs of the practitioners and parties alike to provide them a just, efficient and accessible process. Accordingly, we compiled some of the significant Turkish court decisions and developments around the world in the past year; relating to arbitration.

Significant Turkish Court Decisions in the Past Year Relating to Arbitration



Decisions on Setting-Aside of an Arbitral Award

- In its decision to set-aside an arbitral award the Court of Cassation emphasized that the courts must *ex officio* evaluate whether an arbitration agreement is null and void due to the violation of mandatory rules as it concerns public policy, and concluded that if an agreement is null and void, then all of its clauses shall be deemed null and void, including the arbitration clause. (Court of Cassation 15th Civil Chamber File No. 2019/2133, Decision No. 2019/4456)
- After the Regional Court rejected the Turkish plaintiff's request to set-aside an arbitral award because the parties had waived their right to initiate an action to set-aside in a provision of their agreement; the Court of Cassation decided that, where International Arbitration Law No. 4686 is applied, the parties may waive their right to initiate an action to set-aside only if their domicile or habitual residence is outside of Turkey, therefore, the waiver provision was ruled invalid. (Court of Cassation 15th Civil Chamber, File No. 2019/2927, Decision No. 2019/3987)
- The Court of Cassation decided that an arbitral tribunal's failure to (i) appoint an expert and conduct an on-site examination, (ii) request a certified translation of the agreement between the parties, and (iii) issue a term of reference does not concern public policy which the court should consider on an *ex officio* way, therefore, there were no grounds for setting-aside of the arbitral award on the basis of breach of public policy. (Court of Cassation 15th Civil Chamber, File No. 2019/2427, Decision No. 2019/3640)
- The Court of Cassation emphasized that according to Article 109 of Civil Procedural Law No. 6100, in cases where subject matter of a claim is divisible, the parties may raise a claim for a part of the subject matter, and file such a partial claim, and doing so would not constitute a waiver of the remaining portion of the subject matter. Therefore, the Court of Cassation decided that the mere existence of a second succeeding arbitration filed by the defendant (who was acting as the claimant at both of the arbitration cases) who previously had filed an initial (partial) arbitration requesting parts of its due receivables under

the contract, and arbitral award issued therein shall not be set-aside as the grounds for set-aside are strictly limited to those listed under Article 15 of the International Arbitration Law No. 4686. (The Court of Cassation 19th Civil Chamber, File No. 2018/2954, Decision No. 2020/154)

- The Court of Cassation decided that the plaintiff's claim for invalidity of the arbitration clause constitutes an abuse of their rights as the plaintiff had also filed a counter-claim during the arbitral proceedings; therefore, the law must not protect this behaviour. The Court of Cassation emphasized that filing a counter-claim in the arbitral proceedings means that the parties have a consensus to resolve the dispute by arbitration. (The Court of Cassation 15th Civil Chamber, File No. 2020/1470, Decision No. 2020/2373)



Decision on the Enforcement of Foreign Arbitral Awards

- At its decision to uphold the enforcement decision of the court of first instance, the Regional Court emphasized that as there is no regulation prescribing that enforcement of arbitral awards is subject to proportionate fees (*nispi harç*), the enforcement of an arbitral award must be subjected to fixed fees (*maktu harç*). (Istanbul Regional Court's 14th Civil Chamber, File No. 2019/2100, Decision No. 2020/74)



Decision on Preliminary Arbitration Objections

- The Regional Court approved the court of first instance's decision where the court of first instance ruled that the arbitration clause in a fixed-term agreement (*belirli süreli sözleşme*) remains valid when the said agreement - given the specific of the case - transforms into an indefinite term agreement (*belirsiz süreli sözleşme*) and accepted the defendant's preliminary arbitration objection. (Istanbul Regional Court's 14th Civil Chamber, File No. 2019/2499, Decision No. 2020/248)



Decisions on the Application of Law No. 805 on Mandatory Usage of the Turkish Language in Commercial Enterprises

- The Regional Court emphasized that if one of the contracting parties is foreign, article 1 of the Law No. 805 on the Mandatory Usage of the Turkish Language in Commercial Enterprises ("Law No. 805") cannot be applicable; therefore, the arbitration clause concluded in English is valid. (Istanbul Regional Court's 12th Civil Chamber, File No. 2020/19, Decision No. 2020/184; Istanbul Regional Court's 12th Civil Chamber, File No. 2021/205, Decision No. 2021/185)
- The Regional Court emphasized that an arbitration clause between a Turkish and foreign party being concluded in English does not affect its validity as; whilst Turkish parties must conclude their agreements in Turkish pursuant to article 1 of the Law No. 805 (where breach of this would deem the said agreement invalid), pursuant to article 2 of the Law No. 805 concluding agreements in Turkish is not mandatory where one party is foreign. (Istanbul Regional Court's 12th Civil Chamber, File No. 2019/2338, Decision No. 2019/1649)
- With respect to an arbitration clause under a construction agreement between two Turkish parties, the Regional Court stated that although pursuant to article 1 of the Law No. 805, all Turkish companies and enterprises are obliged to execute their agreements in Turkish within Turkey, in the case at hand the parties implemented the main agreement without objecting to its validity; therefore, defendant who raised a preliminary arbitration objection on the basis of invalidity of the arbitration because it was concluded in English would be breaching the good faith principle. Furthermore, the Regional Court emphasized that article 4 of the Law No. 805 foresees that breach of article 1 of the Law No. 805 would not result to invalidity of the contract, but rather have consequences with respect to evidence law. (Istanbul Regional Court's 15th Civil Chamber, File No. 2020/576, Decision No. 2020/606)
- With respect to an arbitration clause under a construction agreement executed between two Turkish parties in English, the Court of Cassation decided that the arbitration clause is separable from the construction agreement, and therefore, the implementation of the construction agreement should not bar the parties from arguing invalidity of the arbitration agreement; and arguing invalidity of the arbitration agreement cannot be deemed abuse of right as the parties did not initiate arbitration. Accordingly, pursuant to Article 4 of the Law No. 805, the arbitration agreement drafted in English should not be taken into consideration as an evidence in the favour of the defendant who raised a preliminary arbitration objection. (The Court of Cassation 15th Civil Chamber, File No. 2019/3156, Decision No. 2020/2913)

Developments on Arbitration Practices



The International Chamber of Commerce's 2021 Rules of Arbitration Entered into Force

The International Chamber of Commerce ("ICC") unveiled its 2021 Rules of Arbitration ("ICC 2021 Rules") on 1 December 2020. The ICC 2021 Rules entered into force on 1 January 2021 and replaced the 2017 version of the Rules of Arbitration, which had been in force since 2017. The ICC 2021 Rules is a further step for efficiency, flexibility, and transparency at arbitration.

The 2021 Rules include significant modifications that will affect practitioners in a number of important areas. The top six changes introduced that may affect the practitioners are:

1. Expanding the arbitral tribunal's power to order joinder and consolidation in recognition of the complex disputes;
2. New mechanisms introduced to address due process concerns;
3. Inclusion of tailor-made provisions for investment treaty-based arbitration, namely a third-state nationality requirement for arbitrators and the exclusion of provisions on emergency arbitrators;
4. An increased threshold from USD 2 million to USD 3 million for Expedited Procedure, which will apply automatically;
5. Introduction of additional awards for omitted claims; and
6. Amendments to promote the efficiency and flexibility of the arbitral proceedings with a green and online arbitration.

For more information on the 2021 Rules, please refer to our [legal alert](#).



The Rise of the Virtual Hearings

As a response to the difficulties posed by the COVID-19 pandemic upon arbitral procedures, arbitration institutions and practitioners sought ways to conduct arbitrations in an effective and efficient manner, often virtually. Accordingly, the ICC released their [Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#) dated 9 April 2020, providing guidance to mitigate adverse effects of the COVID-19 pandemic on ICC arbitrations; which also included checklists and suggested clauses for the organization of virtual hearings. Similarly, the Chartered Institute of Arbitrators launched its [Guidance Note on Remote Dispute Resolution Proceedings](#) dated 8 April 2020, which is intended

to be broadly applicable to the COVID-19 health crisis and well beyond. Finally, Istanbul Arbitration Centre ("ISTAC") launched its [Online Hearing Rules and Procedures](#) applicable to the hearings which the participants will conduct without physical attendance, through teleconference or video conference, during arbitration proceedings subject to ISTAC Rules.



ICSID Rules and Regulations Amendment

On 28 February 2020, the ICSID Secretariat published its [fourth working paper](#) on proposals for rule amendments. The proposed amendments are intended to modernize the rules based on case experience and make the process increasingly time and cost effective while maintaining due process and a balance between investors and states. Finally, ICSID hopes that the rule amendments will make the procedure less paper-intensive, with greater use of technology for transmission of documents and case procedures.



The London Court of International Arbitration's 2020 Arbitration Rules Entered into Force

The London Court of International Arbitration ("LCIA") unveiled its 2020 Arbitration Rules ("LCIA 2020 Rules") which entered into force on 1 October 2020 and shall apply to any LCIA arbitration commenced from that date. The LCIA 2020 Rules attempt to modernise the arbitral processes by making it even more streamlined and clear for arbitrators and parties alike.



Swiss Arbitration Centre

The Swiss Chambers' Arbitration Institution (SCAI) announced its transition into the Swiss Arbitration Centre, as well as the entering into force of the revised Swiss Rules. Taking effect at the end of May 2021, SCAI will be converted into a Swiss limited company and renamed Swiss Arbitration Centre Ltd (the [Swiss Arbitration Centre](#)). The conversion of SCAI into the Swiss Arbitration Centre does not affect the validity of existing arbitration or mediation agreements referring to SCAI or any cantonal Chambers of Commerce.

On 1 June 2021, after a revision process that included in-depth consultation of practitioners and users, the revised [Swiss Rules of International Arbitration](#) will enter into force. The revised Swiss Rules of International Arbitration can be consulted and downloaded [here](#).

Conclusion

Undoubtedly, the period of 2020-2021 has been a busy year for arbitration, especially considering all the additional challenges imposed by the COVID-19 pandemic. Despite the additional challenges, the majority of arbitral processes has continued with limited hindrance, if any at all. Considering the pro-arbitration tendency of the Turkish Courts, and procedural flexibility and eagerness of the arbitral institutions to adapt and change in light of new challenges, arbitration remains as a very appealing forum of dispute resolution.

For more information on developments under other jurisdictions relating to arbitration, you can also refer to **International Arbitration Yearbook 2020-2021** published by Baker McKenzie, which Esin Attorney Partnership contributed to for its chapter on Turkey.

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