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CHAPTER 27. TURKEY

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X. TAKING DOCUMENTARY EVIDENCE IN SUPPORT OF FOREIGN AND DOMESTIC ACTIONS

§ 27:43 In general

The Convention on Evidence provides the general structure for taking of documentary evidence. However, the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents 1961 (the "Convention on Apostille") provides a special and relatively relaxed procedure for taking documentary evidence with regard to certain public documents.

§ 27:44 Convention on evidence

The Convention on Evidence is directly applicable for taking of documentary evidence domestically. Instead of a summons for witnesses, a court grants an order addressing third parties for submission of documents. Third parties can only refuse submission of documents based on the same grounds as apply to refusals to testify, and provisions for compulsion for witness evidence are applicable for submission of documents. Turkey has reserved its right not to execute requests for documentary evidence for obtaining pre-trial discovery of documents being conducted in Common Law jurisdictions.

§ 27:45 Public documents; Convention on Apostille

Turkey is a party to the Convention on Apostille, and the Convention lists the types of document that are deemed to be public documents. It provides a streamlined procedure for authentication of public documents presented as documentary evidence.

According to the Convention on Apostille, the only requirement to certify the authenticity of a signature, the capacity of the person signing the document, and the identity of the seal or stamp on the document is the single certification document annexed to the document by an authorized body of the issuing country. The authorized bodies to annex such a certification document in Turkey are governorships and deputy-governorships. An apostille does not validate the information

and the quality of the document but only certifies the signature and correctness of the seal or stamp that the document bears.

§ 27:46 Taking documentary evidence abroad in support of a domestic action

Similar to the taking of documentary evidence domestically in support of a foreign action, the taking of documentary evidence abroad in support of a domestic action is subject to same procedure for the taking of witness statements abroad.

XI. ADMISSIBILITY AND PRESENTATION AT TRIAL OF EVIDENCE TAKEN DOMESTICALLY OR ABROAD

§ 27:47 In general

The Civil Procedure Code applies in determining whether a document or witness statement taken abroad is admissible as evidence. As a rule, discovery within the meaning of the Common Law tradition is not provided for in the Turkish legal system. The parties are expected to provide or propose evidence proving the facts that they allege. However, it is possible for parties to request the court to issue writs to the parties or third persons to submit specific information or documents to the case file.

Any evidence is permissible under Turkish law unless it is obtained through unlawful means. Although it also is possible to object to some witnesses on the grounds of their relationship to or a conflict with the parties, courts generally hear these types of witnesses but consider their status when evaluating the weight of their testimony as evidence. Since all witness statements are inconclusive evidence under the Civil Procedure Code, witness statements taken abroad through the procedures referred to above are admissible and treated as inconclusive evidence before Turkish courts.

However, transactions exceeding the amount of TRY 3,660 at the time they were executed may be proved only through written documentation containing the signature of the person who issued the document (signature by hand or registered electronic signature). Apostilles can be issued for documentary evidence abroad that may either be official or unofficial deeds**.** If an apostille is issued for a formal deed, it has the same evidentiary value as a formal deed issued in Turkey.

§ 27:48 Legal privilege

The concept of legal privilege and professional secrecy is recognized under the Attorneys Act and the Professional Rules of the various Turkish bar associations. It is prohibited for an attorney to disclose information communicated in the course of his representation (unless expressly permitted by the client).

Even when the client grants permission, the attorney is entitled to decline to disclose such information and may not be forced to be a witness involving his client's confidences. In addition, an attorney may not be subjected to legal or criminal liability for refusing to be a witness. No distinction exists between external and in-house counsel in this regard.

XVI. ARBITRATION

§ 27:67 International arbitration

The main legislation governing international arbitration in Turkey

is the International Arbitration Code, Act Number 4686.[1] The Code entered into force in 2001 and was modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 and the international arbitration section of the Swiss Federal Private International Law of 1987.

The International Arbitration Code governs arbitrations seated in Turkey and that involve a foreign element. Even if the seat of arbitration is not in Turkey, the parties can contractually subject the arbitration to the International Arbitration Code to the extent that the "foreign element" is present. The following circumstances are qualified as constituting a foreign element under article 2 of the Code:

1. The usual residence, domicile or place of business of any party to the arbitration agreement is located outside Turkey;
2. The usual residence, domicile, or place of business of any party to the arbitration agreement is located in a country not the place or arbitration designated in the arbitration agreement or determined on the basis of this agreement;
3. The usual residence, domicile, or place of business of any party to the arbitration agreement is located in a country not the place where the majority of the obligations under the main agreement will be performed or the place to which the subject of the dispute is primarily, at least one of the shareholders of a company that is a party to the main agreement containing the arbitration clause has injected foreign capital into the company under applicable foreign investment legislation, or when a loan or a guarantee agreement is executed in order to bring foreign investment to Turkey for performance of the relevant agreement; and
4. The main agreement or legal relationship constituting the basis of the arbitration agreement permits the flow of capital or goods from one country to another.

§ 27:68 Domestic arbitration

Domestic arbitration, among local parties and not involving a foreign element, is addressed within the scope of the Civil Procedure Code. The arbitration section of the Civil Procedure Code resolved long-standing conflicts between the International Arbitration Code and the arbitration section of the now defunct Civil Procedure Code of 1927.

The current Civil Procedure Code aligned itself with the International Arbitration Code and, in turn, the UNCITRAL Model Law. Its

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[Section 27:67]

[1]This section is partially based on the submissions of Hergüner Bilgen Özeke Attorney Partnership to the CMS Guide to Arbitration (Turkey), 2012.

arbitration section regulates domestic arbitral procedures and the enforcement of domestic arbitral awards in an attempt to encourage domestic arbitration in Turkey.

§ 27:69 Foreign arbitration and enforcement of foreign arbitral awards

The recognition and enforcement of foreign arbitral awards is regulated, under the Code on International Private Law and Procedure, Law Number 5718, which entered into force in 2007 and replaced the old International Private Law and Procedure Number 2675, which had been in force since 1982.

The main difficulty associated with arbitration in Turkey has long stemmed from the fact that international and domestic arbitration and the enforcement of international and domestic arbitral awards are addressed under separate legal frameworks with conflicting regulations. The problem was addressed by the legislature through drafting domestic arbitral procedures and enforcement mechanisms in line with the provisions of the International Arbitration Code and Law Number 5718.

§ 27:70 Arbitral institutions

The İstanbul Chamber of Commerce Arbitration Centre (ITOTAM) and the İstanbul Arbitration Centre (ISTAC) are the major arbitral institutions in Turkey as mentioned above. ITOTAM provided its first Arbitration Rules in 2014 and updated them in 2016. ITOTAM considered the UNCITRAL 2010 Arbitration Rules and other modern arbitration rules, such as the International Chamber of Commerce (ICC) Arbitration Rules (2012), the VIAC Rules of Arbitration, and the Swiss Rules of Arbitration when drafting its rules.

ITOTAM announced the Arbitration Rules for Emergency Arbitration and Arbitration Rules for Small Claims (expedited arbitration) as of 14 April 2016. Despite the existence of an institutional arbitration mechanism before ITOTAM, the government decided to adopt a new approach towards arbitration in 2014 and attributed importance to the establishment of a new international arbitration institution known as ISTAC.

In line with the approach adopted by the government, the Code on ISTAC was passed into law on 20 November 2014, published in the *Official Gazette* on 29 November 2014 and entered into force on 1 January 2015. The general assembly of ISTAC consists of 25 members from 14 various governmental organizations, such as the Capital Markets Board, the Union of Chambers and Commodity Exchanges of Turkey, the Union of Turkish Bar Associations, and non-governmental organizations. ISTAC introduced the ISTAC Arbitration and Mediation Rules on 26 October 2015. The Rules are based on several international arbitration rules, such as the ICC, AAA and LCIA Rules.

ISTAC Arbitration also provides emergency arbitration and fast track arbitration.

§ 27:71 Arbitral tribunal jurisdiction and court interference

The arbitral tribunal may rule on its own jurisdiction, including any objections regarding the existence or validity of the arbitration agreement.[1] A plea that the arbitral tribunal does not have jurisdiction must be raised in, or prior to, the submission of, the statement of defense.[2] A party is not precluded from raising such plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. The arbitral tribunal will rule on the above-mentioned plea as a preliminary question and, if it should decide that it has jurisdiction, it will resume the arbitral proceedings.[3] Such a decision by the arbitral tribunal cannot be appealed to the courts.

Court interference with the arbitral process is very limited. A court may only intervene in any dispute referred to arbitration to the extent permitted by the provisions of the International Arbitration Code (to the extent it is an international arbitration subject to that Code). If the parties agree to refer the dispute to arbitration pending a court case on the same subject matter, the court would stay the adjudication proceedings and refer the arbitration method of their choice.[4] If court proceedings in a dispute that is subject to arbitration are initiated, the other party may raise an arbitration objection with the court. If the arbitration objection is accepted, the court will dismiss the lawsuit on procedural grounds.[5] If any of the parties requests the court to impose a preliminary injunction or provisional attachment prior to, or during the arbitral proceedings, this will not constitute a breach of the arbitration agreement.[6]

If any of the parties fail to enforce the preliminary injunction or provisional attachment rendered by the arbitrator or arbitral tribunal, the other party may request the competent court to issue an order for preliminary injunction or provisional attachment.[7] The parties may file a request for interim protective measures in accordance with the Civil Procedure Code and the Execution and Bankruptcy Code at any

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[Section 27:71]

[1]International Arbitration Code, article 7.

[2]International Arbitration Code, article 7.

[3]International Arbitration Code, article 7.

[4]International Arbitration Code, article 5.

[5]International Arbitration Code, article 5.

[6]International Arbitration Code, article 6.

[7]International Arbitration Code, article 6.

stage of the proceedings.[8] The arbitrator or arbitral tribunal may seek assistance of the Court of First Instance to collect evidence.

§ 27:72 Challenging and appealing arbitration award in court

Turkish arbitration legislation (be it international arbitration as governed by the International Arbitration Code or domestic arbitration as governed by the Civil Procedure Code) excludes the possibility of any appeal on the merits of the dispute.[1] It only provides for the setting aside of an award under the limited grounds of procedure, arbitrability, and public policy, which are determined in an exclusive manner.

Application for the setting aside of an award is made to the Regional Court of Appeal.[2] If the defendant's usual residence, domicile, or place of business is located outside Turkey, the Istanbul Civil the Court of First Instance will have jurisdiction to hear the application. The parties can appeal a decision to set aside an award in line with the provisions of the Civil Procedure Code. An appeal is limited to the legal grounds applicable to the setting aside of the award.[3] An arbitral award may be set aside by the court if:

1. A party to the arbitration agreement lacks the necessary competence;
2. The arbitration agreement is invalid under the applicable law or, if the applicable law is not agreed by the parties, under the law of turkey;
3. The arbitrator or the arbitral tribunal was not appointed in accordance with the procedure agreed between the parties or in accordance with the international arbitration code; the award was not rendered within the agreed or statutory term for arbitration;
4. The arbitrator or the arbitral tribunal did not have jurisdiction to hear the dispute;
5. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, the award contains decisions on matters beyond the scope of the submission to arbitration or the arbitrator or the arbitral tribunal has exceeded its competence;
6. The arbitral proceedings were not carried out in accordance with the procedures agreed between the parties or, failing such

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[8]International Arbitration Code, article 6.

[Section 27:72]

[1]See article 15 of the International Arbitration Code, which is based on the same principles as article 5 of the New York Convention.

[2]International Arbitration Code, articles 3 and 15.

[3]International Arbitration Code, article 15.

agreement, in accordance with the procedures of the international arbitration code and this failure had an impact on the merits of the award;
7. The principle of equality of the parties was not respected;
8. The subject matter of the dispute is not capable of settlement by arbitration under Turkish law; or
9. The award is in conflict with Turkish public policy.[4]

An action for setting aside the award should be filed before the competent Regional Court of Appeal within 30 days from delivery of the award or, as case may be, of the correction, interpretation of complementary award.[5] The court will give priority to this action and conclude it urgently. Pursuant to the International Arbitration Code, the parties may partially or fully waive their right to file an action to set aside the award.[6] However, parties residing abroad may fully waive their right to file a setting-aside action only by an express declaration in writing or as provided by the arbitration agreement.[7]

§ 27:73 Power to order interim measures

Upon request by one of the parties, the arbitral tribunal may issue a preliminary injunction or attachment during the arbitral proceedings. Since the possible damages that the other party might incur because of a preliminary injunction or attachment should be secured, the International Arbitration Act permits the arbitral tribunal to demand an appropriate guarantee or security from the requesting party prior to rendering a preliminary injunction or attachment.[1]

The International Arbitration Act limits the arbitral tribunal's authority to order a preliminary injunction or attachment by prohibiting it from issuing preliminary injunctions or attachments that are solely enforceable by governmental authorities. For example, real property owned by the defendant may not be seized based on a preliminary attachment ordered by an arbitral tribunal because the seizure of real property requires the involvement of execution officers. Similarly, the arbitral tribunal may not order the customs authority to prevent the defendant from taking its assets out of the country.

The arbitral tribunal is prohibited from issuing preliminary injunctions or attachments that are binding on third parties because a third party may not participate in the arbitral proceedings and could not

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[4]International Arbitration Code, article 15.

[5]International Arbitration Code, article 15.

[6]International Arbitration Code, article 15.

[7]International Arbitration Code, article 15.

[Section 27:73]

[1]International Arbitration Code, article 15.

properly object to the decision rendered by the arbitral tribunal.[2] If one of the parties refuses to comply with a preliminary injunction or attachment rendered by the arbitral tribunal, the other party may request the assistance of the competent court which may enforce the arbitral tribunal's decision by issuing a preliminary injunction or attachment. If necessary, the competent court may authorize another court to issue the injunction or attachment as rogatory when geographical concerns justify it.[3]

§ 27:74 Recognition and enforcement of arbitral awards

In General

As to the recognition and enforcement of arbitral awards in Turkey, the definition of "foreign arbitral award" is vital because foreign and domestic arbitral awards are subject to different regimes under Turkish law.

Domestic Awards

Domestic awards issued in Turkey are rendered because of arbitral proceedings conducted in accordance with applicable provisions of the Civil Procedure Code. These awards also are subject solely to the setting-aside procedures.[1] A review of the request will be carried out on file and will not suspend the execution of the award unless the claimant pays a security deposit.

Foreign Awards

The provisions of the New York Convention of 1958 have the same force in Turkey as Turkish statutory provisions, and are treated as part of the domestic legal system. In terms of enforcing foreign arbitral awards, Turkish law gives precedence to the application of the New York Convention over Law Number 5718. If the award is rendered in the territory of a state other than the Turkish Republic and if the award is not deemed a domestic award under Turkish law, the New York Convention applies.

Turkey enacted the New York Convention with two reservations, which means that the enforcement of foreign awards will be subject to the New York Convention if the award was rendered in another signatory state and the relevant dispute is defined as commercial under the Turkish Commercial Code.[2] If these requirements are not fulfilled, the recognition and enforcement of foreign arbitral awards will be governed by Law Number 5718.

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[2]International Arbitration Code, article 15.

[3]International Arbitration Code, article 15.

[Section 27:74]

[1]Civil Procedure Code, article 439.

[2]Turkey limited the enforcement of foreign arbitral awards to those of a commercial nature by reserving its rights under article 1(3) of the New York Convention.

Law Number 5718 and the New York Convention provide similar grounds for refusal of recognition and enforcement of an arbitral award, but there is one distinction. Pursuant to article VI of the New York Convention, enforcement of an award may be refused if the party against whom the award is invoked proves the existence of any grounds for refusal of enforcement. By contrast, Law Number 5718 provides that enforcement of an award must be refused if the party against whom the award is invoked proves the existence of any grounds for such refusal.

Therefore, while under the New York Convention it is at the discretion of the enforcing court to decide whether the award will be enforced, under Law Number 5718, the enforcing court is obliged to refuse enforcement if one of the refusal grounds is proven. Under both the New York Convention and Law Number 5718, the burden of proof lies with the party arguing for refusal of enforcement. However, there are two grounds for exemption from the burden of proof requirement: violation of public policy and inarbitrability. The enforcing court may consider these two grounds on its own volition. The grounds for refusal of enforcement of foreign arbitral awards under Law Number 5718 are that:

1. The award is not yet binding, has been set aside or suspended by a court;
2. The subject matter of the dispute is not arbitrable; or
3. The award is a violation of public policy.[3]

Violation of public policy is grounds for refusing recognition or enforcement of foreign arbitral awards.[4] The New York Convention stipulates that recognition or enforcement of an award will be refused if recognition or enforcement of the award would be contrary to the public policy of the country where recognition and enforcement are sought. Law Number 5718 stipulates that recognition or enforcement must be refused if the award is contrary to public policy or public morality. Public policy is often regarded as a vague concept.

It is interpreted by Turkish courts on a *sui generis* basis. The Turkish courts face a dilemma between the goal of protecting the state's authority to refuse enforcement of awards that contravene domestic values in terms of public policy and the desire to respect the finality of foreign arbitral awards (*révision au fond* prohibition). In this respect, Law Number 5718 stipulates that only explicit violations of public policy can be considered grounds for refusing enforcement, including:

1. Lack of due process;
2. Invalidity of the arbitration agreement under the law of the country to which the parties have subjected it;

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[3]Law Number 5718, article 61.

[4]Law Number 5718, article 62.1(b); New York Convention, article V.1 and 2.

3. Improper arbitral procedure or composition of the arbitral tribunal;
4. Inarbitrability of the subject matter; and
5. Lack of reciprocity.[5]

Law Number 5718 refers to the principle of reciprocity in the recognition and enforcement of foreign arbitral awards, meaning that the enforcement of awards will be recognized in Turkey if they were granted in a country that is party to a reciprocity agreement, whereby it undertook to enforce and recognize arbitral awards made in Turkey or that is obliged to recognize and enforce arbitral awards made in Turkey pursuant to its domestic laws or the established practice of its courts.[6]

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[5]Law Number 5718, article 61.

[6]Turkey imposed the requirement of reciprocity by reserving its right under article 1(3) of the New York Convention.