

**INTERNATIONAL COMMERCIAL ARBITRATION FOR FOREIGN  
INVESTORS: TURKISH CASE**

**Pınar Karacan Baklaci<sup>\*</sup>, Esen Akıntürk<sup>\*\*</sup>**

**ABSTRACT**

When foreign investors consider investment, the possibility of international commercial arbitration and the recognition and enforcement of foreign arbitral awards in the home country where the investment will take place can be a major factor to effect investment decision. This article aims to discuss the Turkish legal framework, domestic and international, of international commercial arbitration for foreign investors willing to invest in Turkey. In this study, subsequent to the definition of investment and investors in the Turkish law, recognition and enforcement of foreign awards, appeal and setting aside of awards and the possibility of interim measures will be discussed. Special emphasis will be given to the possibility of international commercial arbitration for Build Operate and Transfer Agreements where most of the investments occur.

**Keywords:** *International Commercial Arbitration, Turkish International Arbitration Act, Foreign Investors*

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**INTRODUCTION**

Arbitration is an alternative way to the judicial settlement of disputes and is the most preferred dispute settlement method for international commercial disputes especially for foreign investors.

For the encouragement and the legal protection of foreign investments, the settlement of investment disputes by international commercial arbitration has an important role.

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<sup>\*</sup> Dokuz Eylul University, Faculty of Business, Department of International Relations-International Law, Izmir, Turkey, E-mail: pinar.karacan@deu.edu

<sup>\*\*</sup> Dokuz Eylul University, Faculty of Business, Department of International Relations-International Law, Izmir, Turkey, E-mail: esen.akinturk@deu.edu.tr

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When foreign investors consider investment, the possibility of international commercial arbitration and the recognition and enforcement of foreign arbitral awards in the home country where the investment will take place can be a major factor to effect investment decision.

In this paper we will first define foreign investors and foreign investment, later will discuss the legal framework, both domestic and international, of international commercial arbitration in Turkey. A sample of important international agreements related to foreign investment that have significant importance for international commercial arbitration will be covered. Later due to the high usage of the Build Operate and Transfer (BOT) agreements by foreign investors these agreements with the historical legal development and the possibility of international commercial arbitration for these agreements will be analyzed. Lastly, the legal remedies against international arbitration awards and limits of intervention, in other words the watch outs for foreign investors, such as setting aside of these decisions or appeal, recognition and enforcement of foreign arbitral awards, interim measures and objection to arbitration will be analyzed.

### **FOREIGN INVESTORS AND FOREIGN INVESTMENT**

It is important to define "foreign investor" in Turkey. Turkey adopted Foreign Direct Investment Act on June 2003.<sup>1</sup> Under Foreign Direct Investment Act article 2(a) the term "foreign investor" used in this Law shall have the following meaning:

- "1) Real persons who possess foreign nationality and Turkish nationals resident abroad, and*
- 2) Foreign legal entities established under the laws of foreign countries and international institutions, who make foreign direct investment in Turkey."*

And "foreign direct investment" is:

- i) Establishing a new company or branch of a foreign company by foreign investor,*
- ii) Share acquisitions of a company (any percentage of shares acquired outside the stock exchange or 10 percent or more of the shares or voting power of a company acquired through the stock*

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<sup>1</sup> Foreign Direct Investment Act, No. 4875, Official Gazette, 17.06.2003, No. 25141. An English version of the Foreign Direct Investment Act available at: <<http://www.treasury.gov.tr/irj/go/km/docs/documents/Treasury%20Web/Legislation/Foreign%20Direct%20Investment%20Legislation/FDI%20Law.pdf>>, (10.12.2009).

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*exchange) by means of, but not limited to the following economic assets:*

*1) Assets acquired from abroad by the foreign investor:*

- *Capital in cash in the form of convertible currency bought and sold by the Central Bank of Turkey,*
- *Stocks and bonds of foreign companies (excluding government bonds),*
- *Machinery and equipment,*
- *Industrial and intellectual property rights;*

*2) Assets acquired from Turkey by foreign investor:*

- *Reinvested earnings, revenues, financial claims, or any other investment-related rights of financial value,*
- *Commercial rights for the exploration and extraction of natural resources.*

International agreements also give their own definitions.<sup>2</sup>

### **INTERNATIONAL LEGISLATION**

There is the domestic legislation such as International Arbitration Act, International Private and Procedural Act, Foreign Direct Investment Act and Court of Cassation decisions relating to international commercial arbitration.

Following part is a brief summary on the existing legislation.

#### **International Arbitration Act**

International Arbitration Act regulates international arbitration. The act was adopted on June 21, 2001 and it entered into force on July 5, 2001.<sup>3</sup> The Turkish International Arbitration Act is based on United Nations Commission on International Trade Law (UNCITRAL) Model Law on

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<sup>2</sup> For example in the Energy Charter Treaty Article 1 (6) defines investment and Article 1 (7) defines investor. Also all the Bilateral Investments Treaties (BITS) have their own definitions for investments and investors. For further discussion look at: Tiryakioğlu, B. (2003).

<sup>3</sup> Turkish International Arbitration Act, No. 4686, Official Gazette, 05.07.2001, No. 24453.

International Commercial Arbitration of 1985 (UNCITRAL Model Law)<sup>4</sup>. But there are also some differences.

The enactment of the International Arbitration Act is a milestone for Turkey's international arbitration development. This act was on Turkey's agenda for many years as its commitment to the International Monetary Fund and the World Bank (Elver, 2004: 453-7).<sup>5</sup>

International Arbitration Act was enacted to liberalize international arbitration legislation. The Act aims to make Turkey an arbitration center, develop international business relations and increase foreign investment and attract foreigners for projects. As will be discussed there has been an increase in foreign involvement in infrastructure projects.

International Arbitration Act applies to disputes containing a foreign element and for which Turkey is determined as the seat of arbitration or for disputes which the parties or the arbitrator or the arbitral tribunal has chosen the provisions of this Law.<sup>6</sup> According to International Arbitration Act the definition of foreign element is very broad (article 2, Dayınlarlı, 2002: 5).

*"The presence of any one of the following circumstances indicates that the dispute contains foreign element and in this case, the arbitration acquires an international character.*

*1. That the domiciles or habitual residences or the place of business of the parties to the arbitration agreement are located in different States;*

*2. That the domiciles or habitual residences or the places of business of the parties are located in a State other than;*

*a) The seat of arbitration in cases where it is specified in the arbitration agreement or determined on the basis of this agreement,*

*b) The place where a significant part of the obligations arising from the main contract shall be performed or the place with which the matter in dispute has the closest connection;*

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<sup>4</sup> UNCITRAL Model Law is designed to assist States in reforming and modernizing their laws on international commercial arbitration procedure. Available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)>, (10.12.2009).

<sup>5</sup> For Turkish International Arbitration Act look at: Akıncı, Z. (2003), Ekşi, N. (2005), Yeşilirmak, A. (2002).

<sup>6</sup> All the articles of the Turkish International Arbitration Act have been translated by Dayınlarlı, K. (2002).

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3. *That at least one of the company partners, who are parties to the main contract forming the basis of the arbitration agreement, have brought foreign capital according to the Legislation of Encouragement of Foreign Capital or that in order to be able to implement this contract, it is required to conclude credit and/or guarantee contracts for the purpose of obtaining capital from abroad;*

4. *That the main contract or the legal relation constituting the basis of the arbitration agreement realizes the transfer of capital or goods from one country to another. The provisions of the Law dated January 1, 2000, no 4501 are reserved."*

International Arbitration Act regulates the procedures and principles regarding international arbitration. The parties are free to agree on the language to be used in the arbitral proceedings.<sup>7</sup> There are provisions on arbitration agreement, arbitrators, objection to arbitrators, responsibility of arbitrators, appointment, challenge, responsibility, termination of mandate and competency of arbitrator or arbitral tribunal; arbitral procedure, recourse against arbitral awards and costs of arbitration.

According to International Arbitration Act parties may agree on rules of procedure, may choose rules of international or institutional arbitration (article 8, Dayınlarlı, 2002: 27). If the parties fail to choose procedure rules this Act will apply. In the arbitral proceedings, the parties may be represented by foreign natural persons or legal entities, but this provision shall not apply to the requests made to the Courts concerning arbitration (article 8, Dayınlarlı, 2002: 27).

The parties can choose the rules of law applicable to the substance of the dispute (article 12, Dayınlarlı, 2002: 42). In the interpretation and the completion of the contractual terms, the commercial customs and usages shall also be taken into consideration (article 12, Dayınlarlı, 2002: 42). If the parties fail to choose an applicable law to the merits the substantive law of the State with the closest connection will apply. The arbitrator or the arbitral tribunal may decide according to "*ex aequo et bono*" or as "*amiable compositeur*" only if the parties have authorized it to do so.

Before this legislation, there was only the Turkish Civil Procedure Act. But there was a gap for foreign arbitration since the Turkish Civil Procedure

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<sup>7</sup> According to the International Arbitration Act, Article 10 (C): "*...the arbitral proceedings may be conducted in Turkish or in an official language of a State recognized by Turkish Republic*".

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Act<sup>8</sup> was for domestic arbitration and not well suited for foreign arbitration. After the enactment of International Arbitration Act unless otherwise provided, the provisions of the Civil Procedure Act will not apply to the subjects governed by International Arbitration Act (article 17(1), Dayınlarlı, 2002: 65).

### **International Private and Procedure Act**

International Private and Procedure Act covers the Turkish conflict of law rules. The Act also regulates the recognition and enforcement of foreign arbitral awards and foreign court decisions.<sup>9</sup>

The scope of the conflict of laws was expanded and some changes were done to the existing provisions on the recognition and enforcement of arbitral awards with the adaptation of the new International Private and Procedure Act (Tekinalp, 2007: 313-341).<sup>10</sup> With the adaptation of this Act the recognition and enforcement of international arbitral awards were brought into conformity with the international agreements.

For recognition and enforcement of foreign awards in addition to the Turkish International Private and Procedure Act provisions there are also international agreements that Turkey is part to, such as the New York Convention for Enforcement of Arbitral Awards as will be discussed.

### **Turkish Foreign Direct Investment Act**

The Foreign Direct Investment Act entered into force on June 17, 2003.<sup>11</sup> This Act aims to regulate the principles to increase foreign direct investments by means of established policies. The objective of this Act is to regulate the principles to encourage foreign direct investments and to protect the rights of foreign investors (article 1). This Act establishes the treatment to be applied to foreign direct investments (Baklaci & Akıntürk, 2008: 231-247).

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<sup>8</sup> Turkish Civil Procedure Act, No. 1086, Official Gazette, 02,03,04.07.1927, No. 622,623,624.

<sup>9</sup> International Private and Procedure Act No. 5718, Official Gazette, 12.02.2007, No. 26728, Articles 50-63.

<sup>10</sup> New International Private and Procedural Act No. 5718. Previous act was Act No. 2675, Official Gazette, 22.05.1982, No. 17701.

<sup>11</sup> Act No. 4875, Official Gazette, 17.06.2003, No. 25141. See English translation text of the Law at <<http://www.treasury.gov.tr/irj/go/km/docs/documents/Treasury%20Web/Legislation/Foreign%20Direct%20Investment%20Legislation/FDI%20Law.pdf>>, (10.12.2009).

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The Act also has a special provision regarding dispute settlement and offers the possibility of international arbitration for foreign investments (article 3(e)):

*"For the settlement of disputes arising from investment agreements subject to private law and investment disputes arising from public service concessions agreements which are concluded with foreign investors, foreign investors can apply either to the authorized local courts, or to national or international arbitration or other means of dispute settlement, provided that the conditions in the related regulations are fulfilled and the parties agree thereon."*

### **Court of Cassation ( *Yargıtay* ) Decisions**

The High Court of Appeals is the last instance for dealing with specific cases prescribed by law. Higher court decisions are important for individual cases. Although there is no stare decisis in Turkey the unified decision of the Court of Cassation (*İçtihatı Birleştirme Kararı-İBK*) are binding. Some important cases will be discussed in the last part.

### **INTERNATIONAL AGREEMENTS RELATED INTERNATIONAL COMMERCIAL ARBITRATION AND FOREIGN INVESTMENT**

In addition to national legislation there are international agreements that Turkey is party to. For example the New York Convention for Enforcement of Arbitral Awards, European Convention on International Commercial Arbitration and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) are important international agreements for international commercial arbitration. There are also international agreements related to foreign investment that have provisions on settlement of international disputes. For example the Energy Charter Treaty (ECT) also has a detailed settlement of disputes provisions. Also many Bilateral Investment Treaties (BITS) that Turkey is party to have dispute settlement provisions. Following part will discuss these international agreements.

### **The New York Convention for Enforcement of Arbitral Awards**

Turkey is party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (also

known as New York Convention). The New York Convention is the most widely recognized convention for enforcement of arbitration awards.<sup>12</sup>

The Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal (article 1(1)). The Convention also apply to arbitral awards that are not domestic awards in the State where their recognition and enforcement are sought.

Turkey ratified the Convention subject to a reservation. Turkey applies the Convention only to recognition and enforcement of awards made in the territory of another contracting State; and to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

### **The European Convention on International Commercial Arbitration**

Turkey is also party to the European Convention on International Commercial Arbitration done at Geneva, 21 April, 1961 (Geneva Convention).<sup>13</sup>

This Convention applies to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States; and to arbitral procedures and awards based on these agreements (article 1).

### **The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)**

Turkey is also party to the ICSID Convention.<sup>14</sup> International Centre for Settlement of Investment Disputes (ICSID) was established under this Convention, which came into force on October 14, 1966.

According to the ICSID Convention ICSID provides facilities for the conciliation and arbitration of disputes between member countries and

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<sup>12</sup> 10.06.1958 (entered into force in Turkey in 1991, ratified by the Law No. 3731, 08.05.1991). For further discussion look at: Ekşi N. (2008).

<sup>13</sup> 21.04.1961 (ratified by Turkey, Law No. 3730, 08.05.1991).

<sup>14</sup> ICSID was established under the auspices of the World Bank 18.03.1965 (ICSID Convention entered into force in Turkey 02.03.1989). For ICSID Convention look at: Official Gazette, 06.12.1988, No. 20011.



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investors who qualify as nationals of other member countries.<sup>15</sup> The fundamental purposes of the Convention are to ensure to attract and encourage foreign investment and act as a special forum for the settlement of investment disputes.

When countries ratify the Convention the Parties' courts are obliged to enforce an ICSID award as a final judgment of its courts.<sup>16</sup> Turkey has two reservations for the Convention.<sup>17</sup> For Turkey ICSID does not have jurisdiction on disputes arising from or related rights on immovables in Turkey where the Turkish courts have exclusive jurisdiction. And Turkey does not consider itself bound by Article 64 of the ICSID Convention. According to the Article 64 any dispute arising between Contracting States concerning the interpretation or application of this Convention, which is not settled by negotiation, shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

## Energy Charter Treaty

Turkey is also party to Energy Charter Treaty (ECT).<sup>18</sup> ECT is a a multilateral treaty sets the legal framework on investment, trade, transit, competition and environment on energy sector. ECT has important dispute settlement provisions. Article 29, 7, 6 and 19 are regarding dispute settlement for trade, transit, competition and environment issues. For settlement of investment disputes there both the investor-state arbitration and state-state arbitration. In case of an investment dispute international arbitration is possible. For example in the ECT it is possible to resolve disputes by the Stockholm Arbitration, UNCITRAL Arbitration Rules or ICSID. Because Turkey is party to this treaty and there are important investment disputes under this Treaty against Turkey<sup>19</sup> it is important to understand the coverage of this treaty.

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<sup>15</sup> ICSID Convention available at <<http://www.worldbank.org/icsid/about/about.htm>>, (10.12.2009).

<sup>16</sup> ICSID article 53-54. Article 53 "*...the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention...*".

<sup>17</sup> Article 1(b)-(c), Official Gazette 02.06.1988, No. 19830.

<sup>18</sup> ECT, Official Gazette, 12.07.2000, No. 24107.

<sup>19</sup> Such as: *Libananco Holdings Co. Limited v. Republic of Turkey* (Case No. ARB/06/8), *Europe Cement Investment and Trade S.A. v. Republic of Turkey* (Case No. ARB (AF)/07/2), *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (Case No. ARB (AF) /06/2).

## **Bilateral Investment Treaties**

According to the United Nations Conference on Trade and Development (UNCTAD) definition bilateral investment treaties (BITS) are agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country.<sup>20</sup>

As a result of the failure of the attempts to have a multilateral agreement on the protection of the foreign investments, the BITS became more important and the number of these treaties has been increased promptly. These treaties cover areas such as scope and definition of investment, establishment, important principles such as national treatment and most favored national treatment, fair and equitable treatment, expropriation and most importantly provisions on dispute settlement procedures, both state-state and investor-state arbitration.

Turkey is party to many BITS. It is important for the investor to be aware of any BITS if available between Turkey and the investor's nation. These agreements mostly have provisions on dispute settlement procedures and most provisions foresee ICSID or UNCITRAL arbitration. Investors might be at more advantageous positions under these agreements.

## **OPERATE AND TRANSFER AGREEMENTS AND THE POSSIBILITY OF INTERNATIONAL COMMERCIAL ARBITRATION**

In this part we will discuss the possibility of international commercial arbitration for foreign investors involved in Build Operate and Transfer (BOT) agreements. BOT agreements are important since many foreign investors are involved in projects such as building dams, electricity industry, road and gas pipelines and these are usually done by BOT agreements. The possibility of international commercial arbitration for these agreements is vital.

The projects that the foreign investors are involved in are mostly done under concession agreements. The possibility of international commercial arbitration for concession agreements has been a big problem for foreigners and Turkey for many years. Eventually the problem has been resolved after a Constitution amendment and enactment of relevant laws.

Turkey aims to encourage BOT projects in order to foster investment in many areas.

For Turkey to be attractive to foreigners arbitration is important. Foreigners want to resolve disputes through international commercial arbitration. However it has not been so easy for the Turkish case. We will

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<sup>20</sup> <[http://www.unctadxi.org/templates/Page\\_\\_\\_\\_1006.aspx](http://www.unctadxi.org/templates/Page____1006.aspx)>, (10.12.2009).

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give a brief historical development of BOTs and international commercial arbitration relationship. There has always been uncertainty whether BOT agreements are commercial contracts or concession agreements. The significance is that if they are commercial contracts than they can be subject to arbitration, however if they are concession agreements they will be subject to the review of higher administrative court, the Council of State (*Danıştay*). Council of State is the highest administrative court and has the final word in these disputes.

It was an obstacle for foreign companies to find funding without the possibility of international arbitration. Turkey's refusal to accept international arbitration except in isolated cases has complicated its attempts to transfer operating rights at a number of power plants to more efficient private investors (Boulton, 1999).

Since early 1980s international conglomerates have formed consortiums to carry out large-scale infrastructure and energy projects in Turkey after the government invited foreign participation through BOT contracts (Lowe, 2000: 2). However many projects have been put on hold. The major deterrent was Turkey's insistence on effectively denying the right of investors to seek international arbitration at neutral venue; the Council of State has the final word in disputes involving services to public. Foreign companies lobbied the government for years (Lowe, 2000: 2).

In 1994 there was an amendment to the Act No. 3996, Regarding the Carrying Out of Certain Investments and Services within the Framework of the Build-Operate-Transfer Model. According to Article 5 of this Act BOT agreements were defined as private law contract to prevent the supervision of the Council of State and open the option of international arbitration. However this was a temporary solution since the Constitutional Court annulled the amendment and these agreements were again considered as concession agreements with the Council of State's supervision.<sup>21</sup>

Foreign investors were still reluctant because there was still the big obstacle for international commercial arbitration. Finally the Turkish Constitution was amended.

Article 125<sup>22</sup>

*"Recourse to judicial review shall be available against all actions and acts of administration. National or international arbitration may be suggested to settle the disputes which arise from conditions and*

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<sup>21</sup> Case Decision No. 1995/23, 28.6.1995, Official Gazette 20.03.1996, No. 22586.

<sup>22</sup> As amended on August 13, 1999, Available at <[http://www.anayasa.gov.tr/images/loaded/pdf\\_dosyalari/THE\\_CONSTITUTION\\_OF\\_THE\\_REPUBLIC\\_OF\\_TURKEY.pdf](http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf)>, (10.12.2009).

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*contracts under which concessions are granted concerning public services. Only those disputes involving foreign elements can be solved by international arbitration."*

Article 155<sup>23</sup>

*"The Council of State shall try administrative cases, give its opinion within two months of time on draft legislation, the conditions and the contracts under which concessions are granted concerning public services which are submitted by the Prime Minister and the Council of Ministers, examine draft regulations, settle administrative disputes and discharge other duties as prescribed by law..."*

Biggest obstacle to foreign investors was removed, especially for the growing energy market (Lowe, 2000: 2).

Following the Constitutional amendment necessary changes were made to the relevant laws such as the Law Relating to the Principles Required to be Complied with in the Case of Having Apply to the Arbitration Process for the Settlement of Disputes Arising from Concessions Agreements and Contracts for Public Services.<sup>24</sup> And changes were made to the Council of State Act, Administrative Procedure Act, and the Act Regarding the Carrying out of Certain Investments and Services within the Framework of the Build-Operate-Transfer Model<sup>25</sup>.

All the following decisions of the Council of State stated that arbitration was applicable to BOT agreements.<sup>26</sup>

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<sup>23</sup> As amended on August 13, 1999, Available at <[http://www.anayasa.gov.tr/images/loaded/pdf\\_dosyalari/THE\\_CONSTITUTION\\_OF\\_THE\\_REPUBLIC\\_OF\\_TURKEY.pdf](http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf)> (10.12.2009).

<sup>24</sup> Act Relating to the Principles Required to be Complied with in the Case of Having Apply to the Arbitration Process for the Settlement of Disputes Arising from Concessions Agreements and Contracts for Public Services, No. 4501, Official Gazette, 22.01.2000, No. 23941.

<sup>25</sup> Act No. 4493.

<sup>26</sup> Council of State Decision No. 2000/55, 14.04.2000; Decision No. 2003/110, 11.09.2003.

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### **WATCH OUTS FOR FOREIGN INVESTORS – LEGAL REMEDIES AGAINST INTERNATIONAL ARBITRATION AWARDS AND LIMITS OF INTERVENTION**

#### **Appeal and Setting Aside**

Under the International Arbitration Act, setting aside is the only possibility and there is no appeal procedure to the international arbitration award. The Court cannot analyze the decision on its merits.

The Arbitration Act is very important step for international commercial arbitration. Because before this act the situation was problematic for foreigners since there was no international arbitration act. The Turkish Civil Procedure Act was not sufficient for international commercial arbitration and it had shortcomings.

Under the International Arbitration Act new Act setting aside is the only option. Before the International Arbitration Act there were many Court of Cassation decisions that had a very broad interpretation of these appeal reasons although the appeal reasons were stated numerous clauses in the Article. It was set back foreign investors since the award could be reversed on many grounds.<sup>27</sup> The reasons under Article 533 of the Turkish Civil Procedure Act are (Özsunay: 346):

*"...In the following circumstances, the Court of Appeal may reverse the arbitral award:*

*a-If the award was rendered after the expiration of time allowed for arbitration;*

*b-If the award is concerned with a matter that was not claimed,*

*c-If the arbitrators decided upon matters not within their competence;*

*d-If the arbitrators did not decide upon all claims of the parties..."*

However there are decisions that the appeal was based on different reasons such as: violation of due process, determination of arbitral fees, parties or their representatives acted as arbitrators and so on. The most critical decision was the unified decision of Court of Cassation dated on 28.01.1994 once the applicable law is Turkish law the award can be analyzed on the merits on appeal.

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<sup>27</sup> Unified decision of Court of Cassation Decision No. 1972/12, 23.10.1972. Court of Cassation 26.02.1985, No. 15 YHD, 1023/2841.

International Arbitration Act resolved this problem. In sum according to International Arbitration Act unless there is contrary agreement the Civil Procedure Act is not applicable (article 17, Dayınlarlı, 2002: 65).<sup>28</sup>

The party that is not satisfied with arbitration award can suit an action for setting aside.

Setting aside is the only action against an arbitral award (article 15(1), Dayınlarlı, 2002: 55).<sup>29</sup> The arbitral awards may be set-aside in the following situations (article 15):

*"1. The party who applies proves that;*

*a) a party to the arbitration agreement is under incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it or failing such a choice of law, under the Turkish Law,*

*b) the appointment of the arbitrator or the arbitral tribunal has not been in accordance with the procedure provided in this Law or specified in the agreement of the parties,*

*c) the award is not rendered within the term of arbitration,*

*d) the arbitrator or the arbitral tribunal has decided on its competence or incompetence in contradiction with the law,*

*e) the arbitrator or the arbitral tribunal has decided on a matter beyond the scope of the arbitration agreement or has not decided on all of the issues claimed or exceeded its competence.*

*f) the arbitral proceedings has not been carried out in accordance with the agreement of the parties as to procedure or failing such agreement in this respect, in accordance with the provisions of this Law and this situation has effected the substance of award.*

*g) the principle of the equality of parties has not been respected or,*

*2. The Court, determines:*

*a) the dispute that is subject of the award of the arbitrator or the arbitral tribunal is not arbitrable in accordance with Turkish Law.*

*b) the award is in contradiction with the public policy."*

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<sup>28</sup> "...unless otherwise provided, the provisions of the Code of Civil Procedure shall not apply with respect to the subjects governed by this Law".

<sup>29</sup> "...shall be filed before the Court of First Instance with competent jurisdiction as to venue and shall be discussed with priority and expeditious proceedings".

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State courts cannot intervene on any grounds outside the reasons set forth on this article.

The action for setting aside may be filed within thirty days and will automatically cease the enforcement of the award (article 15).

International Arbitration Act shall not be applied in such circumstances: to the disputes relating to real rights on immovables in Turkey; the disputes which are not subject to the will of the both parties (article 1).

Appeal and setting aside are different procedures. After setting aside appeal is possible, appellate examination shall be decided upon limited grounds of setting aside provided under the setting aside article with priority and expeditious proceedings (article 15). On appeal setting aside can be approved and sometimes reversed. Partial setting aside is also possible according to International Arbitration Act (article 15, Dayınlarlı, 2007: 57).<sup>30</sup>

The reasons for setting aside are listed in numerus clauses manner in Article 15 or in other words reasons are exhaustive. Article 15 and are similar to the Article V of the New York Convention as will be discussed. Under the International Arbitration Act waiver from setting aside procedure is possible (article 15).<sup>31</sup>

### **Recognition and Enforcement**

Enforcement of international arbitration awards in Turkey is regulated under the International Private and Procedure Act. However international arbitration awards shall be enforced in Turkey in accordance with terms of bilateral and multilateral agreements. Before discussing the International Private and Procedure Act procedures we have to mention the enforceability of international awards in Turkey given according to the Turkish International Arbitration Act.

**Under International Arbitration Act.** According to International Arbitration Act (article 15(b)) after the finalization of the decision regarding the dismissal of the action for setting aside, the Court of Instance shall give a certificate regarding enforceability of the award, Certificate of enforceability of award, to the party who is demanding. In the cases where the period indicated for the action for setting aside has expired or where the parties

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<sup>30</sup> "...if the matters within the scope of arbitration agreement is possible to be separated from the ones beyond the arbitration agreement, only the section of the award that includes the matters which are beyond the arbitration agreement may be set aside".

<sup>31</sup> Under the Civil Procedure Act waiver from appeal was not possible.

renounce to file action for setting aside, the court automatically (*ex officio*) take into consideration whether the dispute is not arbitrable according to Turkish Law or whether the award is in contradiction with public policy during the delivery of the document concerning the enforceability of the award. In this case unless the court decides on the contrary, the review shall be conducted on the file.

The Civil Procedure Act does not contain any provision concerning the enforcement of foreign arbitral awards.

For all other international arbitral awards enforcement is done according to the International Private and Procedure Act and the relevant international agreements.

**Under International Private and Procedural Act.** Only the foreign arbitral awards that are final, executable and binding for the parties can be enforced.<sup>32</sup> According to Article 62 the Court shall refuse the request for enforcement of foreign arbitral award if:“...

- a. *There is no arbitration agreement or there is no arbitration clause in the main contract*
- b. *The arbitral award is against good morals or ordre public.*
- c. *The dispute, which became the subject of arbitration, may not be resolved by arbitration under Turkish law.*
- ç. *One of the parties has not been properly represented before the arbitrators and has afterwards not expressly ratified their actions.*
- d. *The person against whom the enforcement of the arbitral award is sought has not been properly informed about the selection of the arbitrators or he has not been given an opportunity to present his arguments and defend himself.*
- e. *The arbitration agreement or arbitration clause is not valid under the law to which the parties have agreed or if there is no such agreement, according to the law where the arbitration award was rendered,*
- f. *The selection of the arbitrators or the procedural rules applied by the arbitrators is contrary to the agreement of the parties or, if there is no such agreement, contrary to the law where the arbitration award was rendered.*

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<sup>32</sup> International Private and Procedural Act, Article 60. Translation from: Ansay & Scheider, (2002), also for the translation of the Act look at: Boztosun, O. A. N. (2007).



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- g. *The arbitral award is on a matter that is not included in the arbitration agreement or clause, or, if it is party outside the scope of the agreement it will not be enforced as to that part.*
- h. *The arbitral award is not final or is not yet executable or binding under the law to which the award is subject or under the law where it was rendered, or a competent authority annuls it where it was rendered.*

*The burden of proof on matters stated in paragraphs c, d, e, f, g and h is on the party against whom the enforcement is sought. "*

According to article 61(2) the court is to apply by analogy the provisions of articles 55<sup>33</sup>, 56<sup>34</sup> and 57<sup>35</sup> to the enforcement of arbitration awards. Reciprocity is no longer a requirement for the enforcement of arbitration awards.

**Under New York Convention.** The New York Convention the setting aside conditions are similar to the International Arbitration Act.<sup>36</sup> According to the New York Convention (article V):

"...

*1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

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<sup>33</sup> Ansay & Scheider, Notice and objection Article 55 (ex Article 39): *"The application for enforcement together with the date of hearing shall be served on the other party. The enforcement decision will be rendered after an inquiry has been made according to the rules of simplified procedure.*

*The defendant can only raise objections that the conditions for enforcement under the provisions of this section do not exist or that the foreign court decision has already been partly or fully fulfilled or that an event, which hinders its fulfillment, has occurred."*

<sup>34</sup> Ansay & Scheider, The decision Article 56 (ex Article 40): *"The court may decide on the enforcement of the foreign judgment wholly or partly or may refuse the demand of enforcement. This decision shall be written beneath the foreign court decision and will be signed and sealed by the judge".*

<sup>35</sup> Ansay & Scheider, Execution and appeal Article 57 (ex Article 41): *"Foreign judgments for which enforcement is given will be executed as if they are Turkish court decisions.*

*Appeals against a decision of enforcement or refusing enforcement are subject to the general provisions. Appeal will stay the execution".*

<sup>36</sup> Also Akıncı, Z. (1994), Şanlı, C. (2005); Nomer, E. & Ekşi, N. & Öztekin, G (2003).

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- a. *The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
  - b. *The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
  - c. *The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*
  - d. *The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
  - e. *The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*
2. *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
- a. *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
  - b. *The recognition or enforcement of the award would be contrary to the public policy of that country."*

**Interim Measures and Court Intervention.** There are two possibilities for granting interim measures. The court or the arbitral tribunal can grant these measures.

According to the International Arbitration Act the courts may intervene only according to the provisions of the Act (article 3(2)). The request of one of the parties for interim measure from the court before or during the arbitral proceedings and the decision of the court granting such measure shall not be incompatible with an arbitration agreement (article 6(1)).

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These articles comply with UNCITRAL Model Law. Under UNCITRAL Model Law no court shall intervene except where so provided in this Law (article 5). And it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings from a court an interim measure of protection and for a court to grant such measure (article 9).

International Arbitration Act also allows arbitrators to decide on interim measures of protection. Unless otherwise agreed, on the request of one of the parties, arbitrator or arbitral tribunal may grant any interim measure or interim sequestration during the arbitral proceedings. The granting of this measure may be subject to the appropriate guaranty by the arbitrator or arbitral tribunal. The arbitrator or arbitral tribunal should not grant any interim measure or interim sequestration decision to be enforced by the compulsory enforcement organs or implemented by other competent official office. And also arbitrator or arbitral tribunal shall not grant any interim measure or interim sequestration decision, which binds the third parties (article 6(2)).

If a party does not implement the decision of interim measure or interim sequestration ordered by the arbitrator or arbitral tribunal, the opposing party may request the assistance of competent court for granting a decision of interim measure or interim sequestration. If necessary, the competent court may give a rogatory commission to another court (article 6(3)).

The provisions of the articles 5 and 6 shall also apply in the circumstances where the place of arbitration is determined outside of Turkey.

Article 6 of the Turkish Arbitration Act, differs from the UNCITRAL Model Law. Article 17 of the UNCITRAL Model Law regulates power of arbitral tribunal to order interim measures. According to this article unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

**Objection to Arbitration.** What happens once there is a dispute if the party files the case at the court regardless of an existing arbitration agreement? Is it possible to object? Or can the court reject the claim?

According to International Arbitration Act if the case has been filed before the court for a dispute that forms the subject matter of arbitration agreement, the opposing party may object that the dispute should be resolved by arbitration (article 5). In the case of the acceptance of the objection as to arbitration, the court shall reject the case for procedure. In

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the case of agreement, in the course of proceedings, of the parties on having recourse to the arbitration process, the court shall forward the action file to the concerned arbitrator or arbitral tribunal.

Also the arbitrator or the arbitral tribunal may rule on its own jurisdiction-Kompetenz/Kompetenz (article 7(h)). The UNCITRAL Model Law is also similar and the arbitral tribunal may rule on its own jurisdiction (article 16).

The arbitrator or the arbitral tribunal shall examine and rule on an objection with respect to the lack of jurisdiction as a preliminary question (article 7(h), Dayınlarlı, 2002: 25).

## **CONCLUSION**

Evaluation of the Turkish national legislation and Turkey's international obligations regarding international arbitration in the last decade is very progressive. Investors before investing in a home country explore the possibilities of international commercial arbitration for the settlement of possible disputes. The important international agreements that the home country is party to and also the national legislation that allows the settlement of disputes by international commercial arbitration are all factors affecting decision of the investor to invest in that country. In addition to the possibility of international commercial arbitration foreign investors also want to know the procedure for recognition and enforcement of foreign arbitral awards, the limits of intervention to this stage such as the power of courts to give interim measure decisions or the setting aside of arbitral decisions. In the overall evaluation of the legal framework regarding international commercial arbitration in Turkey and the legislation especially the recent changes have been positive. Turkey is party to many important treaties regarding international agreements. Also most of the bilateral investment treaties or other international agreements regarding foreign investment that Turkey is party to have provisions for international arbitration for the settlement of investment disputes.

## **REFERENCES**

- Akıncı, Z. (2003). Milletlerarası Tahkim, Ankara: Seçkin.  
Akıncı, Z. (1994). Milletlerarası Ticari Hakem Kararları ve Tenfizi, Ankara: Dokuz Eylül Üniversitesi Hukuk Fakültesi Döner Sermaya İşletmesi Yayınları No. 44.  
Ansay, T. & Scheider, C.E. (2002). Introduction to Turkish Business Law, Ankara: Kluwer Law International.

## **International Commercial Arbitration for Foreign Investors: Turkish Case**

- Baklacı, P. & Akıntürk, E. (2008). Foreign Direct Investment in Turkey: Legal Framework. *International Journal of Emerging and Transition Economies*, 1(2), 231-247.
- Boulton, L. (1999). International Arbitration Agreed, *The Financial Times*, February 9, 1999.
- Boztosun, O.A.N. (2007). The 2007 Turkish Code on Private International Law and International Civil Procedure. In Sarcevic, Bonomi & Volken (Eds.), *Yearbook of Private International Law*, V. IX (583-604). Germany: Sellier European Law Publishers.
- Dayınlarlı, K. (2002). Milletlerarası Tahkim Kanunu / International Arbitration Law. Ankara: Dayınlarlı Hukuk Yayınları Ltd.
- Ekşi, N. (2005). General Evaluation of the Turkish International Arbitration Act, *International Arbitration Law Review*. 8(3), 87-94.
- Ekşi, N. (2008). Yargıtay Kararlarında Yabancı Hakem Kararlarının New York Konvansiyonuna Göre Tenfizine İlişkin Bazı Sorunlar, In N. Ekşi, T. Kalpsüz & M. Yılmaz (Eds.), *Milletlerarası Ticari Uyuşmazlıkların Tahkim Yoluyla Çözümüne İlişkin İstanbul Konferansı*, 1 Kasım 2007 (116-143). İstanbul: Beta.
- Elver, C.N. (2004) Turkish International Arbitration Law and Restrictions on Its Application. *Journal of International Arbitration*, 21(5) 453-457.
- Lowe, L.M. (2000). Turkey Tempts Investors. *Middle East Economic Digest*, 44(I), 5.
- Nomer, E., Ekşi, N. & Öztekin, G. (2003). *Milletlerarası Tahkim*. İstanbul: Beta.
- Özsunay, E. Turkish International Arbitration Act 2001 (It's Structure and Salient Features). Retrieved from the World Wide Web: <http://www.bibliojuridica.org/libros/4/1653/17.pdf>
- Şanlı, C. (2005) *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlık Çözüm Yolları*, 3. Bası. İstanbul: Beta.
- Tekinalp, G. (2007). The 2007 Turkish Code Concerning Private International Law and International Civil Procedure. In Sarcevic, Bonomi & Volken (Eds.), *Yearbook of Private International Law*, V. IX (313-341). Germany: Sellier European Law Publishers.
- Tiryakioğlu, B. (2003) *Doğrudan Yatırımların Uluslararası Hukukta Korunması*. Ankara: Dayınlarlı Hukuk Yayınları.
- Yeşilirmak, A. (2002). The Turkish Arbitration Law of 2001. *Journal of International Arbitration*, 19(2), 171-177.