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New era in arbitration in Turkey

Recent decades have been characterised by trade globalisation and the growth of transnational companies, which has led inexorably toward an increase in cross-border disputes. In capital-importing countries like Turkey, this increase has, in turn, led to a significant growth in the number of international arbitrations. In 2010, the number of disputes referred to the ICC Court of Arbitration that had at least one Turkish party was 76, that is, nearly ten per cent of the total number of claims raised under the auspices of the ICC that year. In 2011, this ratio was slightly less, whereby 46 parties from Turkey were involved in disputes referred to the ICC Court of Arbitration, out of a total of 796. Although Turkey has arguably been lagging in respect of legislating and accommodating for international arbitration, this increase in recent arbitrations has finally resulted in serious efforts to establish an international arbitration centre in Istanbul, as well as prompted the development of more sophisticated provisions on local arbitration in the Turkish Civil Procedure Law.

A new international arbitration institution: the Istanbul Arbitration Centre

The Strategy and Action Plan for the Istanbul International Financial Centre, prepared by Turkey's State Planning Organisation and approved by the High Planning Council, notes that, in order to make Istanbul a global financial centre:

> '… it is necessary to make improvements in the area of law, in order to bring expeditious and effective resolution of disputes in the field of finance, to establish an institutional arbitration centre and to accelerate legislation of draft laws that would contribute to the Istanbul International Financial Centre Project.'[1]

According to the High Planning Council, the establishment of an independent and autonomous institutional arbitration centre that is capable of competing internationally with respect to cost, speed and effectiveness was categorised as 'priority number two'. For this purpose, a working group comprised of scholars and jurists conducted extensive studies under the supervision of the Ministry of Justice regarding the structures and functioning of various arbitration centres around the world. The centres considered included the Arbitration Centre of the Union of Chambers and Commodity Exchanges of Turkey; the German Arbitration Association; the American Arbitration Association; the London Court of International Arbitration; the Zurich Arbitration Centre; the Prague Trade and Agriculture Chamber's Arbitration Court; the Singapore International Arbitration Centre; and the Dubai International Arbitration Centre. Upon completion of the working group's studies, it prepared and submitted a draft Law of the Istanbul Arbitration Centre (the 'Draft LIAC'), which would govern the rules and principles of the establishment, organisation and operation of the Istanbul Arbitration Centre. The Draft LIAC was submitted to the Prime Ministry in March 2011.

Under the Draft LIAC, the Istanbul Arbitration Centre will determine the rules of arbitration, as well as other alternative dispute resolution mechanisms, within six months following the enactment of the LIAC. The Centre will have one Local Arbitration Court and one International Arbitration Court, thereby separating the monitoring of proceedings in local disputes from those with an international element. Several Turkish scholars and practitioners have taken an active role in promoting the establishment and development of the arbitration centre. In a recent speech, Deputy Prime Minister Ali Babacan signalled that the LIAC will soon be enacted.

Local arbitration provisions under the New Civil Procedure Law

From 5 July 2001, when the International Arbitration Law (IAL) entered into force, until late 2011, Turkish international arbitration procedures were set forth in the IAL while domestic arbitration procedures

were governed by the Civil Procedure Law No 1086 of 1927 (the 'Former CPL'). However, the Former CPL was replaced in October 2011 by the New Civil Procedure Law No 6100 (the 'New CPL'). Unlike the Former CPL, the New CPL is more aligned with the IAL, in that it better reflects international legal and procedural principles, even though it applies only to local arbitration proceedings.

Article 407 of the New CPL provides that for the rules of arbitration of the New CPL to apply:

- a dispute must not have an international element; and
- the venue of arbitration must be Turkey.

One novelty of the New CPL is that, while it requires arbitration agreements to be in writing, it states that an arbitration agreement contained in an exchange of letters, telegrams, facsimiles, etc, may also be deemed to be 'in writing'. Though this is much more flexible than the Former CPL, which required a written contract signed by both parties, it is still more restrictive than the UNCITRAL Model Law, which provides that 'an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means'. The New CPL also states that, if the parties mutually agree during the course of a lawsuit before a national court to refer the dispute to arbitration, the court must send the file to the arbitrator/arbitral tribunal.

With respect to interim measures under the New CPL, Article 414 provides: 'the arbitrator/arbitral tribunal may grant any interim measures it deems necessary in respect of the subject matter of the dispute at the request of either party, unless otherwise agreed by the parties'. The Former CPL did not give parties the opportunity to request that an arbitral tribunal decide on interim measures, as the sole competent authority to decide on such measures was the national court system. Nonetheless, even under the New CPL, parties will still have to rely on national courts to enforce any interim measures granted by the arbitral tribunal.

One of the most significant changes introduced by the New CPL relates to the competence of an arbitral tribunal to rule on its own jurisdiction and the existence/validity of an arbitration agreement (Article 422). This effectively establishes a statutory foundation for the competence-competence principle, which was not recognised under the Former CPL.

Another change found in the New CPL relates to the length of the proceedings. Under the Former CPL, arbitrators had to render their final awards within six months. The New CPL has extended this term to one year, which is much more reasonable in light of the fact that failure to render an award within the statutory term has frequently been used by the Court of Appeals as a ground for nullifying arbitral awards.

The most noteworthy improvement in the New CPL relates to the method of recourse against an arbitral award. Before the New CPL's entry into force, arbitral awards could be appealed only on the grounds listed in Article 533 of the Former CPL. However, the Court of Appeals often rendered controversial decisions regarding the legal grounds for appeal, applying a very broad interpretation to the grounds listed in Article 533. In some cases, the Court of Appeals even went so far as to examine the merits of the claim. By contrast, Article 439 of the New CPL seems to be a fundamental change that, hopefully, will bring this problem to an end.

Under Article 439, an arbitral award rendered in a local arbitration is no longer subject to an appeal before the Court of Appeals. Rather, the only legal challenge that can be brought against an arbitral award is a set-aside request before the courts of first instance.[2] Article 439 also lists the grounds for which such annulment can be granted. These grounds are much less likely to be interpreted broadly, as, like the IAL's provisions, they are listed in a *numerus clausus* manner. This is expected to prevent judges from intervening in the merits of a claim. As Article 439 was imported from the IAL, the rules for setting aside awards in both domestic and international arbitrations are essentially harmonised.

Conclusion

The establishment of an international arbitration centre and the unification of the rules of domestic and international arbitration have been determined by the High Planning Council to be two major objectives in enhancing the legal infrastructure in Turkey. The ultimate goal of this enhancement is to make Istanbul an international financial centre.

As a first step, the rules of domestic and international arbitration have been harmonised through the implementation of the New CPL. This has clarified a number of critical points regarding arbitration in Turkey and, hopefully, it will minimise the intervention of national courts in arbitration proceedings. The next step – namely, the enactment of the LIAC, which will be followed by the establishment of the Istanbul Arbitration Centre – will be the start of a whole new era in Turkish arbitration.

Notes

1 The Strategy and Action Plan for IFC Istanbul can be accessed at **www.ifm.gov.tr/SitePages/ifmgiris.aspx**.

2 Decisions granted by courts of first instance can still be appealed, however.