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P viii

Foreword

There has been an explosion in the amount of international arbitration taking place around the world over the past thirty years. This is because of the globalization of international business transactions, the breaking down of national barriers and time zones through electronic communications, and the accepted view that national courts are not best suited to determine disputes arising out of international commercial arrangements of a complex nature. This has been further supported and encouraged by looser and more flexible national and international regulations, backed by treaty arrangements where necessary or appropriate, all in support of not just trade related contracts, but more particularly new and varied types of international business transactions. Participants in international arbitrations include not only ordinary businesses, but also governments, state entities and multinational corporations, and involve all economic sectors.

Commensurate with and perhaps partly driving the expansion of international arbitration has been the increasing economic strength of countries which may previously have been considered as developing countries. Some of the emerging economies are today major economic power-houses competing fully with the traditional western and capitalist countries. The playing fields have changed with respect to participants, venues and rules.

Pivotal to these developments has been the embracing by so many countries around the world of international arbitration as a preferred or at least an accepted dispute resolution method. This is illustrated by the 150 countries which are now party to the 1965 Washington Convention on the Settlement of Disputes between States and Nationals of Other States and have accepted the jurisdiction of the International Centre for the Settlement of Investment Disputes, the 149 countries which have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the 68 national jurisdictions which have enacted arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration. Also, around the world more international arbitration centres offer their institutional arbitration services and rules to the international legal community.

Turkey has developed into a strategically important political and economic power. It is geographically well situated, on the borders of Asia, Europe and the Middle
P xxii
East and is viewed as an important country in all of these areas. The Turkish economy has expanded almost every year since 2001 and annual GDP growth has been as high as 8.8% within the past few years. The industry and service sectors are increasingly more important within the Turkish economy. As Turkish business has expanded along with its foreign trade transactions, both import and export, inevitably so too has the number of transactions involving Turkish parties being involved in international arbitration. Turkish civil and commercial law is based on Swiss law; Turkish corporate law is heavily influenced by German law, so there is a very sound continental law orientation.

Turkey's attitude to arbitration has not always been positive, but it has changed dramatically since the late 1980s and 1990s. Turkey became party to the ICSID Convention in 1989. It ratified the New York Convention in 1992. It adopted up-to-date arbitration legislation in 2001 based on the UNCITRAL Model Law. It has entered into bilateral agreements regarding the recognition and enforcement of civil and commercial judgments and arbitral awards. More and more Turkish parties are involved in arbitration with contracting parties from outside Turkey.

For all of these reasons, Turkish law on arbitration is of great importance. Parties agreeing to submit to arbitration or involved in an arbitration with a Turkish party will be concerned that the arbitration agreement will be respected and enforced under Turkish law and by the Turkish courts. When considering Turkey as a seat of arbitration, parties will want to understand the supporting law including when and in what circumstances the Turkish courts will support or intervene in the arbitral process. Finally, parties will want to know that that the Turkish law and courts will recognize and enforce foreign arbitration awards in accordance with New York Convention standards.

For all these reasons we are delighted to welcome and endorse this excellent book on Arbitration Law in Turkey by Dr Ali Yeşilimirak and Dr Ismail Esin. Written by two outstanding young scholars and practitioners, it will provide a great tool to all those interested in or involved with arbitration in Turkey and with Turkish parties.

We are privileged to have had the authors as our students in earlier years, and are touched by their decision to dedicate this work to us.

Professor Dr Julian D M Lew QC

Professor Dr Gerhard Wegen

London and Stuttgart

September 2014

P xxii

Preface

Turkey, particularly in the last decade, has demonstrated an economic growth that is incredible in pace which has become one of the 20 largest economies in the world. International transactions and foreign direct investments, inflow and outbound, have increased immensely within this period. Such developments have had tremendous impact on the increase in use of international arbitration and other ADR mechanisms where Turkey and/or Turkish parties have been involved. ADR mechanisms, particularly with regards to arbitration, have started to flourish in Turkey. The need to provide a 'guide' to foreign users of arbitration and other ADR mechanisms has thus arisen. This book aims to provide a comprehensive analysis of the law and practice on international arbitration and other ADR mechanisms in Turkey.

This book has been prepared with the contributions of experienced academics and practitioners who are experts in the field of arbitration and/or other ADR mechanisms. The book has incorporated these experts' knowledge and unique perspective on certain matters. We believe this diversified approach has greatly enriched the content of the book, and hope that such is the perceived view of those who use this book for guidance and direction.

The editors hereby thank all contributors for their diligent work and cooperation.

The editors are also thankful to Eleanor Taylor of Kluwer Law International for her encouragement and assistance in the preparation of this book; and to Doğan Gültutan, LLM, Attorney at Law, and Michael J. Curtis for their assistance in editing the book.

This book reflects the law and practice of international arbitration and other ADR mechanisms as of August 2014.

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P xxiv

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P xxiv

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List of Abbreviations

AA 1996	Arbitration Act 1996 (England & Wales)
Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID
ADR	Alternative Dispute Resolution
AoA	Articles of Association
Attorneyship Law	Attorneyship Law, Law No. 1136
BB	Der Betriebs-Berater
BGE	Entscheidungen des schweizerischen Bundesgerichts
BGH	Bundesgerichtshof
BIT	Bilateral Investment Treaty
BT-Drs	Bundestags-Drucksache
CCP; Code	Code of Civil Procedure, Law No. 6100
Center	WIPO Arbitration and Mediation Center
Civil Code	Civil Code, Law No. 4721
CPIL	Swiss Federal Law on Private International Law
Decree Law No. 551	Decree-Law on the Protection of Patent Rights, Decree Law No. 551
Decree Law No. 554	Decree-Law on the Protection of Industrial Designs, Decree Law No. 554
Decree Law No. 555	Decree Law on the Protection of Geographical Indications, Decree Law No. 555
Decree Law No. 556	Decree Law on the Protection of Trademarks, Decree Law No. 556 P xxvi
EBITDA	Earnings Before Interest, Taxes, Depreciation, and Amortization
EBL	Execution and Bankruptcy Law, Law No. 2004
Electronic Signature Law	Law on Electronic Signatures, Law No. 5070
European Convention; ECICA	European Convention on International Commercial Arbitration of 1961
FET	Fair and Equitable Treatment
FDI	Foreign Direct Investment
FDI Law	Foreign Direct Investment Law, Law No. 4875
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
fn.	Footnote
IAC	Istanbul Arbitration Centre
IAL	International Arbitration Law, Law No. 4686
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICANN	Internet Corporation for Assigned Names and Numbers
ICC Court	International Court of Arbitration of the International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IFTA	Independent Film & Television Alliance
Investment Promotion Agreement	Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference 1981
IPR	Intellectual Property Right
IPRG	Bundesgesetz über das internationale Privatrecht
ITO	Istanbul Chamber of Commerce (*İstanbul Ticaret Odası*)
Law No. 1086	Previous Code of Civil Procedure, Law No. 1086
Law No. 4501	Law Regarding Principles to be Adhered to Upon Resorting to Arbitration in Disputes Arising from Concession Stipulations and Agreements Regarding Public Services P xxvii
Law No. 5235	Law on the Formation, Duties and Powers of Civil Courts of First Instance and the District Courts, Law No. 5235
Law No. 5846	Law on Intellectual, Artistic and Literary Works, Law No. 5846
Law No. 6545	Law Regarding the Amendment of the Turkish Penal Code and Other Codes, Law No. 6545

LCIA	London Court of International Arbitration
MAC	Material Adverse Change
Mediation Law	Law on Mediation of Legal Disputes, Law No. 6325
Mediation Rules	Mediation Rules of the International Chamber of Commerce
MFN (treatment)	Most-favoured nation (treatment)
MIT	Multilateral Investment Treaty
NCPC	Nouveau Code de Procedure Civile
New York Convention; Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NJW	Neue Juristische Wochenschrift
OIC	Organisation of Islamic Cooperation
OLG	Oberlandesgericht BayOLG, Bayerisches Oberlandesgerichtshof
Regulation	Regulation relating to Arbitration, Mediation and Expert-Determination of the Istanbul Chamber of Commerce
SchGK	Bundesgesetz über Schuldbeitreibung und Konkurs
SchiedsVZ	Zeitschrift für Schiedsverfahren
SchZPO	Schweizerische Zivilprozessordnung
SHA	Shareholders' Agreement
SPA	Share Purchase Agreement
TCC	Turkish Commercial Code, Law No. 6102
TOBB	Union of Chambers and Exchange Commodities of Turkey (Türkiye Odalar ve Borsalar Birliği)
TPIL	Turkish Private International Law, Law No. 5718
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
Turkish Code of Obligations; TCO	Turkish Code of Obligations, Law No. 6098
UDRP	Uniform Domain Name Dispute Resolution Policy
UDRP Rules	Rules of Uniform Domain Name Dispute Resolution Policy
UNCITRAL Model Law; Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNCTAD	United Nations Conference on Trade and Development
World Bank	International Bank for Reconstruction and Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
ZPO	Zivilprozessordnung
2009 Model BIT	Turkish Model Bilateral Investment Treaty

P xxviii
P xxviii

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Chapter 1: Legal Framework

Ali Yesilirmak

§1.01 INTRODUCTION

Turkey has a stable economic growth. The Gross Domestic Product (GDP) figures demonstrate that it has become the sixteenth largest economy in the world and the sixth in terms of being the largest economy in comparison with the European Union countries. (1) The GDP has reached almost USD 820 billion in 2013. (2) Within the last decade, Turkey attracted foreign direct investment in the amount of USD 135 billion. (3) There are around 30,000 foreign commercial firms doing business in Turkey.

In line with the economic growth above-mentioned and an increase in the number of international transactions and foreign direct investments involving Turkey and/or Turkish parties, there is growing practice of international arbitration in Turkey. There are also a small number of arbitration cases relating to Turcic republics of mid-Asia and Arab republics. In addition, due to the reforms of the last few years, there is an increasing tendency to use arbitration for domestic cases with a foreign element (i.e., where a party has foreign shareholders). Furthermore, there are also an increasing number of arbitrations relating to Turkish parties where recognition and enforcement in Turkey is an important issue to consider. Moreover, increasing number of investment arbitration cases relating to Turkey or Turkish parties is observed. Apart from the above, negotiation and mediation are other ADR mechanisms that are available and can be resorted to for the resolution of disputes. Consequently, it is imperative for all related parties to know and understand the pitfalls of arbitration and other Alternative Dispute Resolution (ADR) mechanisms in Turkey.

P 2

Arbitration and other ADR methods are deeply rooted in Turkish legal history. (4) The first reference to arbitration in Turkish legislations was in the year 1856. During the phase of enactments in Turkish legal history, following the establishment of the Republic of Turkey in 1923, the previous Code of Civil Procedure, Law No. 1086, in 1927 (Law No. 1086) (5) containing a chapter on arbitration was adopted. This law was entirely revised, and so was the chapter on arbitration, in 2011 through the enactment of the new Code of Civil Procedure, Law No. 6100 (CCP; the Code). (6) When compared to the developed legal systems, the development of arbitration in Turkey was a slow process with negative effects on the emergence of an arbitration culture, as it may at times be visible in judicial decisions.

However, in the last decade, Turkey has become a more arbitration-friendly jurisdiction since many significant steps have been and are still currently being taken to further reinforce arbitration for better distribution of justice. In fact, in both national and international commercial disputes, arbitration has become the norm, as opposed to being the exception. Among other things, it could be said that the main reasons for this evolution are as follows: (a) the increase of transnational transactions, (b) the development of the legal framework regarding arbitration in Turkey, (c) expertise of arbitrators, (d) the neutrality of the arbitrators (particularly so for foreign investors), (e) the confidentiality, (f) comparatively little costs involved, and eventually (g) the expeditious resolution of disputes as compared to the lengthy litigation process. It is common knowledge that a dispute before the national courts takes approximately between three and four years to finalize. Arbitral proceedings, on the other hand, usually come to an end within a shorter period. Due to all of the above reasons, the resolution of disputes through arbitration is something to be encouraged.

The aim of this chapter is to set out the legal framework with regards to arbitration law in Turkey and explain in brief the main arbitral institutions that operate within the national territory.

P 3

§1.02 LEGAL FRAMEWORK

[A] Laws on Arbitration and ADR Methods

[1] Code of Civil Procedure

The CCP regulates domestic arbitration in Turkey. An arbitration is considered as being domestic where the seat (place) of arbitration is Turkey and the arbitration does not contain a foreign element. (7) Unlike the Law No. 1086, the CCP has adopted, among others, the principles of separability and *kompetenz-kompetenz*. (8) Further, the CCP has abolished the possibility of appealing against arbitral awards on the merits of the dispute and has instead adopted the setting aside mechanism. (9) It is possible to say therefore that the CCP has substantially developed the legal framework in relation to domestic arbitration in Turkey, when compared with the Law No. 1086.

The CCP is based on the UNCITRAL Model Law like the International Arbitration Law (IAL). [(10)] The CCP, as compared to the IAL, however, is more in line with the UNCITRAL Model Law as translation mistakes were corrected and some provisions that were left out in adopting the IAL were introduced to the Code. It furthermore contains up to date provisions since the Code contains, for example, extensive provisions regarding provisional measures. Thus, the criticisms directed towards the existence of two separate laws on the same topic since both the IAL and the CCP are based to a great extent on the UNCITRAL Model Law, should be dismissed. In any case, the drafters of the CCP recommended as a next step converging both the CCP and IAL into a single law.

[2] International Arbitration Law

In addition to the fact that the IAL was modelled to a great extent on the UNCITRAL Model Law, the provisions of Chapter 12 of the Swiss International Private Law Act [(11)] were also benefited from. [(12)] The scope of application is with regards to arbitrations that are considered international. The IAL states explicitly that it is applicable to arbitrations with its seat (place) in Turkey and where a foreign element is found to exist. [(13)] Pursuant to Article 2 of the IAL, a foreign element exists if:
P 4

–the domicile, permanent residence or place of business of the parties are in different states;

–the domicile, permanent residence or place of business of the parties are in a state other than the place (seat) of arbitration stated in the arbitration agreement or the place (seat) of arbitration determined in accordance with the arbitration agreement; or in a state other than where the substantial portion of the underlying agreement is to be performed, or to where the subject-matter of the dispute is closely connected;

–at least one of the companies' shareholders, who is a party to the principal agreement underlying the arbitration agreement, has brought foreign capital to Turkey under the foreign capital encouragement regulations, or where it is necessary to enter into a loan or security agreement to provide foreign capital from abroad for the implementation of the agreement; or

–the principal agreement or legal relationship underlying the arbitration agreement causes the movement of capital or goods from one country to another.

The IAL also applies before the arbitral tribunal when the parties so agree or where the arbitral tribunal itself determines that the arbitral proceedings should be conducted in accordance with the provisions of the IAL. It should yet be noted that where the parties have agreed that any dispute between them should be solved in accordance with the IAL, the mandatory rules of law of the seat of arbitration (*lex loci arbitri*) should be applied so that the provisions of the IAL should only be adhered to by the arbitral tribunal where it does not contradict the mandatory provisions concerned.

In general, on the basis of the review of the case-law on arbitration, the IAL is generally considered 'a step forward in the establishment of an arbitration culture in Turkey'. [(14)] However, there is a short-fall in that approach; a few cases have been reported where the courts have not acted in an arbitration-friendly manner. The general rule is that procedural legislations ought to be applicable as of their entry into force, provisions of the IAL (most articles of which procedural in nature) should have been applicable as soon as its entry into force. Yet, this was not the case: the Turkish Court of Appeal decided contrary to this general rule [(15)] despite criticisms raised in relation to this issue. [(16)]

P 5
It should be noted that there is little difference between the CCP and the IAL. Most provisions are similar, if not identical. However, there are certain noteworthy differences . Such differences between the IAL and the CCP are as follows:

–The IAL contains an express provision stating that the validity of the arbitration agreement is to be determined in light of the law applicable to the arbitration agreement or, in the absence of a choice, according to Turkish law (Article 4(3), IAL); the CCP contains no such provision with regards to the applicability of Turkish law.

–The IAL provides that a party's application to the courts, before or during arbitral proceedings, for an interim injunction or interim attachment, and the granting of such request by the court does not constitute a breach of the arbitration agreement (Article 6(1)); pursuant to the CCP, however, a party requires the arbitral tribunal's permission to apply for an interim injunction or a determination of evidence, unless the circumstances are such that the arbitral tribunal, or a third party appointed by the parties, is unable to act promptly or in an effective manner (Article 414(3)).

–Under the IAL, an arbitral tribunal is not authorized to grant interim injunctions or interim attachments that bind third parties or that require enforcement through execution offices or other official authorities. The CCP is silent on this matter.

–The CCP authorizes the arbitral tribunal to amend or annul an interim measure granted by the court (Article 414(5)); the IAL provides no such express authorization.

–Under the CCP, where the appointment of a sole arbitrator is to be agreed upon, at least one of the arbitrators must possess at least 5 years' legal experience in his/her field of expertise (Article 416(1)(d)); the IAL contains no such requirement.

–Contrary to the IAL, under the CCP the period used for the re-appointment of arbitrators does not suspend the arbitration period (Article 7(G)(2), IAL; Article 421(2), CCP).

–The IAL expressly provides that a party may be represented by foreign natural or legal persons, provided that such representation does not take place before the courts (Article 8B(2), IAL); such entitlement does not exist with regards to arbitrations subject to the CCP.

–The IAL requires the preparation of a terms of reference (Article 10E(1)); the CCP does not.

–There are different provisions in the IAL and the CCP with respect to the competent court (*görevli mahkeme* in Turkish) and the court with jurisdiction (*yetkilimahkeme* in Turkish) (Articles 15A(1) and 3(1), IAL; Articles 410, 411 and 439(1), CCP).

–The application to set aside suspends execution of awards governed by the IAL (Article 15A(4), IAL); but not those governed by the CCP. Execution may be suspended under the CCP if security is provided by the applicant (Article 439(4), CCP).

P 6
–The IAL permits total or partial waiver of the right to commence set aside actions, which can be benefited from only by parties whose place of domicile or habitual residence is not within Turkey (Article 15A(6), IAL); the CCP contains no such provision.

–IAL requires advance payments to be made by the claimant(s) (Article 16C(1)); under the CCP, the arbitral tribunal may request the payment of advance payment from either party; both parties are to share the burden in equal proportions unless otherwise provided (Article 442(1)).

[3] Mediation Law

The Law on Mediation of Legal Disputes (Mediation Law), [(17)] regulates matters such as the rights and obligations of mediators, the manner of conducting mediation, the effects of settlement agreements and the training of mediators. The cornerstone of the Mediation Law is its adhesion to the principle of party autonomy in its fullest extent. The parties are at freedom when it comes to resorting to, conducting and ending mediation proceedings. It is an entirely voluntary process. According to Article 1 of the Mediation Law, mediation within the boundaries of the said law is only permitted for disputes subject to the parties' will or arising out of private law legal relationships. With the exception of cases where disclosure is required by law or required for the enforcement of the settlement reached, there is a total restriction on the use of admissions, evidence disclosed, etc., in subsequent judicial/arbitral proceedings. Such evidence will be disregarded by the court (or arbitral tribunal) if this prohibition is not complied with. Further, the provision of such evidence cannot be demanded by a court, an arbitral tribunal or an administrative institution without an express legal basis permitting such request. There is an express duty of confidentiality imposed upon the mediator and the parties, unless the contrary is agreed upon. [(18)] The Mediation Law could be applicable where the accredited mediators are chosen by the parties. A mediator could be accredited if she/he passes, after the completion of 48 hours-long course, a written and practical exam done by the Mediation Board established in accordance with the Mediation Law.

If the parties reach an agreement and the agreement is recorded in a settlement agreement, the parties are entitled to request from the courts that an annotation be inserted on the settlement agreement to make it binding and enforceable. [(19)] A settlement record, which has been annotated by the court in such a manner, becomes enforceable and can directly be used to commence execution proceedings against the party failing to comply with its terms.

P 7
Mediation could be done without the use of the Mediation Law with or without the accredited mediators. In such case, the settlement record could not benefit from the enforcement mechanism envisaged by the Mediation Law.

In any event it is noteworthy that a mediation clause cannot be considered a precondition for initiation of an arbitration or litigation process.

[4] Concession Agreements Law

The Law Regarding Principles to be Adhered to Upon Resorting to Arbitration in Disputes Arising from Concession Stipulations and Agreements Regarding Public Services (Law No. 4501) [(20)] enabled the resolution of disputes arising from concession agreements through arbitration. This law has its roots in the amendments made to the Turkish Constitution [(21)] in 1999. It was a significant

step forward, considering that it represents the first piece of legislation whereby foreign investors had been expressly permitted to submit disputes arising from concession agreements to arbitration. (22) With the enactment of the IAL, arbitration of concession disputes becomes subject to the provisions of the IAL (Article 1(5)). Only for the determination of a foreign element, Law No. 4501 shall be referred to. The definition of foreign element under such law seems rather extensive compared to that contained in the IAL.

[5] Attorneyship Law

At the outset, it is noteworthy that under Turkish law, parties have the right to enter into a settlement agreement and such agreements are enforced as a contract.

Under Article 35(A) of the Attorneyship Law, (23) attorneys are equipped with the power of acting as negotiators between the parties until the commencement of the hearing stage. Such power cannot be used once a hearing has been held in relation to the dispute between the parties. Further, the will of the parties remains intact since attorneys are only granted the right of inviting the parties to settle the dispute by way of negotiation. Thus, only upon acceptance of such an invitation and the reaching of a
P 8
settlement in relation to the disputed matters will the parties execute a settlement agreement.

Such settlement agreement signed by the parties and their attorneys is tantamount to a final and conclusive court judgment and, therefore, can directly be used to commence execution proceedings when the terms of the said settlement agreement are not complied with. The details in relation to the form and content of such settlement agreements are contained in the Regulation on the Attorneyship Law. (24)

[6] Turkish Private International Law

The Turkish Private International Law (TPIL) (25) is applicable to private law transactions and legal relations that contain a foreign element. (26) The scope of applicability of the TPIL covers the law applicable to transactions and relations expressed above, the international jurisdiction of the Turkish courts and the recognition and enforcement of foreign judicial and arbitral awards. It should be taken into account, however, that the TPIL becomes applicable to the recognition and enforcement of arbitral awards only in instances where the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention; Convention) (27) is inapplicable. The reason for this is that according to Article 1(2) of the TPIL, the application of international treaties to which the Republic of Turkey is a signatory is reserved. In other words, the mechanism foreseen in the TPIL for the recognition and enforcement of arbitral awards should only be resorted to where the conditions required for the applicability of the New York Convention are not present.

[B] International Conventions (28)

[1] New York Convention

The New York Convention was acceded to by Turkey on 2 July 1992, entering into force on 25 September 1992. (29) It applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where recognition and
P 9
enforcement of such awards are sought. (30) In other words, only the recognition and enforcement of arbitral awards that are rendered in the territory of a state other than the state where recognition and enforcement of such awards are sought will fall within the ambit of the New York Convention. Further, arbitral awards that are not considered as domestic awards where recognition and enforcement is sought may also be recognized and enforced pursuant to the New York Convention. (31)

In line with Article I(3), Turkey has made two reservations in relation to the New York Convention:

(1)First, Turkey declared that it will apply the New York Convention only if the award was granted in a State that is a signatory to the New York Convention.

(2)Second, Turkey has limited the applicability of the New York Convention to conflicts arising from relationships that are categorized as commercial under Turkish law. (32) Thus, a request for the recognition and enforcement of an arbitral award will not be entertained in cases where the arbitral award is issued in a state that is not a signatory to the New York Convention. In such cases, the party will have to resort to the provisions of the TPIL regarding recognition and enforcement of arbitral awards. Requests for the recognition and enforcement of an arbitral award will not be entertained where the dispute that is the underlying basis for the request is not categorized as commercial under Turkish law.

The New York Convention has currently 149 signatories (33) and is described as the ‘most effective

instance of international legislation in the history of commercial law'. [34]

[2] European Convention on International Commercial Arbitration

The European Convention on International Commercial Arbitration of 1961 (European Convention; ECICA) was approved by the Turkish Grand National Assembly on 8 May 1991 and entered into force on 21 May 1991. [35] Its role is to complement the New York
P 10
Convention and, therefore, deals with issues such as the jurisdiction of arbitral tribunals and the procedure to be adopted. There are currently 31 signatories to the European Convention. [36] In light of the fact that there are only 31 parties to the European Convention, its sphere of application is very limited. Reliance upon the European Convention before the Turkish courts is therefore minimal. [37]

[3] ICSID Convention

Turkey became a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on 24 June 1989. It was thereafter ratified on 3 March 1989 and entered into force as of 2 April 1989. [38] The *ratio legis* of the ICSID Convention is the promotion of investments through the creation of a special dispute resolution mechanism for disputes arising between states and investors who are nationals of other states.

When considering the applicability of the ICSID Convention, the rule of double consent must be observed. The rule dictates that the defendant state must not only be a party to the ICSID Convention, but it must also have consented to the ICSID Convention as between disputes that may arise between itself and the investor. The said consent may be given through a private agreement, a bilateral investment treaty (BIT) or pursuant to the domestic laws of the concerned state.

The ICSID Convention has paramount importance for protection of inbound and outward investment relating to Turkey. There have been so far seven ICSID cases involving Turkish parties. The recent case *Libananco Holdings Co Ltd v. Republic of Turkey* (*ICSID Case No. ARB/06/8*) provides a noteworthy example of a dispute between Turkey and an investor conducted under the ICSID Convention. [39]

[4] Energy Charter Treaty and BITs

The Energy Charter Treaty was ratified by Turkey on 5 April 2001. [40] Through its ratification, Turkey has accepted that disputes regarding foreign energy investments
P 11
can be referred to and resolved by arbitration. The main strands of protection provided by the Energy Charter Treaty are the production and distribution of energy and the protection of the environment; its main aim is the promotion of international cooperation in the energy sector through the establishment of a legal framework. There are currently 52 signatories to the Energy Charter Treaty; 5 of which have yet to ratify it. [41] The dispute resolution mechanism under the Energy Charter Treaty permitting recourse to arbitration under the ICSID Convention was first activated in 1998. However, between the years 1998 and 2010, only 20 energy investment disputes have been referred to arbitration under the ICSID Convention. An analysis of the case-law regarding disputes arising under the Energy Charter Treaty therefore has its limitations and difficulties. [42]

Lastly, but not least, bilateral investment treaties (BITs) serve as another tool that states resort to for the promotion of inbound foreign investments. In relation to the inducement and protection of reciprocal investments and economic cooperation, Turkey is currently party to 74 BITs. [43]

[5] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference

The governments of the Member States of the Organisation of the Islamic Conference are signatories to the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference 1981 (the Investment Promotion Agreement). There are 57 Member States to the agreement. Article 16(2) of the agreement contains an arbitration mechanism for the resolution of disputes between a host state and an investor. The arbitration mechanism has not been used yet, but it has great potential.

[6] Judicial Cooperation Treaties

Turkey is a party to several bilateral judicial cooperation treaties, which also ensure the good conduct of arbitration proceedings. [44] The issues agreed upon in such treaties generally concern rules as to notifications, security for costs, [45] the assistance of the other party's courts in taking evidence and other matters, and the provision of equal
P 12
treatment to nationals of the other state. A full list of judicial cooperation treaties may be obtained from the website of the Ministry of Justice. [46]

§1.03 ARBITRAL INSTITUTIONS

There are many arbitral institutions in Turkey, both local and national. Yet, two main arbitral institutions are mostly resorted to:

(1)The Union of Chambers and Exchange Commodities of Turkey (*Türkiye Odalar ve Borsalar Birliği*) (TOBB), situated in Ankara, administers the resolution of commercial disputes. The Court of Arbitration is the body entrusted with the duty of ensuring that the dispute is resolved by a competent arbitral tribunal in an expedient, safe and just manner.

(2)The Istanbul Chamber of Commerce (*İstanbul Ticaret Odası*) (ITO) operates restrictively; this arbitral institution can solely be activated when at least one of the parties is a member of the ITO, the Istanbul Chamber of Industry, the Istanbul Commodity Exchange or the Maritime Chamber of Commerce of either Istanbul or the Marmara region. If this condition is not met, the application may be accepted by the board of directors of the ITO, at its discretion. ITO arbitration proceedings are regulated in accordance with the Regulation relating to Arbitration, Mediation and Expert-Determination (Regulation). Further, under Article 4 of the Regulation on Fees, the arbitrators' fees are calculated in accordance with the amount in dispute. It is 1% of the amount of dispute for each arbitrator.

Noteworthy is also the Turkey Office of the International Chamber of Commerce, which operates under the supervision and control of the TOBB. This platform provides its members the opportunity to obtain advice regarding arbitrators, and organizes seminars and other events to promote international arbitration.

Finally, it should be noted that the Istanbul Arbitration Centre Draft Law, relating to the establishment and operation of the Istanbul Arbitration Centre (IAC), was submitted for approval to the Turkish Parliament on 25 March 2013. The Istanbul Arbitration Centre is envisaged to be governed by private stakeholders and to be an autonomous institution subject to private law. Its purpose is to regulate the procedure and the principles regarding the establishment and organization of the activities of the Istanbul Arbitration Centre. The attempt to establish the Centre is a development that is welcomed. There is a need for a centralized and effective arbitration centre in Turkey, and it is hoped that the Istanbul Arbitration Centre will fulfil this role.

P 13

§1.04 CONCLUSION

Turkey's legislative advances ought to be praised; the enactment of the Mediation Law and the adoption of the Istanbul Arbitration Centre Draft Law will clear up the legal infrastructure regarding arbitration and ADRs in Turkey. Nevertheless, more sound arbitration culture is to be advocated within the country. Arbitration law must be taught to every law student as part of courses on civil procedure, if not separately. Further, seminars, lectures and related events should more regularly be held to ensure that practitioners too are made aware of the attractiveness of arbitration as an ADR mechanism so as to advise their clients accordingly. Such endeavours would no doubt have a positive impact on the national courts' case-load and approach to arbitration. We hope that the IAC, when established, will address these issues adequately in order to ensure a bright future for the arbitration practice in Turkey.

P 13

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