**CASE STUDY:**
**INTERNATIONAL ARBITRATION FRAMEWORK AND PRACTICE IN TURKEY**
**by**
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## I. INTERNATIONAL ARBITRATION FRAMEWORK IN TURKEY

The term "arbitration" first appeared in the Code of Civil Procedure ("CCP") 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, but is a modern law based on the UNCITRAL Model Law.

In 1982, the Private International Law and Procedural Law Act ("PILA"), which contains provisions on the recognition and enforcement of foreign arbitral awards, came into force. The PILA was then amended in 2007.

Turkey is a party to the 1961 European Convention on International Commercial Arbitration ("Geneva Convention") and the 1958 New York Convention. Turkey also ratified many bilateral and multilateral treaties and conventions, such as the Convention on Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).

Due to the increase of investments and development of the build-operate-transfer models, the importance of resolving disputes by arbitration increased, and it was then the Constitution was amended in 1999 in parallel to this need and also several other amendments were made to the relevant administrative acts. Accordingly, it was agreed that the disputes arising out of the concession agreements for public services, where Turkish state is one of the parties, would be resolved by arbitration and the powers of the Council of State (which is the highest instance for reviewing decisions and judgements rendered by administrative courts) would be limited to giving its opinion within two months of time on draft legislation, conditions and contracts under which concessions for public services are granted.

Also, addressing the need for a legal regime on international arbitration, Turkey enacted the International Arbitration Law ("IAL"), 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.

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The IAL provides a brand new legal framework in Turkey for international arbitration proceedings, with a view to attracting foreign investors. The main features of this Law are as follows:

The IAL applies to disputes which have a "foreign element" (e.g., 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.

If an action is brought before the court in a matter, which is the subject of an arbitration agreement, the respondent may make an objection as to the arbitration.

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure and for a court to grant such measure.

The parties are free to determine the number of arbitrators. However, the number shall be odd. Arbitrators must be impartial and independent.

Subject to the mandatory provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. They may make a reference to any law or international or institutional arbitration rules. If there is no such agreement between the parties, the arbitral tribunal shall conduct the proceedings in accordance with the provisions of this Law.

The parties are free to determine the place of arbitration and the language to be used.

Unless otherwise agreed by the parties, arbitration commences on the date on which a request for the appointment of arbitrators is made to the civil court of first instance or to a person or an institution.

Unless otherwise agreed by the parties, an award shall be rendered within one year, which -in the case of a sole arbitrator- is from the date of his appointment or, in the case a tribunal of three, from the date when the minutes of the tribunal's first meeting are kept.

Recourse to a court against an arbitral award may be made only by an application for setting aside the award. Such recourse shall be made before the civil court of first instance.

## II. THE ROLE OF TURKEY AS A SEAT OF INTERNATIONAL ARBITRATION

Today Turkey is the 18$^{th}$ largest economy in the world and 7$^{th}$ largest economy in Europe with a GDP of about 800 billion dollars in 2014. With the 2023 vision of economy, which is a list of goals released by the Turkish government, to coincide with the centenary of the Republic of Turkey in 2023, Turkey aims to count itself among the world's top 10 economies and in that regard tripled its investment over the last decade.

As reported by the Turkish Ministry of Foreign Affairs in its economic outlook of Turkey report, Turkey's successful economic performance, young population, qualified and competitive labor force, liberal and reformist investment climate, highly developed infrastructure, advantageous geographic position, low tax rates and incentives and large domestic market, as well as customs union with the EU since 1996 provide ample opportunities for foreign investors. What makes Turkey unique in terms of trade and foreign direct investment is that it is a gateway to Europe, the Middle East, North Africa and Central Asia. Indeed, a four-hour flight from Istanbul gives access to more than 50 countries and a vast market that accounts for one fourth of the world economy. Besides, access to Turkey is efficient and easy, where advance visa application is usually not required.

Turkey is actually not only a gateway to these regions but also a point of connection between Western and Eastern cultures, which is appealing to foreign parties within the region, especially for the resolution of the disputes between Western and Eastern states. The importance of geographical advantage with respect to selection of the seat for international arbitration has also been the case for instance for Stockholm, Singapore, Dubai and such.

Turkish companies are highly involved in major international construction, energy, transport projects, which attracts foreign companies to build strong relations with Turkey. Not surprisingly, settlement of commercial disputes by arbitration in these major international projects and international trade is widely used. This also provides a good environment for Turkey to promote itself as a seat of international arbitration.

Turkey is signatory to major international conventions related to arbitration and is a model law country with modern arbitration framework. Besides that, there are certain arbitration centers established by the major chambers of commerce, such as the Bursa Chamber of Commerce Arbitration and Mediation Center (BTSOTAM), Arbitration Center of the Union of Chambers and Commodity Exchanges of Turkey, Istanbul Chamber of Commerce Arbitration Center, as well as the Istanbul Arbitration Center.

According to the 2010 International Arbitration Survey on the choices in international arbitration conducted by the School of International Arbitration at Queen Mary University, formal legal infrastructure (such as the national arbitration law, neutrality and impartiality of legal system and such), law governing the substance of the dispute and convenience (such as location, culture) were the top three influencers on the choice of the seat of arbitration. All in all, because of its geographic location, its role as a regional and global player, dynamic and developed industry, modern legislations and existence of arbitration centers, Turkey should be the preferred seat for international arbitration.

## III. EFFORTS TO DEVELOP INTERNATIONAL ARBITRATION IN TURKEY

### Cooperation agreements with international organizations for accredited ADR trainings:

In May 2015, an Arbitration and Mediation Center under the leadership of the Bursa Chamber of Commerce and Industry (BTSOTAM) was established. As such, BTSOTAM is unique as being the first arbitration and mediation center established within the chambers of commerce and industry in Turkey. The city of Bursa represents an active and leading force in the development of the Turkish economy, as the 'locomotive of Turkish industry' and has a thriving Chamber of Commerce with almost 40,000 active members. Upon its establishment, the center first aimed to promote the use of ADR by way of organizing trainings both on arbitration and mediation. The reason behind this initiative was due to the lack of any educational institution in Turkey providing training specifically on arbitration. With regards to mediation, mediation training in Turkey is offered by the institutions approved by the Turkish Ministry of Justice, given that only those with legal background can become accredited mediators by law. However, individuals who want to become professionals in arbitration can only attend short courses or trainings on certain aspects of arbitration or they opt for writing their thesis on arbitration during their post graduate studies due to the lack of an institution offering accredited training on arbitration. Therefore BTSOTAM wanted to fill this gap and with that in mind, last year, a collaboration agreement was signed between the Chartered Institute of Arbitrators (CIArb), BTSOTAM and Uludağ University to promote and develop the education and training of dispute avoidance and dispute resolution techniques. CIArb is a not-for-profit, UK registered charity and provides a wide range of services and support to members and others involved in alternative dispute resolution (ADR), and offer the only globally recognised professional qualifications through its accredited trainings.

Under the agreement signed in May 2016, BTSOTAM and Uludağ University undertook the training and education of judiciary; practitioners and other interested parties within Turkey in the field of ADR so that those participating are fully trained within the field of arbitration and eligible to become members of CIArb. Thus, BTSOTAM and the Uludağ University became the contact point and subject matter experts for other similar institutions within Turkey with respect to CIArb accredited trainings. And for the first time in CIArb's history, it was agreed that the trainings would also be delivered in Turkish so that those who are not proficient in English, but eager to become experienced in alternative dispute resolution methods, would be able to take the trainings in their mother tongue. The aim was also to reach practitioners not only from legal background but also from other fields. Thus, trainings were organized for lawyers, judiciary, academicians and financial advisors, which were all very well attended. Advanced level of training with further modules, including award writing course, will follow in due course.

Raising the awareness to ADR is not only achieved by organizing trainings for sure. The culture of resolving disputes through ADR methods should be spread to large mass of people, *i.e.* we need to ensure that the parties in dispute, their legal representatives and the arbitrators/mediators/judges adopt and make us of these alternative dispute resolution methods effectively. For instance, in order to be a role model and to encourage others to do so, Uludağ University in Bursa decided to include ADR clauses in their agreements as the dispute resolution method instead of litigation. Also one of the municipalities in Bursa resolved a major dispute by mediation and a major textile company in Bursa resolved its dispute with more than 200 of its employees through mediation. By this way a major dispute was resolved with all the employees and in one day. These institutions and the company were then rewarded by the Bursa Chamber of Commerce as the contributors to work peace. You cannot make others believe in you if you do not believe in what you are doing. When esteemed institutions make use of ADR methods, this serves as a model to the community and as a result the awareness to ADR is raised.

**Identification and resolution of the problems in practice:**

Although there are positive developments in the field of ADR in Turkey, there are also certain problems faced in practice, but thanks to the efforts of the local institutions, these problems have either been recently resolved or are yet to be resolved in the very near future.

One of them is the high fees applied to the enforcement proceedings. Under the Turkish Law on Fees, a court filing fee equal to approx. % 1.7 of the entire claim amount is payable in advance by the applicants where there is a monetary claim and where the court is to consider the merits of the case. In other cases a nominal fixed fee of approx.10 USD is payable to the court. According to the New York Convention, there should be no examination on the merits during the enforcement proceedings and as such nominal fixed fee should have been payable given that the courts would not consider the merits of the case. However it was not clear from the Turkish Law on Fees whether a percentage or nominal fixed fee was payable for the enforcement proceedings on the enforcement of arbitral awards and thus the Turkish courts had differing practices. Some courts required payment of a nominal fixed fee, whereas others required payment of a fee equal to a percentage of the claim.

This ambiguity in practice caused major problems with respect to enforcement. Amongst others, recently the officials from the Bursa Chamber of Commerce had a meeting with the Turkish Minister of Justice to draw their attention to this problem, which received complaints from the practitioners for long time and explained why there was the need for the waiver of high fees on enforcement proceedings. The Ministry considered the requests and complaints of the local institutions and the practitioners and accordingly amendment to the Law on Fees came into force on 4 October 2016 for the waiver of the percentage fee applied to the enforcement proceedings. This shows the importance of the efforts of the local institutions and practitioners in drawing the attention of the politicians and

judiciary to structural problems and how these institutions such as the chambers of commerce or arbitration centers can influence the choices of the political authorities.

Another problem faced in practice, which is yet to be resolved, is the need for a special circuit at the Turkish Court of Appeal for arbitration related cases. Currently there is no such specialized circuit at the high court and this sometimes leads to contradictory decisions of the Court of Appeal with respect to the enforcement and annulment cases. Besides that, annulment action can be brought against an arbitral award at the courts of first instance, but the decision rendered by the courts of first instance in the action of annulment is subject to appeal. This also raises complaints in practice and it is requested by the local institutions and practitioners that the competent authority for annulment actions would be the Court of Appeal instead of the courts of first instance, again a special circuit is assigned for annulment cases and the decision rendered by the Court of Appeal would be final. Hopefully these problems will soon be resolved and Turkey will have a more arbitration friendly environment.

**The need for judicial training in ADR:**

In relation to the identification and resolution of the problems in practice, the need for judicial training is also highly important in order to make sure that the judiciary is thoroughly conversant with ADR law and framework, in particular with respect to the enforcement and annulment cases.

For instance, public policy considerations comprise an undefined area of Turkish law. A number of issues may be determined to be against Turkish public policy and, as such, would preclude successful enforcement of a foreign arbitral award, where some issues may meet the approval of enforcement without facing the notion of public policy. Public policy in the New York Convention refers to "international public policy" rather than "domestic". However narrow interpretation of public policy is not in each case adopted by the Turkish Court of Appeal. The notion of public policy is rather regarded as vague and subjective under Turkish law and the judges have a wide discretion in terms of interpretation of public policy. Based on the decision of the Constitutional Court stating that "*...the power granted to the legislator can under no circumstances be used to undermine or exclude the public policy.*", this wide discretion granted to the judges is with limitations. Nevertheless, one cannot define itself as a truly arbitration friendly country if there is a growing number of cases where an arbitral award is annulled or its enforcement is refused frequently due to public policy or if the courts adopt different approaches. Thus the importance of the need for judicial training comes into prominence at this point, because by this way the number of contradictory decisions in enforcement and annulment cases will significantly drop down, which in return will increase predictability.

## IV. CONCLUSION

Despite some conflicting rulings of the Turkish courts, I believe international arbitration has a bright future in Turkey. With its international arbitration law based on the UNCITRAL Model Law, newly established arbitration and mediation centers and with the wide acceptance of international conventions such as the New York Convention and bilateral agreements, international arbitration is becoming increasingly popular and the Turkish courts are growing to be more familiar with arbitration, particularly in the context of the growing number of enforcement cases.

The more importance Turkey gives to harmonized 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 center for international arbitration.