

The international arbitration law in Turkey and its significance for foreign investors



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Arbitration is the agreement of the concerned parties on settlement of any existing or future dispute between the parties by mediation of persons called arbitrators instead of referring the dispute to judicial proceedings. International arbitration is an appealing solution in that it proceeds faster, experts on the disputed subject can be selected as arbitrators and parties are allowed to choose the procedure and language of the arbitration proceedings.

Currently, international arbitration functions as a kind of “international commercial court”. The arbitration law has been an alternative way in the settlement of disputes upon gradual elimination of political and commercial barriers and with rapid globaliza-

tion of the world economy. Reluctance by the parties to refer to national courts of the other party with a concern that they will not be treated impartially and non-preference of national courts for other reasons make arbitration an attractive alternative.

Being a special trial method based on the will of the parties, international arbitration is a procedure where decisions can be made faster compared to national courts. Settlement and resolution of disputes within a short period of time complies with the objectives and requirements of the trading world.

The process leading to regulations which cleared the road for international arbitration in terms of contracts incorporating the element of alienation was initiated as the result of a detailed review of international arbitration in Turkish law in the 90s and efforts of foreign investors and finance centers; amendments and new regulations have

been made in the constitution and in certain laws.

In 1999, with the following clause added to the first paragraph of article 125 of the Turkish constitution related to the judiciary pathway, regulated under the heading of “The Principles of Administration”, the barriers on the way to referral to international arbitration for such disputes were removed on condition that there exists the element of alienation: “Privilege contracts and agreements related to public services may specify that disputes arising therefrom may be settled by national or international arbitration. International arbitration may be referred to only for disputes involving an element of alienation.”

The “International Arbitration Law”, a new legal regulation of international nature in the context of arbitration in the Republic of Turkey as the result of developing commercial and legal relations in the international arena, was put into force in 2001. Before enactment of the said law, Turkey had legal clauses related only to national arbitration or internal arbitration. International arbitration law has considerable importance, if Turkey is to have competitive power in international trade and wants to attract foreign investors, since foreign investors seek not only economic stability but also legal stability in a country where they plan to make investments.

Resources of international arbitration in Turkish law

With respect to international arbitration, there are laws in Turkey in addition to bilateral investment agreements and international contracts related to international arbitration. Article 125 of

the constitution and the international arbitration law no. 4686, enacted on 21 June 2001, are the most important ones.

Applications of the international arbitration law in Turkish law

The objectives and scope of the international arbitration law are stated as follows in article 1:

“This Law applies to disputes incorporating an element of alienation and where Turkey is selected as the place of arbitration or where provisions of this Law is selected by the parties or by the arbitrator or by the arbitration board.”

The law individually specifies the cases where the dispute is considered to have an element of alienation. It has been stated, one by one, in article 2 of the international arbitration law, in which cases a dispute shall be considered as involving a foreign element. While determining the nature of “the element of alienation”, the law has been predicated on the legal relation between the parties. In case of the existence of any of the elements of alienation stated in article 2 of the international arbitration law in this legal relation, the arbitration shall be considered international as well. Therefore, the law determines the “international” aspect based on the legal relation between the parties. The arbitration will be considered international if the legal relation incorporates one of the elements of alienation specified in the law.

The parties may enter into a contract in which they may specify any place outside of Turkey as place of arbitration. In this case, the question will be the binding nature and execution of arbitration awards. The basic principle as to how arbitration awards will be executed (recognized) in Turkey is given in the last subparagraph of art. 90 of the constitution, according to which “international contracts enforced duly will have the force of law. No application can be made to the constitutional court with respect thereto with a claim that they violate the constitution”. With this regulation, international contracts enforced duly have been accepted as part of Turkish law and are considered to have the force of law.

Another regulation with respect to enforcement of foreign arbitration awards is by articles 434 to 445 of the “Law for International Private Law and for the Procedural Law” (Möhuk). The question arising here is whether a relation incorporating an element of alienation will be subject to the terms of the international contract or whether Möhuk will be applicable. Article 1 of the Möhuk specifies that this law will apply to private-law relations incorporating an element of alienation, whereas the last subparagraph of the same clause stipulates that “the terms of international contracts to which the Republic of Turkey is a party to are reserved”. It is specified that the terms of the international contract will have priority, if an international contract exists on the same subject as with the clause. In line with this regulation, the 1958 “New York Agreement on Recognition and Enforcement of Foreign Arbitration Awards”, which Turkey is a party to, will have the priority of application as a special regulation (*lex specialis*), since it regulates the enforcement of international arbitration or arbitration awards.

Article 1 of the New York agreement specifies, which terms of Möhuk or the New York agreement will apply for the enforcement of a foreign arbitration award. Accordingly, “it applies to acknowledgment and execution of awards given in a jurisdiction other than the jurisdiction where acknowledgment and execution is sought for”. Arbitration awards given in any jurisdiction other than that where enforcement is intended, are included in the scope of the New York agreement.

Selection of international arbitration law by the parties

Parties or arbitrators may agree on application of the international arbitration law for arbitration procedures. The parties and arbitrators are given free will with that respect. The parties have to enter into an arbitration agreement in order to refer to arbitration. No referral to arbitration will be possible, unless there is an agreement between the parties specifying that disputes will be settled by arbitration. Statements of the parties as to their will regarding

settlement of disputes by arbitration is the basic element of an arbitration agreement. The parties may add an arbitration clause (“terms of reference”) to the contract regulating the relation between them, in addition to executing an arbitration agreement.

Place of arbitration

It may be said that the term “place of arbitration” in the law is not a *de facto* place, but a fictional place. The place of arbitration in Turkey is a binding point providing application of the international arbitration law in arbitration proceedings.

The place of arbitration being in Turkey does not impose an obligation to perform arbitration proceedings and negotiations in Turkey, and it should not be interpreted as a place where arbitrators meet and hear witnesses and experts or where the arbitration award is given. The place of arbitration in Turkey is one of the conditions of application of the international arbitration law and is used as a binding point which provides that the arbitration proceedings are subject to the international arbitration law.

The element of alienation

In order to enable the settlement of the dispute in the framework of the international arbitration law, the contract has to have an element of alienation. The contract is deemed to have an element of alienation in cases such as when the contract’s place of execution or place of performance is a different country, when the contractual parties are of different nationalities or have residences in different countries.

Governing law and procedural rules

The parties may choose a law to govern the arbitration agreement according to the international arbitration law; otherwise, the Turkish law will govern. Naturally, in order to have such a governing law, there must be a condition applicable to the Turkish law. The international arbitration law has given liberty to the parties to choose the procedural rules to apply for the arbitration. The parties may decide on the applicable rules. They may establish certain matters themselves, including

notices, sessions, collection of evidence or obligation of proof; or they may establish each procedural rule individually or refer to regulation related to arbitration proceedings.

Trial method and language selection is a freedom given to the parties by the international arbitration law. Despite this freedom, the principle of equality in trial will dominate the trial method. For this reason, total equality must be provided between the parties, who will not be entitled to waive the principle of treating the parties equally.

Legal ways

The only remedy against arbitration awards given under the international arbitration law is to file an action of cancellation. The international arbitration law does not include concepts such as appealing, correction of award or retrial. So, the supreme court will not review the merits of and supervise arbitration awards. The parties may waive, in the contract, their right to file an action of cancellation against arbitration awards. The intention of the

waiver is to expedite the applicability of arbitration awards and to allow the award to be enforceable before an action of cancellation is filed.

The burden of proof in a lawsuit of cancellation has been imposed on the party who has filed the action of cancellation. This burden is imposed on the party filing the action of cancellation for all causes, except where the dispute is not suitable for arbitration according to the Turkish law or if the award violates the public order.

All other court judgments and arbitration awards qualified as foreign judgments and awards may create results in Turkey, provided they are acknowledged and enforced. Such awards may be enforced in Turkey under the 1958 New York agreement. Such acknowledgement is related to arbitration awards given in countries which are parties to the New York agreement.

Conclusion

In the globalized world, the boundaries between countries have been removed and the flow of capital has led to the

establishment of multinational corporations. Legal disputes have to be settled fast with developing technology and accumulation of knowledge. In this context, there is a gradually increasing trend towards applying arbitration instead of referring to state law for settlement of commercial disputes of an international nature.

The Turkish international arbitration law has been enacted based on Uncitral model law and on arbitration rules of Switzerland; therefore it contains regulations generally accepted in the international arena. From this point of view, existence of an arbitration law in Turkey at an international level is positive for foreign investors.

Turkey is a party to most important international arbitration agreements. New regulations in the constitution and Turkey being a party particularly to the New York agreement have provided the opportunity to enforce foreign arbitration awards in Turkey, which is also a party to the 1961 Europe and Icsid (Washington) agreements.

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