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**Bennar Balkaya\***

Balkaya & Balkaya  
Attorneys at Law,  
Istanbul  
bennar@balkaya.av.tr

# Turkey

## Enforcement of foreign arbitral awards in Turkey

**T**his article provides a brief historical overview of international arbitration in Turkey and focuses on the enforcement of foreign arbitral awards.

### The recognition and regulation of international arbitration in Turkey over the last 60 years

#### *Early reliance on domestic standards and use of foreign judgments recognition principles*

The term ‘arbitration’ first appeared in the Code of Civil Procedure (CCP)<sup>1</sup> (Articles 516-536), which governs domestic, voluntary arbitration. The CCP, however, does not govern international arbitrations and only applies to domestic arbitrations taking place in Turkey without any foreign element. Furthermore, the CCP does not contain any provisions regarding the enforcement of foreign arbitral awards.

Until 1949, the Turkish Court of Appeal did not see fit to distinguish between domestic and foreign arbitral awards and held the view that all arbitral awards had to be enforced according to the CCP. The Court of Appeal subsequently changed its approach, holding that foreign arbitral awards had to be enforced according to the procedure applicable to foreign judgments.<sup>2</sup>

#### *Adoption of the Private International Law and Procedural Law in 1982*

Then, in 1982, Law no 2675,<sup>3</sup> the Private International Law and Procedural Law Act

(PILA), which contains provisions on the recognition and enforcement of foreign arbitral awards, came into force.

Turkey is a party to the 1961 European Convention on International Commercial Arbitration (Geneva Convention)<sup>4</sup> and the 1958 New York Convention,<sup>5</sup> which was ratified on 2 July 1992 and entered into force on 30 September 1992. Turkey also ratified many bilateral and multilateral treaties and conventions, such as the ICSID Convention and the Energy Charter Treaty, which have their own specific regimes for enforcement and are not discussed in the present article.

Significantly, due to the increase of investments and development of the build-operate-transfer models, the importance of resolving disputes by arbitration increased, leading in 1999-2000 to the amendments of the Constitution<sup>6</sup> and other relevant administrative acts.<sup>7</sup>

#### *Adoption of the International Arbitration Law in 2001*

Also, addressing the need for a legal regime on international arbitration, Turkey enacted the International Arbitration Law, no 4686 (IAL),<sup>8</sup> which entered into force in 2001. The IAL is based mainly on the UNCITRAL Model Law on International Commercial Arbitration and the 12th Chapter of the Swiss Federal Statute on Private International Law. However, the ‘Terms of Reference’ concept is influenced by the Rules of Arbitration of the International Chamber of Commerce.

The IAL applies to disputes which have a

'foreign element' (eg, a foreign party) and designate Turkey as the place of arbitration, or to disputes in which the provisions of this Act are designated by the parties or the arbitrator or arbitral tribunal.<sup>9</sup>

The IAL provides a brand new legal framework in Turkey for international arbitration proceedings, with a view to attracting foreign investors. It regulates the procedures and principles of international arbitration in Turkey and stipulates that unless otherwise provided in this Law, the provisions of the CCP shall not be applied to international arbitration proceedings.<sup>10</sup>

### Enforcement of foreign arbitral awards

#### *Enforcement of non-New York Convention awards under the PILA*

Arbitral awards made in countries that are not parties to the New York Convention are enforced under articles 60-62 of the PILA. However, due to the fact that the New York Convention is widely accepted throughout the world, the PILA is seldom applied in practice. Furthermore, Article 1 of this Act stipulates that the provisions of international conventions to which the Republic of Turkey is a signatory are reserved, meaning that the PILA gives priority to international conventions, such as the New York Convention, with regards to the enforcement of foreign arbitral awards.

With a few amendments along the way, the PILA is now consistent with the New York Convention. For instance, while it previously stipulated that only final and executable foreign arbitral awards were subject to enforcement,<sup>11</sup> the current version of the PILA provides that final and executable or 'binding' foreign arbitral awards may be subject to enforcement.<sup>12</sup> There is no need for double *exequatur*.

Nor is there a requirement of reciprocity. The PILA once required reciprocity, ie, a de facto practice or a provision of law enabling the enforcement of final decisions rendered by Turkish courts in the other state.<sup>13</sup> The new PILA abrogated this requirement to bring the Turkish enforcement in line with the New York Convention.

Under Article 60 of the PILA, a petition for enforcement of a foreign arbitral award must be filed with the Civil Court of First Instance mutually designated by the parties. Failing such agreement, the competent court shall be the court at the domicile of the person in

Turkey against whom the award is rendered, or in the absence of the domicile, the person's place of habitual residence, and in the absence thereof, the court at the location of the property subject to execution.

Article 61 of the PILA stipulates that a party requesting enforcement of a foreign award shall attach the original or duly certified copy of the arbitration agreement or arbitration clause to its request, as well as the original or duly certified copy of the final and executable or binding arbitral award and the translations of those documents.

Article 62 provides the grounds for refusal of enforcement, which are similar to those of the New York Convention.<sup>14</sup>

#### *Enforcement of New York Convention awards*

Turkey made two reservations to the Convention. The Convention only applies to the recognition and enforcement of awards made in the territory of another contracting state, and only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under Turkish law.

Article 1(1) of the New York Convention stipulates that '...It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'. Accordingly, arbitral awards having a foreign element in Turkey with respect to Article 2 of the IAL can also be enforced in Turkey according to the New York Convention.

Article 5 of the New York Convention sets out the grounds on which a state court may refuse to enforce an arbitral award. The grounds set out in the first part have to be established by the party against whom the enforcement is invoked and the second part sets forth the grounds that may be invoked by the court on its own motion.

### Selected enforcement issues

In this section, important precedents of the Turkish Court of Appeal on the enforcement of foreign arbitral awards will be examined.

#### *No enforcement of award under invalid arbitration agreement*

Pursuant to Article 2(2) of the New York Convention, the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or

contained in an exchange of letters or telegrams.

The Turkish Court of Appeal has found that the validity of the agreement to arbitrate must be met in order to request the enforcement and therefore has refused to enforce the award, where the buyer did not sign the relevant contract and the existence of the arbitration agreement did not meet the conditions stipulated under Article 2(2).<sup>15</sup>

Regarding the validity of the arbitration agreement, another important issue in practice is whether a non-signatory is bound by an arbitration agreement that is incorporated by reference. The issue also arises in situations where a party to the arbitration agreement has entered into a separate contract with a non-signatory incorporating the existing arbitration clause, especially where there is no specific reference to the standard contracts. The Turkish Court of Appeal (19th Civil Chamber) made a ruling on this issue which was later approved by the General Assembly of the Civil Chambers (the 'General Assembly').<sup>16</sup> More specifically, it ruled that as there was a general reference to the terms of the Federation of Oils, Seeds and Fats Associations Ltd. ('FOSFA') standard contract in the sales contracts, the parties were bound by the arbitration clause contained in the standard contract.

### *Whether the parties' choice of Turkish Law in their agreement includes the Turkish Civil Procedural Rules*

The Turkish Court of Appeal has rendered conflicting rulings on the issue whether the adoption of Turkish law as the governing law under the contract includes Turkish civil procedural rules.

One case involved an arbitration venued in Zurich, Switzerland, between a Turkish and a Finnish company. The relevant arbitration clause provided that the disputes would be settled under the ICC Rules by three arbitrators and Turkish codes in force would apply to the dispute. In view of the fact that the agreement did not contain a specific reference to Turkish procedural laws, the arbitral tribunal applied Swiss procedural law to the proceedings and Turkish substantive law on the merits. The Turkish Court of Appeal (15th Civil Chamber) denied the enforcement of the award. Upon objection by the defendant, the General Assembly ruled that a general reference to the 'Turkish codes in force' covered both the substantive laws and procedural laws.<sup>17</sup> As a result, the General Assembly denied the enforcement on the

ground that the arbitral tribunal had wrongly applied Swiss procedural law.

A later case reached the opposite result. The 11th Civil Chamber of the Turkish Court of Appeal, in a case involving an ICC arbitration, where the parties had agreed that the contract would be subject to Turkish laws, found the lack of specific reference to Turkish Procedural Law to be conclusive and that the ICC Rules applied.<sup>18</sup>

### Conclusion

International arbitration has a bright future in Turkey. With its new international arbitration law based on the UNCITRAL Model Law – the new Turkish PILA – and with the wide acceptance of international conventions such as the New York Convention, the ICSID Convention and the Energy Treaty, international arbitration is becoming increasingly popular and the Turkish courts are growing more familiar with arbitration, particularly in the context of the growing number of enforcement cases.

The more importance Turkey gives to harmonised legal principles, the more confidence this will provide for companies seeking to safeguard their commercial interests and the more attractive Turkey will become for foreign businesses and investors. Turkey is uniquely positioned to become a distinguished centre for international arbitration.

### Notes

- \* Bennar Balkaya, LL M, MCI Arb, is a member of Istanbul Bar and partner of Balkaya & Balkaya Attorneys at Law based in Istanbul. She specialises in international arbitration, commercial litigation and international trade and is the regional coordinating committee member of the ICC YAF Africa, Middle East and Turkey Chapter, and a committee member of the CI Arb European Branch.
- 1 Official Gazette (OG) dated (dd) 2, 3, 4 July 1927, no 622, 623, 624.
- 2 Court of Appeal, General Assembly Decision no E126 and K109, and the Decision of the 15th Civil Chamber no 1617-1052 (the '*Keban Decision*').
- 3 OG, dd 22 May 1982, no 17701.
- 4 OG, dd 23 September 1991, no 21000.
- 5 OG, dd 25 September 1991, no 21002.
- 6 In particular, the Constitution was amended so as to provide that disputes arising out of concession agreements for public services in which the Turkish state is one of the parties would be resolved by arbitration, and that the powers of the Council of State (which is the highest instance for reviewing decisions and judgments rendered by administrative courts) would be limited to giving its opinion within two months on draft legislation, conditions and



- contracts under which concessions for public services are granted (Constitution, articles 125 and 155 (amended by Law no 4446, Articles 2 and 3). For the amendments, see OG, dd 14 August 1999, no 23786.
- 7 OG, dd 21 December 1999, no 23913, OG, dd 22 December 1999, no 23914, OG, dd 22 January 2000, no 23941.
- 8 OG, dd 05 July 2001, no 24453.
- 9 IAL, Aarticle 1.
- 10 IAL, Article 17.
- 11 See Law no 2675, Article 43.
- 12 See Law no 5718 (OG, dd 12 December 2007, no 27 November 2007), Article 60.
- 13 See Law no 2675, Article 44 (2) and Article 38 (a).
- 14 It should be noted, however, that while Article 5 of the New York Convention provides that the enforcement 'may' be refused where a ground for refusing enforcement exists, Article 62 of the PILA provides that the court 'has to' deny enforcement in such a case.
- 15 Decision of the 19th Civil Chamber no 1999/7119E, 2000/1342K.
- 16 Decision of the 19th Civil Chamber no 1996/9619E, 1997/4669K, Decision of the General Assembly no 1998/19256E., 1998/279K. The General Assembly is the highest authority which examines conflicting decisions of the Civil Chambers and which also examines the civil courts' 'decisions to reinstate' against civil chambers' 'decisions of reversal'.
- 17 Decision of the General Assembly no 1999/15-235E, 1999/273K.
- 18 Decision of the 11th Civil Chamber no 2000/3992E, 2000/4704K.
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