

TURKEY

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Date : 1 April 2015

Re : IBA Public Policy Project

COUNTRY REPORT (TURKEY)

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INTRODUCTION

Legal Sources of International Arbitration in Turkey

The term “arbitration” first appeared in the Code of Civil Procedure (“CCP”)¹ which governs domestic, voluntary arbitration. The CCP, however, does not govern international arbitrations and only applies to domestic arbitrations taking place in Turkey without any foreign element. Furthermore, the CCP does not contain any provisions regarding the enforcement of foreign arbitral awards.

In 1982, Law no: 2675², the Private International Law and Procedural Law Act ("PILA"), which contains provisions on the recognition and enforcement of foreign arbitral awards, came into force. The PILA was then amended by Law no: 5718.³

Turkey is a party to the 1961 European Convention on International Commercial Arbitration (“Geneva Convention”)⁴ and the 1958 New York Convention⁵, which was ratified on 2 July 1992 and entered into force on 30 September 1992. Turkey also ratified many bilateral and multilateral treaties and conventions, such as the Convention on Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”)⁶, which entered into force in 1989 and the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA)⁷, which was published in the Official Gazette in year 2000.

Due to the increase of investments and development of the build-operate-transfer models, the importance of resolving disputes by arbitration increased, and it was then the Constitution was

¹ Official Gazette (OG) dated (dd.) 2, 3, 4 July 1927, no: 622, 623, 624.

² OG. dd. 22 May 1982, no: 17701

³ OG. dd. 12 December 2007, no: 27.11.2007

⁴ OG. dd. 23 September 1991, no: 21000

⁵ OG. dd. 25 September 1991, no: 21002

⁶ OG. dd. 6 December 1988, no: 19830

⁷ OG. dd. 6 February 2000, no: 23956, OG. dd. 12 July 2000, no: 24107

amended in 1999⁸ in parallel to this need and also several other amendments were made to the relevant administrative acts⁹. Accordingly, it was agreed that the disputes arising out of the concession agreements for public services, where Turkish state is one of the parties, would be resolved by arbitration¹⁰ and the powers of the Council of State (which is the highest instance for reviewing decisions and judgements rendered by administrative courts) would be limited to giving its opinion within two months of time on draft legislation, conditions and contracts under which concessions for public services are granted.¹¹

Also, addressing the need for a legal regime on international arbitration, Turkey enacted the International Arbitration Law, no. 4686¹² (“IAL”), which entered into force in 2001. The IAL is based mainly on the UNCITRAL Model Law on International Commercial Arbitration and the 12th Chapter of the Swiss Federal Statute on Private International Law. However, the “Terms of Reference” concept is influenced by the Rules of Arbitration of the International Chamber of Commerce.

Enforcement of Foreign Arbitral Awards in Turkey

Arbitral awards made in countries that are not parties to the New York Convention are enforced under articles 60-62 of the PILA. However, due to the fact that the New York Convention is widely accepted throughout the world, the PILA is seldom applied in practice. Furthermore, article 1 of this Act stipulates that the provisions of international conventions to which the Republic of Turkey is a signatory are reserved, meaning that the PILA gives priority to international conventions, such as the New York Convention, with regards to the enforcement of foreign arbitral awards.

Article 62 provides the grounds for refusal of enforcement, which are similar to those of the New York Convention. It should be noted, however, that while article 5 of the New York

⁸ OG. dd. 14 August 1999, no. 23786 (*Law no:4446*)

⁹ OG. dd. 21 December 1999, no. 23913, OG. dd. 22 December 1999, no. 23914, OG. dd. 22 January 2000, no. 23941

¹⁰ Constitution, article 125 (*Amended by Law no: 4446, article 2. For the amendments, see OG. dd. 14 August 1999, no. 23786*)

¹¹ Constitution, article 155 (*Amended by Law no: 4446, article 3. For the amendments, see OG. dd. 14 August 1999, no. 23786*)

¹² OG. dd. 5 July 2001, no: 24453

Convention provides that the enforcement ‘may’ be refused where a ground for refusing enforcement exists, article 62 of the PILA provides that the court ‘has to’ deny enforcement in such a case.

Turkey made two reservations to the New York Convention. The Convention only applies to the recognition and enforcement of awards made in the territory of another contracting State, and only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under Turkish law.

Setting aside Proceedings in Turkey

The IAL applies to disputes which have a “foreign element” (e.g., a foreign party) and designate Turkey as the place of arbitration, or to disputes in which the provisions of this Act are designated by the parties or the arbitrator or arbitral tribunal¹³.

Article 15 of the IAL stipulates that the award shall be set aside if it is determined by the court that the award is in violation of public policy.

THE NOTION OF PUBLIC POLICY IN TURKEY

Public policy considerations comprise an undefined area of Turkish law. A number of issues may be determined to be against Turkish public policy and, as such, would preclude successful enforcement of a foreign arbitral award, where some issues may meet the approval of enforcement without facing the notion of public policy.

Public policy in the New York Convention refers to “international public policy” rather than “domestic”. However narrow interpretation of public policy is not in each case adopted by the Turkish Court of Appeal.

The notion of public policy is rather regarded as vague and subjective under Turkish law and the judges have a wide discretion in terms of interpretation of public policy. Nevertheless,

¹³ IAL, article 1

based on the decision of the Constitutional Court stating that “...the power granted to the legislator can under no circumstances be used to undermine or exclude the public policy.”¹⁴, this wide discretion granted to the judges is with limitations.

Definition of Public Policy

Regarding the enforcement of foreign arbitral awards, the General Assembly of the Court of Appeals has recently defined public policy as follows:

“public policy is the entire set of rules and institutions, which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time.”¹⁵

In another decision regarding the enforcement of a foreign court judgment, the notion of public policy was again defined as:

“public policy is the set of rules, which protects the foundation structure and fundamental interests of the society.”¹⁶

These two recent decisions are highly significant not only because they demonstrate how the notion of public policy is and should be defined by the local courts, but also reflect the approach of the local courts with regards to the enforcement of foreign arbitral awards and court judgments in terms of public policy grounds.

In each case, wide judicial discretion is adapted in terms of determination of the violation of public policy. A judge shall use this discretion considering the conditions and characteristics of each specific case. Nevertheless, in order to avoid arbitrariness, the local courts have adopted a specific way to apply public policy rules to the enforcement. Accordingly, violation

¹⁴ Decision of the Constitutional Court, E.1985/1, K.1986/4

¹⁵ Decision of the General Assembly of the Court of Appeals dated 8 February 2012, E. 2011/13-568 K. 2012/47

¹⁶ Decision of the General Assembly of the Court of Appeals dated 10 February 2012 E. 2010/1, K. 2012/1

of public policy should be flagrant and it should not be overlooked that the notion of public policy is beyond the differences in systems.

Overview of Specific Situations in terms of Violation of Public Policy

Below are the examples of specific procedural and substantive issues which are deemed as the violation of public policy under Turkish law.

1. If the foreign arbitral award contains provisions violating the principles of equality and fairness and right to be heard or if there is a violation of the principle of independence and impartiality of the arbitrators, the enforcement of foreign arbitral awards shall be refused due to the violation of public policy.
2. Foreign arbitral awards which refer to the parties' agreement waiving to resort to the legal remedies against a foreign arbitral award before the right to resort to those remedies originates shall be refused due to the violation of public policy.
3. If the foreign arbitral award contains provisions which do not comply with a final court judgment rendered by a Turkish court, the enforcement of foreign arbitral awards may be refused due to the violation of public policy due to the fact that granting enforceability at the same time for two decisions which contain contradictory provisions will destroy the notion of public policy which is based on legal security, social peace and stability.
4. If the foreign arbitral award contains provisions such as an order of payment of claims related to gambling or bribery, or delivery of goods whose imports and exports are prohibited by law, or fulfillment of obligations arising out of contracts of drugs or white slave trafficking, the enforcement of foreign arbitral awards shall be refused due to the violation of public policy. In such cases, violation of public policy is determined by reviewing the content of the subject arbitral award.

SELECTED ENFORCEMENT ISSUES ON PUBLIC POLICY

Turkey has for a long time been criticized of being arbitration unfriendly due to a very well know decision of the Court of Appeal (the so-called “Keban Decision”) rendered in 1976¹⁷. This decision was regarding the enforcement of an ICC award, where the Court of Appeal ruled that the arbitral award was reviewed and approved by the ICC and therefore it was against public policy. Such review was actually related to the form of the award and not to the merits of the case, but nevertheless such a decision was rendered. Although this award was rendered when Turkey did not even regulate any laws about enforcement, this decision is still being argued. In fact, the Court of Appeal then changed its view and decision on the scrutiny of the award, as such review of the award by ICC was just related to the form of it, and accordingly ruled that issuance of an award in accordance with the ICC rules does not contravene public policy.

With regards to the interpretation of public policy, the Court of Appeal recently rendered decisions, which are worth looking at.

One of these decisions is related to a tax dispute, where the General Assembly of the Court of Appeals referred to the doctrinal definition of the public policy as follows: “*public policy is the entire set of rules and institutions, which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time.*” The court emphasized that for instance customs laws and tax laws relate to the public policy and an arbitral award ruling in favor of a claim against the tax laws will definitely come across the intervention of the public policy, thus it might sometimes be necessary to partially review the merits of the case for a better determination of the public policy objections. Accordingly the General Assembly of the Court of Appeals refused enforcement in this case on the basis that tax issues are related to the public policy.¹⁸

¹⁷ Decision of the 15th Civil Chamber, dated 10 March 1976, no: 1617-1052

¹⁸ Decision of the General Assembly of the Court of Appeals dated 8 February 2012, E. 2011/13-568 K.2012/47

The other worthwhile decision relates to the enforcement of foreign court judgments and not the arbitral awards, but this recent decision of the General Assembly of the Court of Appeals brings important and thoughtful explanations as to the interpretation of the public policy by the Turkish courts. The issue was related to whether or not an unreasoned foreign court decision automatically constitutes a violation of public policy. The notion of public policy was again defined in this decision as “*the set of rules, which protects the foundation structure and fundamental interests of the society.*” The court ruled that even though the lack of reasoning of a court decision is in violation of the Constitution, right to defence and public policy, the existence or lack of reasoning in a foreign court decision as per the requirements of Turkish law is neither effective nor necessary in terms of the intervention of the public policy. Accordingly the court rendered enforcement saying that an unreasoned foreign court decision does not automatically constitute a violation of public policy.¹⁹

In another enforcement decision rendered on 16 July 2013, the Turkish Court of Appeal overruled the decision of a local court which refused the enforcement of a foreign arbitral award based on public policy grounds. In this particular case, which was related to an arbitration proceeding under the rules of the Zurich Chamber of Commerce and Industry, the arbitral tribunal, while dismissing the losing party’s, *i.e.* the claimant’s request, ordered the prevailing party, *i.e.* the respondent, to bear the arbitration costs and expenses. Upon application by the losing party for partial enforcement of the award, the local court refused the enforcement request on grounds that under Turkish law it should be the losing party to bear the costs and expenses in court proceedings. Following the claimant’s appeal, the Court of Appeals however overruled the decision of the local court saying that an arbitral award ordering the prevailing party to bear the costs and expenses will not violate public policy.²⁰

With regards to the set aside proceedings, on 17 April 2012 the Turkish Court of Appeal set aside an arbitral award related to an arbitration proceeding conducted under the Rules of the International Chamber of Commerce and seated in Istanbul for a case arising out of a concession agreement subject to Turkish law between a state agency and a telecommunications company, where the latter should pay a contribution of %0.35 of its gross

¹⁹ Decision of the General Assembly of the Court of Appeals dated 10 February 2012 E. 2010/1, K. 2012/1

²⁰ Decision of the 11th Civil Chamber of Court of Appeal, E. 2012/16024, K. 2013/24728, 16 July 2013

sales to the treasury. The telecommunications company initiated arbitration proceedings claiming that it was not supposed to pay a contribution to the treasury and as a result prevailed in arbitration. Upon filing of a set aside action by the state agency on grounds that the award was contrary to the public policy and that the arbitral tribunal exceeded its authority under article 15 of the IAL, the local court dismissed the set aside request. The state agency appealed the local court's decision and the Turkish Court of Appeal then overruled the decision and set aside the relevant arbitral award due to the violation of public policy. With this decision, the Court of Appeal made a distinction between public policy in local law and in private international law stating that *"public policy in local law is the entire set of rules protecting the fundamental structure and fundamental interests of the Turkish society... The notion of international public policy is more limited compared to that of local law. Therefore a situation considered as a violation of public policy in local law may not be considered as violation of public policy in international law."* The court also determined that *"in the present case, the arbitration agreement between the parties provides that the dispute shall be resolved by Turkish law, thus in terms of determination of the violation of public policy, the notion of public policy as per the applicable Turkish law should be considered."* In this decision, the Court of Appeal referred to the doctrinal definition of public policy as *"the entire set of rules and institutions, which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time."* and added that although the treasury share and contribution fees which were agreed to be paid under the concession agreement are not deemed as tax debts, they are continuous and significant items of income arising out of the transfer of the State's public service. Accordingly, an arbitral award ruling that the telecommunications company is not supposed to pay such fees violates the purpose of the State's income generation, the mandatory principles of Turkish law and thus public policy. This decision on set aside proceedings is significant given that the Court of Appeal adopted a broad definition of public policy.²¹

²¹ Decision of the 13th Civil Chamber of the Court of Appeals dated 17 April 2012, E. 2012/8426, K. 2012/10349

TABLE OF CASES

Identification of the decision	Summary of the public policy argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
15 th Civil Chamber of the Court of Appeal, no: 1617-1052, dated 10.03.1976	Scrutiny of the arbitral award by ICC violates public policy.		X	X	
General Assembly of the Court of Appeals, no: E. 2011/13-568 K.2012/47, dated 08.02.2012	An arbitral award ruling in favor of a claim against the Turkish tax laws will come across the intervention of the public policy.		X	X	
General Assembly of the Court of Appeals, no: E. 2010/1, K. 2012/1, dated 10.02.2012	An unreasoned <u>foreign court decision</u> does not automatically constitute a violation of public policy.		X		X
11 th Civil Chamber of the Court of Appeal, no: E. 2012/16024, K. 2013/24728, dated	An arbitral award ordering the prevailing party to bear the costs and		X		X

16.07.2013	expenses will not violate public policy.				
11 th Civil Chamber of the Court of Appeals, no: E. 2002/13265, K. 2003/5759	The allegation that the request for compensation arising out of a freight agreement and thus enforcement of the LMAA award will cause unjust enrichment is not against public policy.		X		X
13 th Civil Chamber of the Court of Appeals, no: E. 2012/8426, K. 2012/10349, dated 17.04.2012	Although the treasury share and contribution fees are not deemed as tax debts, they are continuous and significant items of income arising out of the transfer of the State's public service. Accordingly an arbitral award				

	ruling that these fees should not be paid, violates the purpose of the State's income generation, the mandatory principles of Turkish law and thus public policy. ²²				
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²² This decision relates to the setting aside of an ICC arbitral award by the Turkish Court of Appeal and not enforcement.