



# YAR

## YOUNG ARBITRATION REVIEW

Under40 International Arbitration Review

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YOUNG ARBITRATION REVIEW EDITION

EDITION 22 • JULY 2016

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Annual subscription: € 200

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# ISTANBUL ARBITRATION CENTER: A FRESH BREEZE FOR INTERNATIONAL ARBITRATION FROM THE BOSPHORUS

By Abdülkadir Güzeloğlu



## 1. Introduction

Arbitration is a specially designed legal process that produces a final and binding judgment on conflicts by prioritizing party autonomy. International arbitration has become a widely embraced method for resolving commercial disputes over the last thirty years. Behind this popularity, it is not a secret that globalization of business has played a big part by integrating national fora on economic, social and cultural grounds. Such developments paved the way for a rapid growth of the global economy which necessitated the utilization of an independent, neutral and tailored mechanism to deal with multifarious cross-border disputes. For this reason, arbitration, due to its important advantages i.e. confidentiality, flexibility, finality, avoiding national courts, enforceability of awards and speed, has strengthened its position. Importantly, well-established international and domestic instruments have built an intercontinental legal framework in which many countries are participatory. Moreover, parties who prefer arbitration and especially operate in developing countries, expect to secure their interests within an established and stable legal infrastructure to avoid any volatility.

Turkey; the 17th largest economy<sup>1</sup> in the world with a projected GDP growth rate of 4% for the next two years<sup>2</sup> and enviable geography that accesses to Europe, Middle East, and Asia, is a key, strategic and developing jurisdiction that attracts foreign investment.<sup>3</sup> With its expanding business sectors, undoubtedly, this progress has been also accommodating an increasing number of Turkish and foreign parties engaging in international transactions of myriad nature to refer to arbitration. It is in this perspective that providing an updated look to Turkish arbitration climate with a special emphasis on the most recent developments becomes critically vital. In detail, while aiming to carve out the most enlightening stance, the article will introductorily inform the legal framework regulating arbitration in Turkey and focus on the current status of the institutional arbitration and recently established the Istanbul Arbitration Center (“ISTAC” or ‘the Center’).

## 2. Legal Framework of Turkish Arbitration

For arbitration, a concept that has dominated dispute resolution in the era of globalization, it would be erroneous to



project a lifespan of a few decades. Quite the contrary, enjoying a rich and long historical background<sup>4</sup>, arbitration has also been implemented by the Ottoman Empire in Civil Code of 1876 with 11 articles.<sup>5</sup> Thus, it has not been an uncommon legal model, especially when subsequent legislative actions i.e. abrogated Code of Civil Procedure of 1927 and others are taken into account.<sup>6</sup>

### 2.1 Code of Civil Procedure

Through its Articles 407 and 444, Code of Civil Procedure<sup>7</sup> (“the Code”) regulates domestic arbitration in Turkey. The Code qualifies an arbitration procedure domestic if the seat of arbitration is designated in Turkey and it does not contain any foreign element. It is beneficial to mention that the relevant articles of the Code are in conformity with the UNCITRAL Model Law on International Commercial Arbitration. (“Model Law”)

### 2.2 International Arbitration Law

In 2001, the Turkish legislator; acknowledging the widespread usage of arbitration in the world and realizing the importance and advantages of possessing a modern arbitration regime in order to promote and secure sustainable inflow of foreign investment along with the objective of enacting a dedicated law to international arbitration, enacted International Arbitration Law<sup>8</sup> (“IAL”). Being in parallel with the 1985 version of the Model Law, Chapter 12 of the Swiss Private International Law has been also determinant for amendments that were made throughout fifteen years.<sup>9</sup> In order to see its differences from the Code, it is imperative to mention IAL’s scope of application. Indeed, Article 1 manifests that IAL is applicable to international disputes that designate Turkey as the seat of arbitration or to disputes in which the application of the IAL is chosen by the Parties. Significantly, the international or foreign characteristics of a dispute is listed by IAL in the succeeding article as following:

- If parties to the arbitration agreement have their domicile or habitual residence or places of business in different States, or,
- If domicile or habitual residence or places of business of the parties are in a different place than the seat of arbitration consented in the arbitration agreement or seat of arbitration determined pursuant to the arbitration agreement or in a place other than where the substantial part of the obligations arising from the substantive agreement is to be performed, or the place with which the subject matter of the dispute is closely connected, or,
- If the substantive agreement or the legal relationship constituting the base of the arbitration agreement provides for the transfer of capital or goods from one jurisdiction to another, or,
- If at least one of the shareholders of a company which is a party to substantive agreement on which the arbitration agreement is based, brought foreign

capital from abroad under the terms of the regulations governing foreign investment incentive or a loan and/ or a security agreement had to be entered into for foreign capital from abroad, so that the substantive agreement could take effect.

### 3. A Half Century of Turkish Institutional Arbitration: Letdowns and Remorse

Unfortunately, the relatively hopeful developments to enhance and diffuse arbitration culture into legal practice that were witnessed during the 1800s have not turned out to be sustainable. Certainly, a young nation, strengthened its independence in the beginning of the 19<sup>th</sup> century, could take initiative and host several, if not, one reputable arbitral institution.

Although a thorough analysis on the emergence and development of Turkish institutional arbitration is only a handful, it is seen that some researches have been conducted in between 1960 and 1970.<sup>10</sup> For instance, an Ankara based foundation, The Research Institute of Banking and Commercial Law, organized sessions in order to institutionalize arbitration and a consequent Draft Law on Chambers of Arbitrators had been published.<sup>11</sup> Yet, it is sad to see that none of these efforts have been able to come to an established fruition until 1979.

Indeed, it is possible to say that the establishment of Istanbul Chamber of Commerce Arbitration Institute (“ITOTAM”) by Istanbul Chamber of Commerce in the aforementioned year, have constituted a major step. Aiming to resolve commercial disputes by conciliation or arbitration; at first, ITOTAM had accommodated three subdivisions as being Conciliation, Arbitration and Expert Arbitration.<sup>12</sup> Over the years, it is possible to infer that ITOTAM has been and is trying to achieve a modern setup and remodeled strategy, as amendments to its arbitration rules and applicable instruments are identified. Despite all, popularity of ITOTAM could not reach a level whereby its name is associated with institutional arbitration in Turkey. It is highly possible that one of the reasons for the latter can be found within the Article 1.2 of the ITOTAM Rules of Arbitration.<sup>13</sup> Indeed, it states that the Rules are applicable only if one of the parties is a member to Istanbul Chamber of Commerce. Surprisingly, by a provision such as that; an arbitral institution, that is said to carry the mission to resume a well-established and embraced tradition, shoots itself in the foot.

Moving south to Aegean coast, we have the Izmir Chamber of Commerce (“IZTO”) which also provides arbitration services within Rules of Commercial Reconciliation and Commercial Arbitration. However, resembling ITOTAM, its services are dedicated only to its members.<sup>14</sup> Apart from these, IZTO appears to apply a more aggressive strategy as it engages in cooperation agreements with other academic institutions and legal entities providing arbitral services.<sup>15</sup> Nevertheless, even with statistics of 2010 stating that workload of IZTO arbitration does not exceed three cases per year<sup>16</sup>, identity of IZTO is far from an arbitral institution. Other than Istanbul and Izmir, Turkish Union of Chambers and Commodity Exchanges Center of Arbitration (“TOBB Arbitration”) delivers arbitral

services to Turkish and foreign companies in Ankara.

Lastly, while the aforementioned institutions have been aiming to strengthen their presence in the arbitration community by taking various steps for a long time, another promising development i.e. establishment of the Istanbul Arbitration Center (“ISTAC”) was recently put in place.

#### 4. The Path Leading to the ISTAC

Pursuant to the 9<sup>th</sup> Development Plan which aims to transform Istanbul into an International Financial Center, State Planning Organization of the Prime Ministry office has published Strategy and Action Plan for Istanbul International Financial Center (“the Plan”)<sup>17</sup> in 2009. Indeed, for the first time, establishing a modern, independent and autonomous arbitration center was set as an objective along with training judges and creating a uniform arbitration legislation.<sup>18</sup> For this purpose, the Plan tasked working groups within Ministry of Justice, Banks Association of Turkey, Capital Markets Board of Turkey and other non-governmental organizations operating in the relevant field. These working groups examined various arbitral institutions including the German Institution of Arbitration, American Arbitration Association, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, Dubai International Arbitration Centre, London International Court of Arbitration, International Court of Arbitration of International Chamber of Commerce (“ICC Arbitration Court”) and Singapore International Arbitration Centre. Five years later, Law No:6570 was concluded in success as a result of numerous strenuous sessions held by these working groups.<sup>19</sup> In other words, aforesaid Law which came into force on 01.01.2015, has established the ISTAC.

#### 5. Structure and Composition of the ISTAC

In order to proceed with the novelties that the ISTAC has brought to the Turkish international arbitration practice, understanding its constituents holds a great deal of importance. In this vein, Article 1 states that the ISTAC will facilitate resolution of disputes including of those including foreign element. Then, Articles 2 and 4 collectively make an important statement, the ISTAC is a private legal entity which is responsible for determining and ensuring implementation of applicable rules for arbitration and other alternative dispute resolution methods in an environment whereby promotional, supportive and cooperative activities are conducted to gain a solid position for arbitration. Then, administrative organs are stipulated in Article 5 as being General Assembly, Board of Directors, Auditor, Board of Counsellors, National and International Boards<sup>20</sup> and General Secretary.

For an ambitious establishment such as the ISTAC, it could be claimed that including most of the stakeholders in governance mechanisms emerges as a natural responsibility. From this perspective, Article 6 states that within its twenty-five members, the General Assembly receives participation from major actors such as the TOBB, Ministry of Justice, Banks Association of Turkey, Banking Regulation and Supervision Agency, Capital Markets

Board of Turkey and Participation Banks Association of Turkey. Then Article 14 clarifies a potential doubt on the management of the ISTAC regarding arbitration cases. Importantly, it states that members of the administrative organs excluding Board of Counsellors, cannot act as an arbitrator or mediator during their term of office unless parties agree otherwise. Then, the second paragraph proceeds to bar members of the administrative organs and employees from disclosing or using secrets and other confidential information that they become aware of due to their duty to any person or institution, even after expiration of their term of office. Also, it is not possible for the aforesaid to make statements or publications based on the secrets and other confidential information of same nature. Finally, it can be confidently concluded that the Law No:6570 delivers the ISTAC a reliable, well-structured and professional grounds on which it can operate as an independent, neutral and impartial institution.

#### 6. Novelties and Advantages of the ISTAC

In accordance with the Law No: 6570, Arbitration Rules of the ISTAC (“the Rules”)<sup>21</sup> have been adopted on 26.10.2015. In the eyes of a prudent, it is seen that the rules of the most prominent of institutional arbitration, for example the ICC Arbitration Court, have been a major source of influence. At first sight, services such as Fast Track Arbitration and Emergency Arbitrator as well as initiation of Procedural Timetable stand out as the distinctiveness brought to Turkish international arbitration practice. Also, party-autonomy seems to be prioritized. Now, it would be constructive to elaborate on the aforesaid major points.

##### 6.1 Fast-Track Arbitration

Implementing fast-track arbitration rules is a verifying sign that the ISTAC does not confine itself to develop into an ordinary arbitration center. Throughout nine articles, it is seen that for disputes in which the total amount of the claims and any counterclaims do not exceed TRY 300.000, these rules become applicable automatically. Alternatively, parties may agree applicability of the Fast Track Arbitration Rules<sup>22</sup> to their dispute in which the total amount exceeds such limit. Additionally, disputes subject to these Rules are in principle resolved by a sole arbitrator.

Expectedly, Fast Track Arbitration Rules makes a huge difference regarding timing concerns. For instance, while time limit for making submissions and selecting the arbitrator is 15 days, a 7 day and three-month<sup>23</sup> limit is designated for establishment of procedural timetable and rendering the final award, respectively.

As has been continuously expressed by practitioners, Fast Track Arbitration has unlocked the next level of a swift, efficient and satisfactory adjudication in modern Turkish legal practice.

##### 6.2 Emergency Arbitrator

In order to secure parties’ interest in a quick fashion and attain the most updated arbitral rules, the ISTAC has also implemented Emergency Arbitration Rules.<sup>24</sup> Latter while allowing parties to opt out of its application, it does not require



for party who applies for an emergency arbitrator to submit a Request for Arbitration, Statement of Claim, Answer to the Request for Arbitration, or Statement of Defense.<sup>25</sup>

It is important to mention that under the Emergency Arbitrator Rules; a party is not deprived from seeking national courts' assistance of an interim measure of protection before or after appointment of Emergency Arbitrator.<sup>26</sup> Emergency Arbitration Rules underline that this situation does not constitute a breach of the arbitration agreement, or a waiver of the arbitration agreement or waiver of the right to make an application to the Emergency Arbitrator.<sup>27</sup>

It is imperative to note that the Emergency Arbitrator makes the decision within, at the latest, 7 days of receipt of the file.<sup>28</sup> Although the Emergency Arbitrator's decision is binding on the parties<sup>29</sup>, the sole arbitrator or the arbitral tribunal is not bound by such decision. In that respect, judgment of the Emergency Arbitrator, upon request of a party or *ex officio*, could be modified or even terminated by the sole arbitrator or the arbitral tribunal.<sup>30</sup>

### 6.3 Procedural Timetable

In order to address the increasing concerns in relation to controlling the costs of arbitration, providing parties a clear-cut view rather than a nebulae in terms of the length of the process and simplifying the proceedings, Article 27 of the Rules stipulates<sup>31</sup> that during the preparation of terms of reference, the Sole Arbitrator or Arbitral Tribunal must produce a Procedural Timetable by having consent of the parties. Indeed, open to modification, the Procedural Timetable establishes the dates for written submissions and hearings, as well as other procedural issues. It is known that the mechanism of the Procedural Timetable is eminent within other reputed arbitral institutions, however, for the ISTAC to implement this mechanism also promotes its user-friendly approach.

## 7. Conclusion: Sustainable Success of the ISTAC

It is known that international arbitration is a vibrant and diverse dispute resolution platform which modifies itself to meet demands of its users. In addition to the broader community of users, arbitral institutions had also created their own 'market'. Indeed, pursuant to International Arbitration Survey of 2015<sup>32</sup>, the five most preferred arbitral institutions are the ICC, LCIA, HKIAC, SIAC and SCC. Behind these choices, it is stated that administrative quality, internationalist approach and reputation of the institutions played a major part.<sup>33</sup> In addition to preference of the arbitral institutions, the trend in selection of the seat must be mentioned. Indeed, the same report reveals that apart from the most popular seats such as London, Paris, Geneva, Stockholm; developing venues such as Hong Kong and Singapore gained popularity over the last five years and increased their attractiveness.<sup>34</sup>

Looking at the aforementioned, it can be understood that the course of the ISTAC which is destined for success has many waypoints within numerous topics. In this prospect, it would be beneficial to address several criticisms and potential challenges, the current performance of the Center as well as ultimate objectives to be fulfilled in order to confer a strong institutionalized position for the Center.

First of all, establishing the ISTAC with a special law rather than as an association bound by Turkish Civil Code and ancillary legislation could be criticized for the concerns of independence and impartiality. Unquestionably, maintaining a sterile environment from State intervention holds a prime element especially for the foreign users of arbitration. However, in an atmosphere in which private individuals could not form a unified international policy towards institutionalizing the arbitration for decades, initiative taken by the Turkish government in this respect have timely boosted the Turkish presence in institutional arbitration. Moreover, criticism based merely on the vehicle that established the ISTAC cannot reach a reasonable level in terms of its independence. Then, instead of building arguments



solely on theoretical grounds, operation of the Center must be closely monitored. Another important parenthesis, that is in close connection with the independence and impartiality of the Center emerges as the source of revenue of latter. At this point, Law No:6570 states that the Center can gain revenue in exchange for the services provided. However, taking elements of the reality in account, leaving a newly established ISTAC without allowing sufficient time for it to maintain a budgetary balance, would constitute an incompleteness of a substantive part of the Plan. Admitting that, the Law No:6570 lays out that Prime Ministry will cover the first two year budget of the Center.<sup>35</sup>

Aside from the scarce criticisms voiced so far by numerous circles, it is important to highlight the current operational status of the ISTAC. Today, after 17 months of its establishment; its Rules have been circulated, logistical capabilities are perfected and governing bodies are formed. Being an indication of its bright future; two international arbitration cases are being conducted as per to the Rules.<sup>36</sup> Also, some of the major projects in the region, namely 3<sup>rd</sup> Airport Project<sup>37</sup> and water supply agreement between Turkey and Northern Cyprus, includes an ISTAC arbitration

clause<sup>38</sup> Therefore, it can be safely stated that the ISTAC has been promoting its popularity on domestic and international levels.

Furthermore, it is beneficial to recall that legal infrastructure of Turkish arbitration is modern. Indeed; having domestic and international arbitration legislations reflecting international standards, Turkey is also party to major instruments such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Energy Charter Treaty. In addition to all, there are over 70 Bilateral Investment Treaty that Turkey has ratified. Above all; looking at this colorful picture, with the right dosage of patience and optimism accompanied by accurate strategies, the ISTAC, which started to flourish immediately, will reach ultimate success and develop into a major arbitral institution in the near future.

Abdülkadir Güzeloğlu

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