

International Arbitration Regime in Turkey

Introduction

The Directorate General of Criminal Records and Statistics announced the judicial records for 2016; and according to these records, each judge was responsible for 725 cases and average day spent by a judge for finalizing an action was 451 days. As these numbers increase year by year, the tendency to solve the disputes outside the litigation before the courts increases as well. Alternative dispute resolutions (“ADR”) as the alternative ways to litigation before the courts, have more advantages as parties may solve their disputes with minimum time and cost. It is possible to resolve any dispute through arbitration, mediation and conciliation as the methods of ADR in Turkey.

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Arbitration in Turkey is mainly regulated under the Turkish Civil Procedure Code (“TCPC”) No. 6100 and the Turkish International Arbitration Code (“Code”) No. 4686. For the disputes in which Turkey is determined as the place of arbitration and which do not contain an element of foreignness, TCPC shall be applied. The Code, on the other hand, shall be applied to the disputes in which Turkey is determined as the place of arbitration and which contain an element of foreignness.

Purpose and Scope

As specified under the Code, the purpose of the Code is to determine the procedures and principles of international

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arbitration. The Code shall be applied to the disputes which contain an element of foreignness and for which the place of arbitration is determined as Turkey. In addition, provisions of Code may be applied to the dispute, if parties, arbitrator or arbitration tribunal prefer to do so.

In case any of the following circumstances exists, it shall be deemed that the dispute has an element of foreignness.

- Domiciles, or habitual residences or business addresses of the parties of arbitration agreement are in different states,
- Domiciles or habitual residences or business addresses of the parties are different than;
 - the place of arbitration determined under arbitration agreement, or
 - the place where substantial liabilities of an agreement shall be performed or the place with which the dispute has the closest connection among others.
- At least one of the shareholders of a company, being one of the parties of the main agreement including arbitration clause, brings foreign capital to Turkey in respect of the code of encouragement of foreign capital or the necessity to conclude a loan and/or a guarantee agreement to provide foreign capital for the purpose of executing the said agreement, or
- Main agreement, constituting the basis of arbitration agreement, sets forth the movement of capital or goods from one country to another.

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Arbitration Agreement

Under relevant provision of the Code, arbitration agreement is defined as an agreement by which parties agree to settle disputes, through arbitration, which have arisen or may arise from their legal relationship whether it is contractual or not.

Arbitration agreement must be in writing. It is stipulated as the condition for the validity of the agreement. In addition, arbitration agreement shall be deemed to have been concluded in writing in case there is, (i) a document signed by parties or (ii) an agreement is concluded by method of exchange of letters, telegram, fax, telex

and other means of telecommunication or electronic forms; (iii) no objection raised by the defendant party to plaintiff claim regarding existence of arbitration agreement.

The parties may include an arbitration clause in their main agreement or they may sign a separate arbitration agreement by referring to the main agreement.

It is important to state that parties' consent regarding choice of arbitration must be explicit and certain. In other words, there must be no doubt about parties' consent that they choose to settle their dispute through arbitration. Thus, in case parties authorize both arbitration and the courts to resolve their dispute, arbitration agreement or clause shall be deemed invalid.

Arbitration Objection Before the Courts

In case one of the parties commences an action before the courts despite a valid arbitration agreement or clause, the defendant party may raise an objection based on the existence of an arbitration agreement or clause between each other as a preliminary objection. As it is a preliminary objection, it shall be raised through the response petition at the latest. In case the court deems such an objection proper, the said action shall be dismissed.

In respect of TCPC, the courts shall not *ex officio* consider any arbitration agreement or clause unless the defendant party raises an objection. Thus, in case one of the parties commences action although there is a valid arbitration agreement or clause, defendant party should raise an objection pertaining thereto; otherwise, it shall be deemed that both parties agree on the court's jurisdiction.

Objection to Jurisdiction of Arbitral Tribunal

In case an objection is raised as regards the incompetency of the arbitrator or the arbitral tribunal; the arbitrator or arbitral tribunal may decide on its own jurisdiction (Principle of Competence – Competence). The arbitrator or arbitral tribunal may reject such an objection depending on the existence and validity of an arbitration agreement. The objection regarding the incompetency of the arbitrator or arbitral tribunal shall be raised through the response

petition at the latest. Arbitrator or arbitral tribunal shall evaluate and rule on objection regarding the incompetency as a preliminary question.

Appointment of Arbitrator or Arbitral Tribunal

Parties have the right to determine the number of arbitrators; but in any case, the number shall be odd. In case the number of arbitrators is not determined by the parties, three arbitrators shall be appointed as a rule.

Parties may determine the conditions for the appointment of arbitrators. Otherwise, conditions defined under the Code shall be applied. Conditions stipulated under the Code are as follows:

- Only real persons may be appointed as arbitrator.
- In case parties may not/cannot agree to appoint sole arbitrator, upon request of one of the parties, civil court of first instance shall appoint the arbitrator.
- In case parties agree for the appointment of three arbitrators, each party shall appoint one arbitrator and two arbitrators shall appoint the third arbitrator. If one of the parties fails to appoint arbitrator within 30 days starting from other party's request or two arbitrators fail to determine the third arbitrator, upon request of one of the parties, civil court of first instance shall appoint the third arbitrator. Third arbitrator shall be the chairman of the arbitral tribunal.
- In case parties agree to appoint more than three arbitrators, parties shall appoint equal number of arbitrators in respect of the procedure stated above.

Arbitration Procedure

Procedural Rules

Parties are entitled to determine procedural rules within the scope of mandatory provisions of the Code. In addition, parties may determine procedural rules by addressing any law, rules of international or institutional arbitration. In case procedural rules are not determined by parties; the arbitrator

or arbitral tribunal shall apply provisions of the Code through arbitration.

Place of Arbitration

Parties or an arbitration institution which is appointed by parties, are entitled to choose the place of arbitration. If the place of arbitration is not determined, the arbitrator or arbitral tribunal are entitled to choose the place of arbitration.

The arbitrator or arbitral tribunal may meet in another place other than the place of arbitration, provided that parties have been informed in advance.

Commencement Date and Term of Arbitration

Unless otherwise specified by parties, an arbitration commences on the date that parties apply to either the court or institution or organization for the appointment of arbitrators. In case each party is entitled to appoint their arbitrators in accordance with their agreement, arbitration commences on the date that notification of the plaintiff regarding the appointment of his arbitrator is made to the other party. Additionally, in case arbitrators are already determined under an agreement concluded between parties, arbitration commences on the date that request for arbitration is received by the other party.

Unless otherwise agreed by parties; the arbitrator or arbitral tribunal shall render the award within one year starting from the date of (i) the appointment of the sole arbitrator or (ii) the first minutes of meeting of the arbitral tribunal is taken. The parties may extend the term of arbitration with their mutual consent. Otherwise, one of the parties may apply to the civil court of first instance to request an extension of the term.

Language of Arbitration

The language of arbitration shall be Turkish or any other official language of countries recognized by the Republic of Turkey. In case the language to be used in arbitration is not

determined by parties, the arbitrator or arbitral tribunal are entitled to choose.

Arbitration Award

The arbitrator or arbitral tribunal render awards by majority of their members unless otherwise agreed by parties. The arbitrator or arbitral tribunal shall state in the award names/titles, addresses of parties and their representatives or attorneys if any; legal reasons and grounds of the award, compensation amount if there is any demand for compensation; place of arbitration and award date; names, signatures and information regarding the right to commence action for setting aside the award.

Either party may apply to the arbitrator or arbitral tribunal for the correction of errors or interpretation of the award within 30 days from the date of notification of the award. In case the arbitrator or arbitral tribunal accepts such a request, the correction or interpretation shall be made within 30 days. In addition, the arbitrator or arbitral tribunal may *ex officio* correct errors or make interpretations within 30 days.

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Challenge of Awards

The Code defines the conditions to challenge arbitral awards. Either party has right to request to set aside the award from an authorized civil court of first instance within 30 days of notification of the award. Reasons of a request for setting aside the award are set forth under the Code.

The party who requests to set aside the award must prove any of the following situations:

- Invalidity of the arbitration agreement, or
- The procedure of the appointment of the arbitrator or arbitral tribunal has not been applied in accordance with the procedure accepted by parties or specified under Code, or
- Failure to render the arbitral award within the term of arbitration, or

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- Unlawful decision of the arbitrator or arbitral tribunal regarding their competency or incompetency, or
- Rendering a decision on an issue which is beyond the subject matter of the arbitration agreement or failure to render decision for all claims or excess of powers, or
- Arbitral procedure has not been conducted in accordance with the procedures determined by parties and provisions of the Code -in case procedure is not determined by parties- provided that this situation affects the essence of the award, or
- Failure to comply with the principle of equality of parties.

The Court itself may set aside the arbitral award in case below situations are determined;

- The subject matter of the dispute is not arbitrable in respect of Turkish Laws, or
- The award is in conflict with the public order.

Commencing an action to set aside the award automatically suspends the enforcement of the award. Parties may appeal the court decision given upon the request to set aside the award in respect of provisions of TCPC.

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