Türkiye

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I INTRODUCTION

Türkiye has become more arbitration friendly as the alternative dispute resolution methods are trending. The legal framework, court decisions, scholarly opinion and approach to arbitration have been transformed to match international standards. The Istanbul Arbitration Centre (ISTAC) which provides dispute resolution services for international and domestic parties was established in 2014. The Prime Ministry Circular numbered 2016/25 was published later on, in which it explicitly states that resolving disputes through arbitration or alternative dispute resolution methods is targeted as a state policy by aiming to reduce the workload in the national courts.[2] The circular encourages all organisations and companies to insert an arbitration clause into their contracts.

In light of the above-mentioned developments and encouragements, both international and domestic arbitration cases that involve Turkish parties are increasing. The disputes solved through arbitration in Türkiye typically revolve around shareholder conflicts, infrastructure, construction, energy and associated issues.

i Legal framework and main issues of arbitration in Türkiye

International arbitration in Türkiye is primarily governed by the International Arbitration Law No.4686 (IAL), heavily drawing from the UNCITRAL Model Law on International Commercial Arbitration, where domestic arbitration is governed by the Civil Procedure Law No.6100 (CPL).

Türkiye is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Energy Charter Treaty, and maintains active bilateral investment treaties (BITs) with 108 countries.

As the national courts have gained more experience in dealing with arbitration-related cases in recent years, arbitrability has been discussed more frequently. Pursuant to the IAL and CPL, disputes involving *in rem* rights in immovable properties or matters beyond the control of the parties are not arbitrable. Generally, conflicts pertaining to family law, bankruptcy law, criminal law or administrative law are deemed non-arbitrable. Expansion of arbitrability to other areas of law (e.g., to cancellation of general assembly decisions) has been a subject of discussion among scholars, stakeholders and chambers of commerce in Türkiye.

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2 Prime Ministry Circular Numbered 2016/25 which published in the Official Gazette Numbered 29893 Dated 19 November 2016.

Besides the issue of arbitrability, the validity of the arbitration agreements is another frequently discussed issue before national courts. The essential requirement for a valid and enforceable arbitration agreement in Turkish Law is the clear and unequivocal consent to arbitration. The arbitration agreement must be in writing and meet the criteria that:

a the agreement is documented and mutually signed by the parties, exchanged through communication channels like letters, telecommunication, fax or electronic means;

b the respondent refrains from contesting the existence of the arbitration agreement; and

c he parties incorporate a document containing an arbitration clause as an integral part of the main agreement.

Another issue to be mentioned is the internationally recognised principle of doctrine of separability. The principle of separability is well established in Turkish law, which dictates that the arbitration clause remains valid even if the main contract is deemed invalid or non-existent. Challenges to the arbitration agreement based on the invalidity of the underlying contract are impermissible as per both the IAL under Article 4/4[3] and CPL under Article 412/4.[4] Consequently, a tribunal's determination of the nullity of the underlying contract does not automatically render the arbitration clause invalid, as stated in the IAL under Article 7/H.[5]

ii Distinctions between international and domestic arbitration law

In accordance with Turkish legal provisions, arbitral proceedings without a foreign element seated in Türkiye are subject to the regulations outlined in the CPL. Notably, Türkiye-seated arbitral proceedings involving a foreign element are specifically regulated by the IAL. It is essential to underline that the legal framework for both international arbitration and domestic arbitration is regulated by these two primary legislations in accordance with the UNCITRAL Model Law.

The IAL applies in instances concerning:

a disputes featuring a foreign element, where Türkiye is designated as the seat of arbitration; and

b the involved parties, arbitrator or tribunals have explicitly agreed to the application of IAL.

Conversely, the CPL, specifically the 11th section encompassing Articles 407 to 444, applies in instances concerning:

a disputes lacking a foreign element as per the definition outlined in IAL; and

b where Türkiye is designated as the seat of arbitration.

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3 Article 4/4 of IAA states: 'No objection can be made against the arbitration agreement by arguing that the underlying contract is invalid or that the arbitration agreement is related to a dispute that has not yet arisen'.

4 Article 412/4 of CPL states: 'An arbitration agreement cannot be appealed against which the original agreement is not valid or that the arbitration agreement is related to a dispute that has not yet been born'.

5 Article 7/H of IAA states: 'The arbitrator or the arbitral tribunal may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of an agreement shall be treated independently of the other terms of the agreement. A decision by the arbitrator or arbitral tribunal that the original agreement is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement.'

Accordingly, the distinction between international arbitration under IAL and domestic arbitration under CCP is determined by the presence of a foreign element. A foreign element exists when a party (1) resides in different country; (2) is in a seat of arbitration different from Türkiye; (3) there is an involvement of foreign capital; or (4) the underlying contract, or legal relationship facilitated the movement of capital or goods from one country to another.

iii Structure of the courts

The Turkish judicial framework is separated into civil and administrative divisions. The civil division also includes criminal litigation. Each of these institutions operates autonomously within its jurisdiction, ensuring non-interference with the functions of others. Within the civil and criminal divisions, there are primary judicial authorities, namely first instance courts, Regional Courts of Appeal, and the Court of Appeal. Regional Courts of Appeal possess the jurisdiction to scrutinise cases originating from the first instance courts, evaluating them in terms of both procedural and substantive aspects. The Court of Appeal is assigned with reviewing decisions and judgments rendered by both first instance and regional courts for the civil and criminal divisions as the high court.

There is no dedicated court assigned to handle arbitration-related matters. Those cases are assigned to different chambers of the high courts based on types of underlying disputes.

Enforcement proceedings undergo a three-stage adjudication process. The initial stage typically spans six to eight months, and a final decision is reached within 2–3 years following the completion of the two-stage appeal process. These periods are dependent upon workload of each court varying across local jurisdictions. Courts' discretion in enforcement proceedings are constrained by well-established principles to review merits of awards, even in review of public policy exception.

Set-aside (annulment) proceedings in Türkiye are governed by a two-instance court system, distinguishing them from enforcement proceedings. This procedural characteristic presents a notable advantage for selecting Türkiye as the seat of arbitration, particularly for its efficiency in terms of time. Set-aside proceedings commence before the relevant Regional Court of Appeal and undergo an appeal process exclusively before the Court of Appeals. Recognised as urgent matters, these proceedings are concluded without extensive investigation.

Turkish courts are bound to interpret awards strictly. Adhering to the widely accepted principle of non-review of merits (revision au fond), Turkish courts refrain from delving into the substantive aspects of the award. Consequently, improper application of the law by the arbitral tribunal or erroneous decisions regarding the dispute, falling within this prohibition, cannot serve as grounds for annulling the arbitral award or refusing its enforcement. Any contrary interpretation would contravene the prohibition against delving into the merits, as recognised by Turkish law.

iv Local institutions

The preference for local arbitration institutions like ISTAC, the Turkish Union of Chambers and Commodity Exchanges Court of Arbitration and the Istanbul Chamber of Commerce Arbitration and Mediation Centre is steadily increasing. Their rules are similar to the rules of major international arbitration institutions, with the exception of scrutiny.

II YEAR IN REVIEW

i Legislative developments

While no legislative change was introduced last year, the local institutional rules were subject to changes.

Amendment on the Rules of the Arbitration Centre of the Union of Bar Associations of Türkiye entered into force

The amendments on the Rules of the Arbitration Centre of the Union of Turkish Bar Associations (TBA) entered into force. Established in 2015, the Rules of the TBA Arbitration Centre were previously regulated by the TBA Directive of 2020. The amendments to the arbitration rules are designed to be in line with the rules of the leading arbitration centres. While the TBA Arbitration Centre was previously authorised to resolve only attorney–client disputes arising out of the attorney fee agreement, it is now authorised to resolve all arbitrable national and international disputes.

ii Arbitration developments in local courts

In recent years, Türkiye has witnessed significant advancements in international arbitration, characterised by pivotal case law that offers valuable insights for arbitration practitioners. The decisions focusing on 2023 are recapped below.

Decision of the court of first instance rejecting the request for enforcement on the grounds of public order

Istanbul 19th Commercial Court of First Instance rendered a much-debated decision on 22 June 2023. The case is concerning the rejection of the enforcement of an International Chamber of Commernce (ICC) arbitration award valued at US$396,349,122.76 (before interest), which was successfully enforced by the courts in England and Wales, Hong Kong, Switzerland, New York, Texas and Florida. Additionally, the Paris Court of Appeal upheld the award, dismissing claims of forgery of private document and perjury.

During the enforcement proceedings, it was claimed that the final award was made based on false evidence and false witness statements. Although one of the witnesses admitted that they made a false statement during the arbitration proceedings, the arbitral tribunal did not obtain a report to resolve the contradictions. Istanbul 19th Commercial Court of First Instance considered the award to be clearly contrary to public order, as perjury is a ground for retrial under Turkish law.

It was also revealed that one of the witnesses had a conviction for forgery of a related private document in a Turkish court. Istanbul 19th Commercial Court of First Instance held that a judgment clearly conflicting with public order constitutes a barrier to enforcement. It determined that the arbitration award, tainted by unlawful documents and witness statements and in conflict with a Turkish criminal court judgment, contravenes the public order. Consequently, Istanbul 19th Commercial Court of First Instance rejected the enforcement request, emphasising the principle of the rule of law and constitutional right to a fair trial. The claimant appealed the decision and the application is currently pending.

Validity of arbitration clause

In its decision dated 11 May 2023, the 11th Civil Chamber of the Court of Appeal made an important assessment regarding the validity of the arbitration clause. The case is regarding the enforcement of the arbitral award rendered under the CIETAC Rules. The respondent argued that his signature was not on the seventh and eighth pages of the contract dated 13 November 2013. Since there was an arbitration clause on the unsigned eighth page of the contract, the respondent claimed that there was no will to arbitrate. The Court of First Instance accepted the respondent's claim and rejected the request for enforcement.

The claimant ultimately brought their case before the Court of Appeal, contending that the dismissal of the enforcement request because of the absence of the respondent's signature on the eighth page of the agreement was unjustified. Additionally, the claimant asserted that although the respondent had signed the page containing the arbitration clause in the agreement dated 26 November 2013, identical to that of 13 November 2013, this crucial detail had been overlooked by the lower court.

The Court of Appeal reversed the decision of the Court of First Instance by ruling that the arbitration clause was valid, on the grounds that it should be accepted that the respondent, as a prudent businessperson, had examined all pages of the contract he signed, taking into account Article 2/2 of the New York Convention stating that an arbitration clause includes an arbitration clause 'in a contract'.

Enforcement of an arbitration award contradicting a criminal court judgment

The Court of Appeal's General Assembly reviewed claims that enforcement of an ICC award would conflict with a finalised criminal court decision.

In the case, the claimant filed a complaint against persons, including the respondent, for forgery of official documents and fraud offences. The subject of the complaint was forgery of an official document during the transfer of some shares subject to arbitration proceedings. The Criminal Court of First Instance acquitted the defendants because there was no evidence that they had committed the offence and this decision became final.

The General Assembly firstly determined that, as a rule, an arbitral award that contradicts a finalised Turkish court judgment would be contrary to Turkish public order, adding that a dispute becoming a subject matter before Turkish courts does not prevent enforcement of arbitral awards in all cases. In case a criminal court's decision contains a different judgment in relation to the same fact from an arbitral award, this does not invariably hinder enforcement.

In Turkish law, criminal court judgments do not bind the civil court judge as a rule. However, according to the established practice of the Court of Appeal and the general acceptance in the Turkish legal doctrine, criminal court judgments regarding the determination of 'material facts' bind the civil judge. If there is a finalised criminal court decision regarding the determination of the existence or non-existence of a material fact, the same matter cannot be reviewed by civil courts.

The General Assembly found that the criminal court decision in question did not make a clear determination as to the unlawfulness of the event mentioned in the arbitral award dated 13 December 2012. It was only understood that the defendant was acquitted as a result of the inability to prove the accusations because of insufficient evidence. Accordingly, the General Assembly revoked the rejection of the enforcement and remanded the case to the first instance court.

Written form requirement in the arbitration agreement

The parties entered into distributorship agreements in 2005 for a duration of two years, in 2007 for one year, and once more in 2008 for another two years. However, from 2010 onwards, although their legal relationship persisted, no written agreement was formalised. Given that the most recent written agreement includes an arbitration clause, a dispute has arisen regarding whether this clause from the last written agreement will govern the dispute that arose between the parties in 2017.

The case was initially dismissed at both the first instance and Regional Court of Appeal levels based on the presence of the arbitration clause. However, the Court of Appeals overturned this decision. Subsequently, the first instance court reinstated its initial ruling, prompting the case to be elevated to the General Assembly of the Court of Appeal.

The General Assembly determined that, as per the provision outlined in the final written contract between the parties, any extension of the contract requires a clear expression of intent, which was not fulfilled. Despite this, the parties continued their contractual relationship through their actions without meeting this condition. Consequently, the General Assembly concluded that the contract was not extended but rather a new distributorship agreement was established by conduct, lacking a valid and written arbitration clause. Therefore, the General Assembly asserted that this subsequent agreement did not include a valid and written arbitration clause.

Moreover, even if it were acknowledged that the parties implicitly extended the contract in accordance with the provisions of the written contract, the outcome would remain unchanged. This is because the arbitration clause constitutes a separate agreement from the contract in which it is embedded, necessitating an explicit declaration of intent from the parties for its extension.

The effect of filing a declaratory action in Turkish courts on the arbitration clause

The 11th Civil Chamber of the Court of Appeal ruled that initiating legal action in Turkish courts and the lack of arbitration objection from the opposing party shall effectively nullify the arbitration clause binding the parties, even if done solely for the purpose of determining evidence.

In the subject matter dispute, a sales contract was concluded between the parties. The claimant filed a request for determination of evidence in Türkiye before the court, where the evidence was located, to be used in the arbitration proceedings in the United Kingdom, and requested the court to determine that the goods were damaged. During the enforcement of the award in Türkiye, the respondent argued that Turkish courts became competent and the arbitration clause was invalidated because the parties did not raise the arbitration objection against the determination of evidence before a Turkish court. The court of first instance accepted the respondent's objection and rejected the request for enforcement.

The court stated that it would be contrary to the unequivocal will to arbitrate if the party who had resorted to the Turkish jurisdiction were to resort to arbitration for another dispute arising out of the same contract. The Court of Appeal rejected the claimant's appeal that the claimant applied to the Turkish courts only for the determination of evidence and that the arbitral tribunal in the UK, where the dispute arose, was not able to make the same determination. The Court of Appeal rejected the claimant's request for correction of the judgment and upheld the decision of the court of first instance rejecting the request for enforcement.

Impartiality and independence of arbitrators

In a decision dated 2022, the Court of Appeal did not accept the fact that the arbitrators had previously worked together as a reason for the annulment of the award. The dispute before the 11th Civil Chamber was for request for annulment of the ISTAC award dated 26 November 2019. The claimant claimed that the lead arbitrator and the arbitrator selected by the respondent had previously operated the same law firm as partners and did not disclose this fact, and requested the annulment of the arbitral award.

The Regional Court of Appeal dismissed the case by stating that the claimant did not raise any objection during the formation of the arbitral tribunal, and that the fact that the arbitrators had previously operated a law firm together could not be considered to have jeopardised the principle of impartiality on its own, and that the arbitrators were not obliged to share their past business relations not related to the parties and the case. The 11th Civil Chamber of the Court of Appeal upheld the decision of the Regional Court of Appeal.

iii Investor–state disputes

Türkiye's engagement with ICSID commenced in 1987 with its ratification of the ICSID Convention. Since then, numerous investment disputes involving Turkish investors and the Turkish government have been adjudicated by ICSID.

This ongoing interaction with ICSID has played a significant role in shaping Türkiye's approach to foreign investment and dispute resolution. It has underscored the value of BITs and international arbitration mechanisms in facilitating investment flows and resolving disputes in a fair and efficient manner.

During 2023, only one case against Türkiye, involving Westwater Resources, was resolved. Currently, there are three cases pending before ICSID against Türkiye, brought by *Akfel Commodities Pte Ltd and I-Systems Global BV*,[6] *Alamos Gold Holdings Coöperatief UA and Alamos Gold Holdings BV*[7] and *Enel, SpA*[8].

An interstate arbitration was initiated by Iraq against Türkiye in 2014 regarding the use of the Iraq Türkiye Pipeline (ITP) under the ICC rules. The dispute has been resolved by an ICC tribunal on 13 February 2023,[9] awarding Iraq over US$1.9 billion before setting-off counterclaims.

Westwater resources

The dispute arose after Türkiye cancelled Westwater's licences for the exploration and development of a mineral deposit known as the Temrezli uranium project. The investor argued that Türkiye's revocation of its licences constituted expropriation without compensation and breach of its obligation to provide fair and equitable treatment to foreign investors. The arbitral tribunal rendered its award on 3 March 2023 and held that although Türkiye's cancellation of licences breached the BIT, the breaches did not cause any loss on the investor and that

6 ARB/20/36.

7 ARB/21/33.

8 ARB/21/61.

9 ICC Case No. 20273/AGF/ZF/AYZ/ELU.

the project would never have reached production and made profits regardless of Türkiye's breaches. However, the tribunal concluded that the claimant is entitled to investment costs, which were assessed at US$1,283,000, excluding interest.

Akfel Commodities Pte Ltd and I-Systems Global BV

The request for the institution of arbitration proceedings was registered on 18 September 2020. The case relates to a natural gas and electric power plan services dispute and is currently pending.

Alamos Gold Holdings Coöperatief UA and Alamos Gold Holdings BV

The request for the institution of arbitration proceedings was registered on 7 June 2021. The case concerns a dispute regarding silver and gold mines and is currently pending.

Enel, SpA

The request for the institution of arbitration proceedings was registered on 10 December 2021. The dispute concerns the cancellation of renewable energy projects of Enel SpA and is currently pending.

Iraq and Türkiye

The dispute between Iraq and Türkiye over the use of the ITP originated when Iraqi oil was transported through the ITP despite Iraq's directive to cease such operations. The tribunal determined that Türkiye breached the ITP Agreement by loading Iraqi oil in Ceyhan port and denying access to facilities, resulting in an award of over US$1.47 billion to Iraq.

Recently brought actions

There had only been one case brought before ICSID against invested states by Turkish investors in 2023. The case[10] was initiated by Güriş İnşaat ve Mühendislik Anonim Şirketi against the Kingdom of Saudi Arabia and concerns the project related to the construction of a dam and hydroelectric power plan in Saudi Arabia. The case is currently pending.

III OUTLOOK AND CONCLUSIONS

In recent years, Türkiye has emerged as a jurisdiction increasingly inclined towards arbitration, buoyed by the collaborative support of its local courts, the establishment of arbitral institutions, and legislative advancements. Turkish judicial bodies have showcased a robust pro-arbitration stance, consistently upholding arbitral awards while minimising judicial intervention in arbitration proceedings. The inclination towards institutional arbitration has witnessed a notable surge, propelled by the commendable recognition and bespoke services offered by entities such as ISTAC, which have set forth comprehensive guidelines tailored to meet diverse business needs.

Türkiye's participation in investment arbitration has witnessed a notable uptick, with a discernible increase in investor–state disputes initiated against the nation. This trend underscores the imperative of safeguarding investor interests and fostering an environment conducive to foreign investment. Furthermore, there is a burgeoning emphasis on the

10 ARB/23/36.

integration of technology in arbitral proceedings, aimed at bolstering efficiency and curtailing costs within Türkiye's arbitration landscape. Notably, online case management solutions and virtual hearings have surged in prominence, spurred by the exigencies imposed by the covid-19 pandemic.

In light of these developments, Türkiye's arbitration milieu is undergoing a transformative evolution, characterised by concerted endeavours to enhance the efficacy, accessibility and credibility of dispute resolution mechanisms. Türkiye steadfastly positions itself as an alluring destination for international arbitration.

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