MEALEY'S
International Arbitration Report
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Recent Developments In International Commercial Arbitration In Turkey

by
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A commentary reprinted from the March 2001 issue of Mealey's International Arbitration Report.

MEALEY'S **International Arbitration Report**

Vol. 16, #3 March 2001

Commentary

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By
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[Editor's Note: Serdar Bezen is a member of the Ankara bar and has ten years advocacy and litigation experience in Turkey. This commentary was originally submitted to the Queen Mary & Westfield College, University of London, as an LLM dissertation. Copyright 2001 Serdar Bezen. Replies to this commentray are welcome.]

Introduction

This study intends to examine the recent developments in international commercial arbitration in Turkey. Arbitration law has developed very slowly in Turkey until the beginning of the 1980s and faced a number of problems at the domestic and international stage.

The first part of the essay aims to summarise the legal framework and problems of Turkish arbitration law in order to illustrate the reasons for the recent changes and their effect on the existing regulation. Most countries are affected by globalisation in international business. In particular, developing countries, including Turkey, have started to provide a sufficient economic and legal environment for foreign investments for the last two decades. Meanwhile, they realised that a modern arbitration approach is one of the leading requirements of international trade to initiate investments in their country. As far as Turkey is concerned, the problems appearing at this stage are to compel Turkey to amend its constitution and to improve its legal system in international arbitration.

The second part tries to demonstrate the developments with regard to the constitutional amendments and the relative new legislation. However, these only deal with the foreign investment projects and they are far from satisfying all needs of international arbitration in Turkey.

Therefore, the third part intends to provide a thorough analysis of the recently drafted International Arbitration Bill, which is considered as the last piece in the vast chain of developments. In spite of some changes, the Bill mainly focuses on the UNCITRAL Model Law. The differences between the Turkish text and the Model Law and their reasons will be examined. It is also attempted to assess the success rate and effect of the new text for the future.

I. The Legal Framework Of Turkish Arbitration Law Before The Recent Developments

A) Legal Aspects Of Turkish Arbitration

Arbitration, as a concept, is not new for Turkish Law. It was regulated in Article 1790[1] of 'Mecelle.'[2] However, it only started to be modified, in the meaning of secular and modern legislation, in the late 1920's. The subject of arbitration is mainly regulated in two legislation, which are the Code of Civil Procedure (CCP)[3] and the International Private and Procedural Law (IPPL).[4] Although there are some other legislation relating to arbitration, a part is out of the scope of commercial arbitration and another part is not used effectively.

The major conventions have been ratified by Turkey in the recent decade, such as; the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958),[5] the European Convention on International Commercial Arbitration (1961),[6] and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Foreign States (1965).[7]

Moreover, a great number of Bilateral Investment Treaties (BITs) have been signed between Turkey and major industrialised states in order to facilitate foreign investments and formulate how to access international arbitration in spite of some contrary Articles of the Turkish Constitution.[8]

1. Domestic Law

a) Code Of Civil Procedure

The Articles relating to arbitration are employed in Chapter VIII of the CCP under Articles 516–536. The code is derived from the Civil Procedural Code of Neuchâtel[9] in 1927 and deals with domestic arbitration. The Civil Procedural Code of Neuchâtel has been completely translated, except some unimportant differences, into the Turkish CCP.[10] Although the original text of Neuchâtel has been amended at least twenty times[11] and repealed in 1970, the relating Articles of the Turkish CCP have not been amended so far. A commission,[12] who prepared a draft law regarding essential changes of arbitration rules in the CCP, was established by the Research Institute of Banking and Commercial Law in 1966. The draft proposed reasonable changes in the substance of the Articles as well as the language of the CCP. The draft was submitted to the Ministry of Justice. However, the amendment was not achieved.

The law will only deal with domestic arbitration after the enactment of the International Arbitration Act.[13] Therefore, the importance of the CCP is limited as it will only be applicable, where the subject matter of disputes do not fall within the scope of the International Arbitration Act or international treaties.

Articles 516 and 517 deal with the **arbitration agreement**. According to Article 516, an arbitration agreement can be concluded in a separate agreement or stipulated in the main contract. The parties' consent regarding arbitration must be clear and doubtless. For instance, the parties cannot stipulate in the contract that disputes will be settled either under arbitration or in state courts. Such a contractual provision would render

the arbitration clause invalid.[14] Additionally, Article 517 clearly states that the arbitration agreement must be in writing. The Turkish Court of Appeal held that an arbitration agreement provided by "telex" is sufficient if it shows the submission of the parties.[15] However, the Court also found that other means of telecommunication, which provide a record of agreement, are not valid under Turkish law. Finally, Article 518 embodies 'arbitrability' stating that an arbitration process does not take place if the parties are not entitled to decide upon the subject matter of the dispute such as; family law, insolvency law, and cases relating to public policy.

Articles 520–523 provide the **composition of arbitral tribunal**. There is no restriction that non-lawyers and foreigners cannot be arbitrators. In the sense of the law, the parties are free to appoint arbitrators and determine their number. However, if the parties fail to do so, the competent state court has the power to appoint arbitrator(s) with the request of one of the parties. If the parties cannot come to a conclusion regarding the appointment of arbitrator(s), unless otherwise agreed between the parties, the court shall appoint three arbitrators. If a party fails to appoint the arbitrator within seven days of receipt of a request to do so from the other party, the appointment shall be made by the court.

Article 521(1) expresses that the Articles of the Code regarding the challenge of judges also apply to the subject matter of the challenge of arbitrators. The challenge can be made by the first hearing or within five days when the party knows or ought to know the appointment of the arbitrator. The challenge claim is to be decided by the court after considering assertions of the parties. In addition, during the arbitration process, the mandate of arbitrators cannot be terminated unless the parties agree on the termination. The principle of *"Kompetenz-Kompetenz"* is not recognised by the CCP. Under Article 519, the State Court has the power to decide and deliver a summary judgment on a conflict regarding the jurisdiction of arbitral tribunals.

Articles 523–529 provide the legal framework of the **arbitral proceeding**. The arbitral tribunal has the power to determine the procedural rules and the timetable of the process unless otherwise agreed by the parties. Nevertheless, Article 529 states the maximum time limit of the arbitration process. The arbitral tribunal has to deliver the award within six months. Otherwise, the arbitration agreement will be invalid and the dispute will be settled by the competent court. However, the time limit can be extended with the parties' consent or the court can be asked to grant an extension on application of one party. Nevertheless, the judgment, concerning the extension of the time limit, is not appealable by the parties.[16] According to Article 528, if the commitment of a fraud has been alleged by one of the parties during the arbitral procedure, the proceeding is adjourned until the criminal court rules about the case. This period of time is not accounted for in the arbitration time limit.

Article 526 dealing with the rules taking evidence refers to the general rules on taking evidence in Articles 236– 374 applicable to the courts. However, in some circumstances the tribunal must seek the assistance of the competent Justice of the Peace. These circumstances are stated in Article 527:

- administration of oaths,

- summoning or swearing of witnesses when refusing to appear in the arbitral tribunal,
- need for a rogatory letter to a foreign court,
- obtaining of written documents as described in Articles 322, 323, and 333.

Articles 530–532 concern the **arbitral award**. An arbitral tribunal is able to render its award by majority. Article 530 states that an arbitral award must contain:

- description of the dispute,
- explanation of facts and judicial reasons,
- substance of the dispute,
- expenses and reasons of the expenses.

Arbitration awards must be signed and dated by arbitrators and the arbitration agreement must be attached to the final award. Article 532 embodies the form of the registration and deposit of arbitral awards. The award needs to be delivered to the parties by the competent court and comes into force by the notification of the parties.

The final Articles deal with **recourses against the award**. The CCP simply limits the grounds for attacking arbitral awards. According to Article 533, an award may be set aside only under the following conditions:

- if a final award is delivered after the expiry of the arbitration time limit, or
- if an award deals with an issue which is not claimed by the parties, or
- if an award deals with an issue not within the scope of the submission of the parties, or
- if an award does not deal with all the issues between the parties.

If an arbitral award is set aside by the Court of Appeal, in accordance with the last three reasons stated, an arbitral tribunal with a new time limit will be re-established. Despite the number of recourse against an arbitral award, the Court of Appeal created new appeal grounds. For instance, an arbitral award can be challenged on appeal, if it does not contain the necessary explanations, as stated in Article 530, or if a counsel of a party is appointed as an arbitrator. In this context, a judgment of the Court of Appeal[17] is criticised by many writers.[18] The debate has arisen from sub-section 3 of Article 533. The Court of Appeal ruled that, if the parties agree that the applicable law is Turkish substantive law, the tribunal must deliver the award in accordance with the merits of Turkish substantive law. Otherwise, the award may be challenged by one of the parties and set aside by the Court. In the light of this decision, the Court of Appeal will henceforth consider two questions. First, whether the tribunal applied Turkish substantive law? Second, whether the tribunal delivered the right award

in respect of the law? Criticisms are mainly based on two grounds. First, Article 533 is a mandatory rule and does not mention such a recourse against an award. Therefore, the view is that enlargement of the scope of the Article is contrary to the spirit of Civil Law. Second, the principle of the parties' autonomy is essential for arbitration proceedings. However, such a decision does not allow the parties to settle the dispute under the arbitration process. Thus, it is conceded that this is contrary to the principle of the parties' autonomy. In the light of Article 533, the CCP does not vest in the Court of Appeal the power to review the merits of the arbitral awards. In addition, arbitrator(s) do not have the power to persist against judgments of the Court of Appeal. In fact, the parties have a right to apply for a re-trial from the Court of Appeal. However, this might not modify the outcome as the final appeal authority remains the Court of Appeal.

The last Articles of Chapter VIII provide that the parties cannot waive to challenge an arbitral award by agreement and an award is not enforceable if a party has still legal remedies against the award in accordance with the CCP.

b) *International Private And Procedural Law*

The IPPL came into force on 22.11.1982 with Law No. 2675 and repealed relevant Articles[19] in the CCP in respect of the recognition and enforcement of foreign judgments. Before the legislation came into force, there was no specific legal codification in this field regarding foreign arbiral awards. Further, the repealed Articles, relating to the recognition and enforcement of foreign judgments, had been applied to foreign arbitral awards by analogy.

Articles 43–45 of the IPPL are concerned with the recognition and enforcement of foreign arbitral awards. After the ratification of the New York Convention (1958) in 1991, the application of the IPPL was restricted in practice. The law is only applicable on two occasions. First, according to Article I(3) of the New York Convention (1958), the IPPL is only applicable to non-contracting states' arbitral awards. Second, a party, relying on Article VII of the New York Convention, is able to choose the recognition and enforcement of the award in accordance with the Code. However, the second probability is not advantageous for the party who seeks recognition and enforcement of the award, because the New York Convention is much more efficient and wider than the Code. Furthermore, during the drafting of the Code, the Convention was taken as an example.[20] Nevertheless, the Code does not sufficiently cover all relevant issues as dealt with extensively in the New York Convention (1958).

Articles 43, 44 embody the procedure of the recognition and enforcement of a foreign award. They address the competent court and require necessary documents, which are stated in Article IV of the New York Convention. However, there are a number of differences between the IPPL and the New York Convention. First, in spite of mentioning the words "foreign arbitral awards" in the heading of Article 43, the Code does not define the terms. In fact, the concept is not defined in any statute in Turkish Law. Therefore, the interpretation of the subject matter of the question was left to the Turkish Court of Appeal. The Court described the concept in many decisions as; 'an award delivered under the law of a foreign authority.' However, the Convention points to the territory of a foreign state rather than the law of a foreign authority.[21] Other differences for recognition and enforcement have arisen from the reasons of the rejection of the application. Subsection (i) of Article 45 and Article V(e) of the Convention have almost

the same wording except that the Code mentions "the award has not yet become conclusive or capable for execution . . ." instead of "the award has not yet become binding on the parties . . . ". However, both legislation aim to stress that the parties do not have any legal remedies against the award in respect of the procedural rules of the arbitration process. Thus, the legal consequences of both provisions are similar. Finally, one other difference arises from Article 45(b). The Article mentions another concept in addition to Article V,2(b) of the Convention, which states that "recognition or enforcement may be refused if the award would be contrary to the public policy of that country." In Article 45(b), the Code only adds "common moral principles" as an additional reason for refusal of the application to Article V,2(b) of the Convention.

c) Other Legislation

Arbitration is also regulated in other legislation in Turkish Law, which all concern domestic arbitration. Besides, most of them are not in the scope of commercial arbitration. These statutes will not be deeply examined in this study. However, it is necessary to mention some of the legislation in order to indicate the approach of legislators and the historical background of Turkish arbitration law. The aim of each legislation is to provide specific arbitration rules in certain areas. In this context, a majority of legislation does not allow the parties to choose any other dispute resolution course and the parties do not have the power to appoint their arbitrators. Obligatory arbitration might be imposed either in respect of the identity of the parties for disputes such as:

- between the councils or government establishments,[22]
- between the members of the stock exchange,[23]

or in respect of a specific area of dispute, such as;

- the Consumer Rights Act (Articles 22–23).[24]

The remaining legislation, which contains very limited provisions regarding arbitration, is based on the parties' consents and its scope is very limited in practice, such as:

- the Co-operative Act (Article 95),[25]
- the Act of Lawyers (Article 95, (5)).[26]

2. Treaties

Turkey has ratified several international conventions and treaties in respect of international commercial arbitration since the late 1980s. Until 1989, the year of the ratification of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Foreign States 'ICSID' (1965), Turkey had not been a party to any major international convention in the subject matter of commercial arbitration. However, in 1991, Turkey ratified two major international conventions — the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the European Convention on International Commercial Arbitration (1961) — and both conventions came into force on 30.09.1992.

Turkey also signed 37 bilateral international treaties ('BIT'), that contain international arbitration provisions, and ratified 21 of them.[27] Furthermore, the majority of these BIT's provide for ICSID or UNCITRAL arbitration.

The ratification power with regard to international treaties is regulated under Article 90 of the Turkish Constitution. By the Constitution, this power is vested in the Parliament and it must be exercised by parliamentary act. The Constitution does not mention any strict time between the signing and ratification of treaties. It merely states that it must be accomplished 'as soon as possible.' It should be emphasised that, according to Article 90(5) of the Constitution, the unconstitutionality of international treaties cannot be alleged before the Constitutional Court. In the event of a conflict between international treaties and national law, the treaties will prevail.[28] Therefore, ratified international treaties have a special place compared with other statutes in Turkish Law.

a) The New York Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (1958)

As already mentioned, recognition and enforcement of arbitral awards is modified in the IPPL and its provisions are absolutely harmonious with the New York Convention. Turkey ratified the Convention with two reservations. First, the Convention will only be applicable, if an award is delivered in the territory of another contracting state. This reservation is derived from the principle of reciprocity, which is one of the main principles of Turkish foreign policy. Furthermore, Article 38(a) of the IPPL also indicates the principle of reciprocity regarding the recognition and enforcement of foreign judgments. Thus, legislators thought that such a reservation would prevent a conflict between the Code and the Convention. Second, the Convention will only apply to legal relationships whether contractual or not, which are considered as commercial under Turkish law. It seems that such a reservation makes narrower the application of the Convention. However, the meaning of commercial relationships is evaluated in Turkish law as in any other modern law regimes. Thus, this concept would not be a real issue in the application of the Convention.

b) The European Convention On International Commercial Arbitration (1961)

Turkey had joined the 'working group' during the preparation of the Convention and signed the final text. However, it had not ratified the Convention until 1991. During the discussions on the ratification of the Convention, many Turkish lawyers were in favour of the Convention.[29] The fundamental principles of the Convention and Turkish arbitration law are in harmonious relationship with each other. The Convention was the first legislation with regard to international commercial arbitration in Turkish law. Therefore, the Convention contributed to the emergence of a number of new legislation on this matter.

c) The Washington Convention On The Settlement Of Investment Disputes Between States And Nationals Of Foreign States (1965)

The importance of the ICSID Convention can be perceived under two points. Firstly, the Convention was the first major international convention, accepted by Turkey, in

international commercial arbitration. Secondly, the fast growing economy and the necessity of foreign investments made Turkey conclude many more investment treaties within the scope of the Convention. In spite of the recent problems,[30] Turkey seems to be able to solve legal obstacles to provide for arbitration under the Convention. At the time of the ratification of the Convention, Turkey notified the Centre that, disputes relating to real property rights will be out of the jurisdiction of the Centre.[31] Moreover, Turkey made a reservation with respect to Article 64 of the Convention, by denying the power of the International Court of Justice on the interpretation and application of the Convention. According to the reservation, the disputes, which may arise from the interpretation and application of the Convention can be solved through meaningful negotiations between the parties instead of having recourse to the International Court of Justice.[32]

d) Bilateral Investment Treaties

Bilateral Investment Treaties (BIT) are concluded by states in order to regulate relationships between investors and host countries. The aim of these treaties is to create a secure environment for foreign investors. In general, BITs deal with the definition of investors and investment, currency exchange regulation between the states, guarantees investors' assets, dispute resolution courses and so on. As far as international commercial arbitration is concerned, the treaties, which are signed by Turkey, are only important, if they contain any provision to international arbitration. Many BITs contain such a provision. However, all of them stipulate a negotiation stage before invoking the international arbitration process. The time limit of the negotiation stage varies from contract to contract. However, two most preferred time limits are concluded by the parties. The first group of contracts stipulates a one-year time limit. In this time, the parties must solve the disputes with negotiations or conciliation methods.[33] In the second group of contracts, the negotiation time limit is six months. After expiry of the time limit, the parties are free to invoke international arbitration or national litigation.[34] The treaties mainly refer to UNCITRAL and ICSID arbitration.

B) Problems Of International Commercial Arbitration In Turkey

1. Problems With Respect To Lack Of Access To International Commercial Arbitration

a) Concession Agreements And International Commercial Arbitration

Turkey, as a developing country, faces fast growing infrastructure investment problems, which cannot be afforded by Turkey itself because of a shortage of financial resources. For example, there were 5221 public investment projects on the waiting list in 1996. However, merely 14.7% of the budget could be allocated for public investment projects, which was only enough to cover 1 to 16 of the total amount of all projects.[35] Therefore, in 1980s Turkey grasped the necessity of attracting foreign investments and started to regulate a number of legislation.

In 1984, foreign investors were invited to the electricity energy sector by Law No. 3096.[36] The following step was taken for motorways with Law No. 3465[37] in 1988. Both legislation provide for concession agreements regarding public services between investors and

public sectors which were concluded in the Built — Operate — Transfer (BOT) model. However, there were two main problems regarding implementations of the contracts. First, the Turkish Supreme Administrative Court had the power to review the conditions of concessions and concession contracts under Article 155 of the Turkish Constitution. In practise, this type of examination caused delays and undesired changes in contracts for the parties, because, some criteria of the Supreme Court were very severe especially on international arbitration. Second, the Turkish Administrative Courts have exclusive jurisdiction on any dispute arising from the concession agreements. Actually, this is not a unique law regulation in the world. Likewise, concession agreements are generally not arbitrable under French, German and Belgian law.[38] Naturally, in the point of view of foreign investors, BOT agreements are not attractive under these conditions.

In order to avoid foreign investors' suspicions, Law No. 3996[39] was enacted in 1994, which was amended by Law No. 4047[40] in the same year. The law added some specific sectors to the electricity and motorway sectors such as the construction and operation of bridge, tunnel, telecommunication, dam, sewer system, railway, seaport. Therefore, it enlarged the scope of the implementation of BOT agreements. Moreover, Article 5 stipulates that the BOT agreements, regarding these services, will be concluded between state organs and investors in the form of non-concession agreements. In other words, the contracts do not give any concession rights in favour of investors. By this provision, the lawmaker desired to indicate that BOT agreements are not concession or administrative agreements. In order to reinforce this argument the last sentence of Article 5 also states that BOT agreements are governed by private law. Therefore, the legislator tried to avert the exclusive jurisdiction and review power of the Turkish Supreme Administrative Court on BOT agreements. Consequently, the agreements would be subject to international arbitration.

At this stage, the battle started between the lawmaker and various courts. First, the Turkish Supreme Administrative Court delivered a number of judgments[41] against the provisions of the law. However, these judgments were not sufficient to set aside the provisions of the law. Some members of the Parliament invoked the Constitutional Court by alleging that Article 5 was contrary to the Constitution. The Court held that Article 5 was contrary to Articles 2,11,37,125,155 of the Constitution and set aside[42] Article 5. However, the Court needed 9 months, after delivering the decision, to state the reasons of the judgment. According to the Constitutional Court:

- BOT agreements are concession agreements and not regulated by private law, because one of the parties is a state organ and the subject of the agreements relates to public service. Therefore, the contracts are within the scope of administrative law.
- BOT contracts cannot be subject to international arbitration under Turkish Law, because the Turkish Constitution gives the Turkish Administrative Courts an exclusive jurisdiction on the subject matter of disputes.

There was no definition of 'public service' in Turkish law or in any judicial decision. However, the decision of the Constitutional Court is based on the interpretation of the terms 'public service' and 'concession.' The Court defined the concept of 'public service' in the decision as "systematic and continuous services, which are carried out directly by or under the control and inspection of the state or any state organ, in order to

meet the needs of the public and be in favour of the public." In the same decision, the Court embodied the meaning of 'concession' as "a transfer of responsibility from a governmental public service to a private person, regarding an implementation of any public service under the control and inspection of the administration, on the strength of a contract between the state and an investor." The Court also added that, the determination of any contract as a 'concession agreement' could be derived from the nature of the transaction and not from the statute. Consequently, the judicial decision of the Court closed the way to international arbitration in respect of the concession agreements.

b) Bilateral Investment Treaties As An Alternative Solution To Access International Commercial Arbitration

As stated above, a number of BITs were concluded between Turkey and mostly developed countries in order to create a secure environment for foreign investors. The BITs provided for ICSID or UNCITRAL arbitration in the event of future disputes, which might occur between the host country and the contracting country's investors. Moreover, the inconsistency of treaties with the Turkish Constitution cannot be alleged under Article 90(5) of the Constitution. In other words, treaties have immunity under the Constitution. Therefore, Turkish courts must take into account the superior powers of international treaties over Turkish law during the litigation or inspection process. In spite of this situation, the Turkish Supreme Administrative Court set aside an arbitration clause in a concession agreement during its review and approval examination.[43] The Court relied on the same reasons, which were stated in the BOT decision of the Constitutional Court.[44] However, the dispute on the jurisdiction between the state courts and international arbitration seems to be ended by the constitutional and other relevant amendments.[45]

The implementation of the BITs can be seen by illustrating the relationship between the BITs and the ICSID arbitration. The exclusive jurisdiction of the Turkish Supreme Administrative Court can be overruled by the Convention, if the conditions of Article 25 of ICSID are satisfied. The Court cannot deny the jurisdiction of the Centre, if:

- an investor is a national of another contracting state,
- consent of the parties relating to the jurisdiction of the Center is given in writing,
- there is any legal dispute, which has arisen directly from an investment.

Besides, Article 25(1) of ICSID clearly states that ". . . when the parties have given their consent, no party may withdraw its consent unilaterally." Therefore, Turkey, as a contracting state, cannot refuse unilaterally to revoke its consent to ICSID arbitration, which has been given in a BIT. The consent of the parties could be submitted in three ways. First, it may be concluded in the investment contract between the host-state and the private investor. However, the Supreme Administrative Court insisted on removing the arbitration clause in concession agreements in the review stage. Second, the consent of the host-state may be regulated under the internal legislation of the state. Nevertheless, there is not such a provision in Turkish law. Lastly, such consent may be found in international treaties between the host-state and the state of the private investor. In the last point, BITs may have a function to illustrate the consent of Turkey. By the strength

of the fusion of the ICSID Convention and a BIT, it could be possible to bring a dispute under ICSID arbitration.

2. Enforcement Problems

Although an arbitration process is formed by the parties' consent, a struggle against the award may occur in every stage of the process. The issue of a refusal to enforcement of an award might be the core issue in an arbitration dispute settlement mechanism. It could deprive the winning party of the outcome of the award. The history of commercial arbitration in Turkey indicates that the enforcement problem was one of the main issues and initiated some debates in Turkey as well as on international platforms. Enforcement problems of arbitral awards in Turkey can be divided into two main groups. First, the Court of Appeal delivered inconsistent judgments to determine the nationality of arbitral awards. Second, some applications were refused under the reason of contrariety to Turkish public policy.

a) Nationality Of Arbitral Awards In Turkish Law

Until 1949, there was no distinction between foreign arbitral awards and domestic arbitral awards in Turkish law. Foreign awards were enforced as if they were domestic awards in accordance with provisions of the CCP. The dominant thought was that arbitration agreements came into existence from the parties' consent and were valid anywhere in the world similar to other commercial agreements in general.

In 1949, the Court of Appeal reached a different decision known as *Argentina*.[46] According to the judgment, a foreign arbitral award would be enforceable in respect of the relevant provisions of the CCP regarding the enforcement of foreign judgment by analogy. Therefore, the Court, for the first time, distinguished a foreign award from a domestic award. The Court also determined the criterion between foreign and domestic awards by describing foreign awards as follows: "the award, which is delivered under the authority of foreign law, is a foreign award."

Nevertheless, the Court changed its previous opinion in *Keban Case*[47] in 1976. The Court created an additional criterion regarding foreign arbitral awards, which was criticised by many lawyers in Turkey[48] as well as on international platforms.[49] In *Keban*, the contract was concluded between French — Italian constructor companies and a state owned Turkish water authority regarding the construction of a dome named Keban in Turkey. The parties stipulated in the contract that Turkish substantive and procedural laws were applicable in the event of disputes. They also provided for an arbitration process to be formed and to proceed according to the relevant regulations and procedures of the ICC. After the dispute arose, it was brought before the Court of Arbitration of the ICC tribunal. The tribunal convened in Lausanne and rendered an award in favour of the constructor companies. The award was submitted to the ICC Secretary and approved by the ICC Court of Arbitration. In the later stage, the plaintiffs brought an action in the competent Turkish court in order to enforce the award. The judgment of the competent Turkish court, which was in favour of the enforcement of the award, was appealed by the defendant. The Turkish Court of Appeal held that the examination of such an award, which was delivered outside the national borders, was not within the jurisdiction of the Turkish courts. Therefore, the award, delivered in the sovereignty of another state, was considered as a foreign award. Thus, the recognition and enforcement of the award

would not be possible in respect of the decision. By this decision, the Court redefined the concept as an award, which was delivered outside the territory of Turkey, and reversed its previous decisions. The Court also found the award was contrary to Turkish public order.[50]

Two years later, the Court of Appeal returned to its previous decision and rejected the "territorial principle." The judgment[51] embodied that an award cannot be defined as a foreign award according to the nationality of arbitrators or the place, where it had been rendered. In the light of the decision, the characteristic point was the nationality of the procedural law, which regulates the arbitration process. The criterion has been applied to distinguish foreign awards so far. Although the Court of Appeal mentioned the "territorial principal" in later decisions,[52] the judgments were not based on this principle. Some lawyers[53] also shared the same thought that the "territorial principle" can be used as a subsidiary criterion in the absence or uncertainty of the applicable procedural law, which regulates the arbitration process.

Besides, after the ratification of international treaties, the uncertainty of the question was satisfied on a large scale. However, the probability of such an event as in *Keban* case may re-occur in the recognition and enforcement of a foreign award, which is out of the scope of international treaties.

b) Contrariety To Turkish Public Order

In Turkish law, provisions regarding public order are spread in different codes concerned with procedural or substantive laws. These rules might intervene with mandatory rules or the determination of public order rules might be left to the discretion of judges with regard to the subject matter of disputes.

Public order played a major role in both the setting aside and the refusal of recognition and enforcement of awards in the history of Turkish arbitration. The obvious example occurred in *Keban* Case. The Turkish Court of Appeal found that the submission of the award to the Court of Arbitration for its approval in respect of ICC rules was against Turkish public order. The approval of the Court of Arbitration was considered as an action against the immunity and freedom of the arbitrators by the Turkish Court. In this sense, despite the parties' contractual agreement, which states that any dispute must be settled by ICC arbitration under the Turkish procedural law, the approval of the Court of Arbitration was not an appeal authority according to the applicable law. Therefore, the action was considered a violation of Turkish public order. In fact, the Turkish Court of Appeal failed to point out that the Court of Arbitration does not examine the cases in the substance relating to errors of facts or law. Its function is to review the formal sufficiency of the award such as; enforceability under the assumed law(s) and so on. Consequently, the Turkish Court of Appeal, in previous decisions, held[54] that the approval of the Court of Arbitration was not contrary to Turkish public order.

Another example can be seen in *Metex* Case. The Commercial Court of Ankara[55] found that an arbitral tribunal has to deliver its award in accordance with the stipulated procedural law, which is determined by the parties. Otherwise, the award is contrary to Turkish public policy. It is alleged that such a decision shows the hostile attitude of Turkish courts against foreign arbitral awards because the parties' determination in favour

of Turkish procedural law is not clear in the contract.[56] In the appeal stage of the case, the Court of Appeal did not comment on the reason of the Commercial Court of Ankara. However, it found that such a failure was in violation of Article V1(d) of the New York Convention.[57]

II. Constitutional Amendments

The international political economy has caused a substantial liberalisation of attitudes towards foreign investment and privatisation across most of the world since the 1980s. Especially developing countries, which cannot cope with all the investment spending with their own economic sources, are in desperate need for foreign investment in order to afford major projects. Therefore, there has been a competition among states to attract foreign investment to their territories. There is no doubt that they have to improve their investment environment and prepare investment-friendly legal regimes for this purpose.

Turkey, one of the fastest developing countries in the world, has exerted to find immediate solutions to investment problems in public sectors. There were many disadvantages for foreign investors. In spite of the 1995 BOT decision of the Constitutional Court, some investors were able to access international arbitration relying on BITs or the ICSID Convention. However, the pre-inspection power of the Supreme Court of Administration has caused undesired changes and delays for investment contracts. In addition, the framework of the law was sinuous and complicated for foreign investors and not sufficient to cover all investors because of nationality reasons. Nevertheless, there were a serious number of oppositions against concession agreements and international arbitration. This criticism was one of main reasons for the late legal improvement.

A. Arguments Against Constitutional Amendments

In the 19th and early 20th centuries, the implementation of major economic sectors had been left to foreign investors and non-muslim citizens with concession agreements. The capitulation had caused economic dependence and political pressure on the state. It is commonly said that this economic situation was one of the main reasons, which prepared the end of the Ottoman Empire. Such painful historical experiences made Turkish public opinion against foreign investments, consequently, international arbitration. In the light of the historical experiences and the protection of social economic policy, reasons were put forward against the new legal regime by mainly social democrat politicians and writers. The criticisms can be divided into two main groups. The first group argued against the economic structure itself,[58] which was tried to be built with legal measures. According to these critics, implementation of some sectors must be carried out by the government on a non-profit making basis such as; electric and water supply, transporting services and so on. The private sector, either foreign or not, would, naturally, want to make a profit from the operation of these sectors. Consequently, such a change would damage public interests. The second group was not against the idea of the economic structure itself.[59] However, it was concerned about the carrying out of the privatisation and concession transactions in practice. It clearly pointed out its suspicions about politicians because such big projects might be used to make a political or personal profit or as negotiation tools in international relations. In the event of these occasions, the situation would prosper against the public and country. It was in favour of a new legal process, which would enable to inspect transactions in this field. In spite

of the oppositions, the governments tried to create an investor-friendly environment in the last fifteen years. However, the measures were not enough to achieve the aim without constitutional amendments. Nevertheless, the governments did not have the necessary parliamentary majority in order to amend the Turkish Constitution until 1999.

The strong struggle against international arbitration and the political inconsistency have postponed the constitutional amendments until August 1999. Consequently, the constitutional amendments were passed in the Parliament with Law No.4446[60] and came into force on 14.08.1999. Following by, relating amendments in several codes were enacted by the Parliament.

B. The Substance Of The Amending Law

The aim of the amendment is to clear all obstacles on the road of concession agreements in order to attract foreign investments. It would be alleged that the BOT Decision 1995 guided to build the spirit of the amendment. The legislator basically tried to get rid of every hindrance, which were stated in the decision.

The first Article of the Law amends the heading of Article 47 of the Constitution and adds new sentences. Its previous heading was "Nationalisation," which was changed to "Nationalisation and Privatisation." The first Article of the amending law states:

> "The principles and procedures of the privatisation of enterprises and assets, belonging to the State, public economic enterprises, and other public legal entities, shall be governed by statutes.
>
> It is to be determined by law, which of those investments and public services, carried out by the State, public economic enterprises, and public legal entities, should be carried out or transferred to private persons or legal entities on the strength of private law contracts."

As examined above,[61] the Constitutional Court set aside Article 5 of Law No. 3996 with the opinion 'agreements relating to infrastructure projects are concession contracts and they must be governed by administrative law.' Consequently, the Court did not let such a statute to regulate the subject matter of the field on the basis of the contrariety to several Articles of the Constitution. Therefore, the legislator removed the constitutional obstacle with this Article in order to determine two substances in a future law. First, it would be possible to stipulate 'the principles and procedures of privatisation' by statute. Second, the aim of the new sentence is to exclude the concession agreements from the category of administrative contracts by mentioning 'private law agreements.' Therefore, the parties would be able to make an agreement regarding public sectors, which could be determined by an ordinary parliamentary act.

Article 2 of the law adds a new sentence to the end of the first sub-section of Article 125 of the Constitution.

> "It may be stipulated that any dispute, arising out of concession contracts relating to public services, can be settled

> under domestic or international arbitration. Access to international arbitration can only be given where a foreign element involved in the subject matter of the dispute."

According to Article 125 of the Constitution, the Turkish administrative courts have the exclusive jurisdiction on most administrative acts of the Government. The amendment adds the second paragraph to the Article and provides that concession contracts regarding public services can be subject to domestic or international arbitration if the parties stipulated in the contract to do so. However, the last sentence mentions a condition in order to access international arbitration. The condition is that a dispute must contain a "foreign element." Terms, "foreign element" and "international arbitration," stated in Article 2, were not defined in Turkish law, consequently, the interpretation of the terms would lead to further problems. In fact, the determination of arbitral awards was subject to inconsistent decisions[62] of the Court of Appeal in the past. The lack of definitions caused some commentaries[63] and anxieties[64] at last, the debate is almost come to an end by Law No. 4501.[65]

Article 3 of the law amended the second sub-section of Article 155 of the Constitution as follows:

> "The Supreme Administrative Court is empowered to give advisory opinion on draft laws, which are sent by the Prime Minister and the Cabinet, and on concession contracts related to public services, within two months of submission, and to examine the draft regulations, to solve administrative disputes and cases, and to carry out other duties given by law."

It is obvious that, the legislator wanted to get rid of two negative effects of the Supreme Administrative Court on concession contracts. By the amending law, the specific power of "examination and review" is restricted as an "advisory opinion" therefore, the court has no power to make a change on concession contracts at all. Besides, the Law provides two months time limit, commencing with the submission of the case, in order to prevent any delay.

C. The Relative Legislation

Despite the fundamental changes, which were made by the constitutional amendment, there were still needs for further legislation. First, some concepts had to be clarified such as "foreign element," "international arbitration." Second, the gaps needed to be filled by new acts in order to create a secure legal environment for concession contracts consequently, international arbitration. Therefore, three new legislation, which amend some existing laws and provide new rules, followed the constitutional amendments for these purposes.

The Law Regarding the Amendment of some Articles of the Supreme Administrative Court and the Administrative Procedural Law[66] has effects on two legislation, The Supreme Administrative Court Act and the Administrative Procedure Act, and came into force on 18.12.1999 with the Law No. 4492. Both amended laws are concerned with the jurisdiction of administrative Courts, and the Supreme Administrative Court.

First, it provides that, the administrative courts have no jurisdiction over concession contracts if a contract contains an arbitration clause. Next, the amending law annihilated the review and approval power of the Supreme Administrative Court over concession agreements. The Court is only empowered to give advisory opinions in two months, which are not legally effective on concession contracts.

The Law Amending Some Articles of Law Concerning Realization of Some Investments and Services under the Framework of Built-Operate-Transfer Model[67] amends some Articles of Law No.3996, which was the subject of the BOT decision of the Constitutional Court. The first Article of the amending law enlarges the scope of BOT projects in electricity energy investments. It adds some other type of business to Article 2 of the 3996 Law that the transmission, distribution, and trade of electricity production can be also concluded in BOT agreements under the law. There is no doubt that the immediate electricity needs of Turkey[68] compelled the Government to take measures against the problem. The second Article of the amending law resuscitated the previous Article 5 of Law No. 3996. Thus, the legislator one more time specifically emphasises that BOT contracts are governed by private law and are arbitrable. Nevertheless, there was no need to specifically explain this matter because it was stated both in the constitutional amendment and Law No. 4492 that concession contracts are governed by private law. Furthermore, there was no discussion that BOT contracts were in the category of concession agreements, the Constitutional Court stated even in the BOT decision that BOT contracts create concession in favour of investors. However, it seems that the Government was concerned about a further debate and wanted to take steps very carefully in this matter.

The Law on Principles That Shall be Complied with When There is an Access to Arbitration for Disputes Arising from Concession Contracts.[69] After the Constitutional Amendment, some questionmarks remained in minds[70] such as the definition of some concepts, the situation of existing investors and concession agreements, and the relationships between the new modification and arbitration under BITs and the ICSID Convention. Law No. 4501 attempts to employ all relevant answers for the concerns.

The law states its aim in the first Article. It intends to determine the binding principles and procedures of concession contracts, which contain arbitration clause. Parties have to obey these principles and procedures when they conclude concession contracts.

The following Article spells out the meaning of some concepts, which are mentioned in the law as follows: arbitration, international arbitration agreement, foreign element, and contract. The definition of "foreign element" has a special importance because, its existence in a concession contract is a condition to initiate an arbitration process in accordance with Article 3. The foreign element does exist where either one of the two following circumstances is satisfied. First, at least, one partner of the corporation, who is a party to the concession agreement, must be a foreigner in accordance with the regulations on the encouragement of foreign capital.[71] The subject matter of the corporation either is already established or will be established. Second, if it is necessary to conclude a foreign capital, loan, or security agreement, in order to operate the concession contract.

Article 3, under the headline of "resolution of disputes involving foreign element by international arbitration," states that a dispute arising from a concession contract,

which employs a foreign element, can be settled under arbitration process regulated in accordance with the alternative courses listed in the Article. Listed alternative courses in Article 3 leave a large space to the parties to determine the place of arbitration, the applicable law to disputes, and an institutional or *ad hoc* arbitration. A dispute arising from a concession contract, which contains a foreign element, may be settled by an arbitrator or arbitral tribunal in accordance with either Turkish or foreign law in Turkey or a foreign country. In addition, a dispute may be bought to an international arbitration institution, which has its own arbitration procedural rules. The handicap is that neither Article 3 nor the other Articles of the Law failed to determine the nationality of arbitral awards. Therefore, an award rendered in an arbitral tribunal, which constituted in accordance with Article 3, might be subject to the review of the Turkish Court of Appeal and this situation could create undesired consequences for a foreign party. Because, domestic awards can be appealed under Turkish law and the Court of Appeal evaluates a domestic award as an award that is not pending under the authority of a foreign law.[72] Such an award would be appealed and set aside by the Court of Appeal, for instance, on the ground of the error of the application of Turkish substantive law to the merit of the dispute.[73] For example, the Turkish Court of Appeal in a previous decision ruled about an ICC award, which has taken place in Turkey and rendered in accordance with Turkish substantive and procedural law, was a domestic award.[74] Moreover, Article 5 of the amending law clearly states that "awards in respect of contracts shall be appealed before the Court of Appeal . . ." and, it does not states the specific type of awards, which is subject to the Court's review.

The silence may lead to judicial debate and the further problems of the implication of the Law in the recognition and enforcement stage. There is no doubt that international treaties, especially Article I of the New York Convention (1958), and Article 54 of the ICSID Convention (1965) play a major role to help clarifying the nationality of awards. Thus, Article 6 addresses the same point by stating that "where there is no provision in this law and in international treaties duly put into force, the relative provisions of the CCP, and the IPPL shall be applicable."

According to the Code, an arbitration clause would be concluded either in a concession contract or in a separate agreement. The Code also provides a list of titles, which shall be agreed in an arbitration agreement by the parties, such as the place of arbitration, the applicable law, the number and composition of arbitral tribunal, language of the tribunal, and so on.

Article 7 concerns with the existing concession contracts and amends Article 1(2) of Law No. 3996. Under the wording of the Article, concession contracts, concluded in accordance with the provisions of Law No. 3096 and 3465, would be able to be re-concluded under private law and arbitrable in an international arbitral process. In order to get the opportunity; an investor should have applied to the relevant administration in a month commencing from the effective date of Law No. 4501, which was 22.01.2000. The application is considered by the Cabinet. After the approval of the Cabinet, the contract is re-concluded between the project company and the administration in accordance with private law by taking into account principles of international finance and the administration's other implementation agreements that are in effect. Parties have a three months time limit to re-provide the agreement. However, time limit may be extended for a three months with the parties' consent.

Another type of retroactivity addresses the concession contracts, which are already commenced under the previous concession regime of Law No. 3996. The subject matter of agreements have had the same opportunity to benefit amending law's provisions, if they complete the same process. However, a three months time limit is not stipulated by the Article. It also excluded some contracts, which were set aside by final judgements.

The lawmaker intended to satisfy existing investors by this amendment. However, a group of Parliament claimed the unconstitutionality of retroactivity provisions of Law No. 4501 before the Turkish Constitutional Court.[75]

III. Adoption Of The Model Law

A. The Specific Needs And Background Of The Regulation

The recent developments in international arbitration in Turkey demonstrate the necessity for a modern legislation in this field. The Articles of the CCP are outdated and do not address all relevant issues in international arbitration. Therefore, it is essential to establish a reliable legal environment in order to address the country as a dispute settlement centre for Central Asia and the Middle East. The subject was considered in a symposium[76] entitled "Is there a need for new legislation in international arbitration?" by leading academics, practitioners, and high court judges in arbitration. It was decided to establish a Drafting Committee[77] in order to draft a bill. A draft was provided by the Committee and submitted to the Working Group[78] in the first meeting.[79] The First Draft strictly adopted the Articles of the UNCITRAL Model Law (ML). However, it was agreed to re-write the Draft in the light of new proposals and opinions. In the second meeting,[80] the Working Group and the Committee discussed on the details of the new draft and took the view in favour of some changes. Finally, the Last Draft[81] was written by the Committee in accordance with the proposals.[82]

B. Comparison Of The Draft With The Model Law

1. General Provisions

The Working Group and the Drafting Committee spent an extensive effort to determine the scope of application of the draft in order to avoid any conflict, confusion, and complication. The committee proposed to adopt Article 1 of the ML in the first meeting, including its footnote regarding the definition of the term 'commercial' as a sub-section of the Article. However, to some extent, Article 1 of the ML was criticised by some attendants at the meeting.[83] Critics can be divided into two main groups. First, it was alleged that the definition and interpretation of the term "commercial" might cause hesitations and confusions. Consequently, such a provision may lead to narrow the scope of application in practice. Second, Article 1 of the ML is much more complicated than other comparable legislation such as the Swiss legislation. In this sense, Article 1 of the Draft was written by taking the ML as well as Swiss Private International Law (SIPL) as an example.

The Draft is provided for all disputes whether commercial or not. Nevertheless, Article 1 of the Draft stipulates a number of limitations regarding the scope of its application. The first limitation is that the text applies only to arbitration processes, which

take place in Turkey. Second, the Bill also requires an additional condition to the territorial criterion. According to sub-section (b), the Act applies to an arbitration only if at least one of the parties had neither its domicile nor its habitual residence in Turkey at the time when the arbitration agreement was concluded. In spite of the limitations, Article 1 tries to ensure a wide field of application, stating that the Law applies to any arbitration process if the parties agreed on it. Conversely, parties can exclude its application to their dispute, which falls into the scope of the Law. Therefore, the Draft gives parties as much autonomy as possible on the determination of the applicable law.

Nevertheless, Article 1 (5) of the Draft states that disputes arising out of real property rights, regarding immovable property in Turkey, do not fall within the scope of the Law. Surprisingly, the arguments against the limitation were not intensively discussed by the Working Group[84] and the limitation does not fit the general attitude of the Working Group towards ensuring a wide field of application. Such a limitation is provided in Iranian arbitration law. Under Iranian law, transactions regarding immovable property, whether it is commercial or not, are not considered commercial.[85] Thus, disputes arising out of immovable properties are not arbitrable under Iranian law. In addition, the Turkish text provides another limitation likewise Article 518 of the CCP stating that arbitration does not fall into the scope of the Law if the parties are not entitled to decide upon the subject matter of the dispute.[86] Therefore, the Draft excludes certain disputes, which are not arbitrable under Turkish law.

Finally, Article 1 establishes that the Law does not affect international treaties ratified by Turkey. Thus, the Draft one more time mentions the precedence of international treaties.

The authors of the Draft adopted a different legal form rather than the law-making technique followed by the ML. Unlike the ML, the Bill does not contain definitions or rules of interpretation. Some members of the Working Group[87] objected that such a technique, adopted by the ML, was contrary to the spirit of the civil law form. Besides, the definition of some terms (arbitration, arbitral tribunal, and court), situated in Article 2 of the ML, is not necessary in Turkish law. The meaning of these terms has been evaluated in Turkish law similar to the wordings of the ML and there is no interpretation problem regarding these terms.

Article 3 of the ML regarding the delivery of various written communications is not included the final draft. It might be criticised that this silence can create an undesired gap, if the parties do not agree on how the receipt of written communications will be regulated. However, the drafters try to alter the question under Article 21.[88] In the same way, Article 4 of the ML was omitted with the reason that the subject matter of the question is regulated under general principles of Turkish law.[89]

Article 2 of the Draft addresses the competent state courts. According to the Article, the competent court is the commercial court of the seat of arbitration. Nevertheless, there is one exception in Article 32 that the Court of Appeal is empowered to examine the decisions of the competent courts regarding any course of action against arbitral awards. Instead of mentioning the numbers of Articles, which draw the scope of judicial intervention, the Draft basically states "certain functions as stated in the law." Article 2 is also reinforced by Article 4 stating that no court shall intervene to the arbitral procedure

unless the Law allows to do so. Moreover, the Draft clearly expresses any possible area of court control. In this context, the extent of the court control is designated as it is in the ML. Therefore, the approach of the Turkish text is slightly different from the ML form, however both texts clearly reach the same point.

2. *Arbitration Agreement*

Although, the drafters find it unnecessary to mention some terms stated in Article 2 of the ML, they prefer to define the concept of arbitration agreement in Article 4 of the Draft. The definition and following part of Article 7 of the ML, which deals with the formal validity of arbitration agreements, is directly transferred to the Turkish text from the ML. In addition, the Turkish text contains a provision regarding the substantive validity of arbitral agreements. In fact, the question is a conflict of laws problem and the ML leaves the question to be tackled by the regulations of each state. No country has specifically dealt with the question in their arbitration laws except for Switzerland.[90] Article 178 (2) of the SIPL is based on the principle of *in favoren validitates*. However, unlike the SIPL, Turkish authors adopted a dual alternative application rather than a triple alternative application in order to avoid any conflict between the Draft and the New York Convention. Under the Swiss law, an arbitration agreement is valid if it conforms to one of three independent alternatives, which are (i) the law chosen by the parties, (ii) the law governing the subject matter of the disputes, or (iii) Swiss law. On the other hand, Article V 1 (a) of the New York Convention states that the substantive validity of the arbitration agreements is determined in accordance with the law chosen by the parties, or in the absence of such a choice, the law of the country where the award was made. In this sense, a group of awards, of which the validity of arbitration agreements is determined by the law governing the subject matter of the dispute, may cause problems in the enforcement stage in a foreign country, which is a party to the Convention. Therefore, in the Bill the part of Article 178(2) ("the law governing the subject matter of the dispute") of the SIPL was omitted by the Working Group for the sake of harmonisation with the New York Convention.

Moreover, Article 178 (3) of the SIPL is taken into the Turkish Draft. It basically deals with the relationship between the main agreement and the arbitration agreement. The sentence is based on the principle of separability of the arbitration clause — *autonomie de la clause compromissoire*. As a result, parties cannot claim the invalidity of the arbitration agreement on the ground that the main contract is not valid.

Article 5 of the Draft provides that, parallel to Article 8(1) of the ML, the court refers a matter to arbitration, unless the court finds that the arbitration agreement is null and void, inoperative, or incapable of being performed. The court can only refer a case to arbitration if one of the parties invoke to do so. There is, however, one difference between both provisions. While the ML states that the request must be invoked by the party no later than the submission of its first statement on the substance of the dispute, the Draft provides that the request must be submitted in accordance with the CCP.[91]

Although Article 8 of the ML was adopted into the First Draft, the sub-section 2 was criticised in the first meeting of the Working Group. It is alleged that such a provision may lead to pending inconsistent decisions by state courts and arbitral tribunals. However, Article 8(2) was adopted by the ML in order to avoid delay and needless court intervention to arbitration proceedings. This feature of the provision was not evaluated by the Turkish Working Group.[92]

Under Turkish law, an arbitral tribunal has no power to grant interim measures. Conversely, Article 6 of the draft provides that, the arbitral tribunal has the power to order interim measures of protection in respect of the subject matter of the dispute at the request of one of the parties, unless otherwise agreed by the parties. In the ML, the subject matter of interim measures is provided under Article 9 and 17. However, interim measures, delivered by courts or arbitration tribunals, are stated under the same Article. According to Article 6, the arbitral tribunal may require the party to provide appropriate security in connection with such measures. Moreover, the requesting party has the right to seek court assistance in this regard in the event of a failure to obey the interim measure. On the other hand, the Article limits the power of arbitral tribunals. First, the arbitral tribunal cannot order an interim measure binding third parties. Second, any interim measures have to be enforced by the executive state departments or government offices. Parties can also request interim measures from state courts in accordance with Turkish law.

3. Composition Of Arbitral Tribunals

The provisions of the Draft regarding the composition of the arbitral tribunal, and the challenge of arbitrators closely follow the relevant provisions of the ML, except some differences.

The parties have the freedom to determine the number of arbitrators and to set the rules regarding the appointment of arbitrator(s). In the absence of such a choice, the provisions of the Draft remain in this matter, and the number of arbitrators will be three. If there are to be three arbitrators, each party has the right to appoint one arbitrator and the arbitrators, appointed by the parties, determine the third arbitrator, who is the chairman of the tribunal in accordance with Article 2(a). If one of the parties fails to appoint an arbitrator within thirty days of receipt of a request by the other party, or the appointed arbitrators cannot agree on the chairman within thirty days of their appointments, the selection will be made by the competent state court. If there is to be a sole arbitrator, the court will appoint the arbitrator at the request of one party, in the event that the parties cannot agree on the arbitrator. In addition to the ML, the Draft also states that if there are to be more than three arbitrators the provision regarding the appointment of three arbitrators will apply by analogy.

Although there is an agreement between the parties on appointment procedures, the competent court may be requested to appoint arbitrator(s) in certain circumstances. Article 8 of the Draft states the circumstances as follows:

- when one of the parties does not comply with the existing agreement in this matter, or
- when the parties or their appointed arbitrators cannot reach an agreement under the procedure, or
- when the appointing authority or institution cannot select arbitrator(s) in accordance with the procedure

The judgment, delivered by the court is not appealable. Article 8 also states that the court must take into consideration the parties' agreement, impartiality and independence of arbitrator(s), and nationality of arbitrator(s). Turkish law and the Draft do not con-

tain any restriction regarding the nationality of arbitrators. However, the court is required by the Draft to appoint an arbitrator of a different nationality than that of the parties unless otherwise agreed by the parties.

Provisions of the ML regarding grounds of challenge of arbitrators are entirely adopted in the Turkish text. Nevertheless, the procedure for challenging an arbitrator is changed in some respect. Like the ML, the Turkish text initiates the freedom of the parties to determine the challenge procedure. In the absence of such a choice, the provisions of Article 10 come into force between the parties. According to the Article, a party, who challenges an arbitrator, has to notify the tribunal and the other parties in writing within fifteen days. The time limit is commenced at the time when the challenging party is aware of the reasons for the challenge. If the tribunal refuses the challenge, the party may take an action against the tribunal's decision in the competent state court within thirty days after having received notice of the tribunal's decision. However, if the tribunal is consisting of one arbitrator or all arbitrators are challenged in a proceeding, any challenge in this matter can be made to the court. The decision of the court is not appealable. Unlike the ML, the Turkish text does not employ any provision regarding the period of time while the decision of rejecting the challenge is pending in the competent court. Thus, according to the established opinion of the High Court and Articles 187 and 195 of the CCP, the tribunal must wait for the competent court's decision. There is no doubt that lack of such a provision may cause delays in arbitral proceedings.

The last sentence of Article 10 embodies a special occasion, which is not provided for neither in the ML nor in the SIPL. In this respect, if the parties determine the name of arbitrators in the arbitration agreement and the court decides that the majority of arbitrators are not able to carry on their duty in the tribunal, the arbitration process is terminated. On the other hand, if the names of the arbitrators are not specified in the arbitration agreement, the arbitration process is not terminated and new arbitrators are appointed in accordance with the appropriate procedure. With such a provision the drafters aimed to prevent the parties' consent regarding specific arbitrators. Article 10 also empowers the parties to conclude a different procedure in this matter.

Articles 11 and 12 of the Draft deal with the failure of impossibility to act as an arbitrator and the appointment of a substitute arbitrator. The only difference between the provisions of the Draft and Articles 14 and 15 of the ML is a strict time limit in the Turkish text. In meetings, the drafters were in favour of a time limit for arbitration proceedings[93] and this was adopted in Article 17 as a one-year time limit, unless otherwise agreed by the parties. In fact, according to the Article, the parties are free to extend the time limit by agreement or a party may request to extend the time limit from the competent court. The time limit mentioned in Article 17 reflects Articles 11 and 12 of the draft. The time limit is not affected by the replacement of arbitrator(s).

4. Jurisdiction Of Arbitral Tribunal

The principle *Kompetenz-Kompetenz* is adopted in Article 13 of the Turkish text without any difference to the ML. For the first time in Turkish arbitration law, arbitral tribunals will be able to decide on their competence, if the provisions of Article 14 pass the Parliament as it is in the Draft. Consequently, the Draft constitutes a great step forward in Turkish arbitration law.

5. Implementation Of Arbitral Proceedings

In this chapter, Turkish drafters put together chapters V and VI of the ML. They did not change the relevant provisions of the ML. However, they added some sentences and provisions to appropriate places, which might be important to some extent. Moreover, some principles of the ML, which are not harmonised with the usage and provisions of Turkish law, are strictly adopted by the Turkish text.

Under Article 14, "Equal Treatment of Parties," the situation of foreign counsellors is provided as a supplementary subject to the ML. According to Turkish law, in arbitration tribunals, a party can only be represented by lawyers, who are members of one of the Bars in Turkey,[94] and foreigners are not allowed to be lawyers.[95] Therefore, there is an obstacle for a foreign party who desires to work with a non-Turkish counsellor. The second sentence of Article 14 provides that foreign persons will be able to represent their clients in an arbitration process, which is conducted in accordance with statements of the Draft.

There is a contrast in the Draft. Turkish authors provided some provisions, which may cause delays, such as Articles 5, 10, 29(4). There is also the absence of Article 3 of the ML. However, the Draft contains surprising and distinguishing features in this regard. Article 17 states that unless otherwise agreed by the parties, an arbitral award has to be delivered within one year, commencing at the time when the composition of the arbitral tribunal is complete. In fact, this provision is not mandatory and can be disregarded by the parties, or it can be extended by the competent court at the request of a party.

The Turkish chapters embody the commencement of arbitral proceedings in a large perspective. Article 18 states possible courses in this matter. If the parties do not determine another procedure, the arbitral proceedings commence on the date when:

- a party resorts to the competent court, institution, or a person who has the power to determine the arbitrator(s) in accordance with the agreement between the parties, or
- the respondent receives a request to appoint the arbitrator in an arbitration with three arbitrators

The Turkish text preserves some Articles of the ML without any change, such as the determination of rules of procedure,[96] the place of arbitration,[97] the language of arbitration,[98] the submission of the statement of claims and defence,[99] the hearings and written pleadings,[100] the default of a party,[101] the appointment of experts by the arbitral tribunal,[102] the court assistance in taking evidence,[103] the rules applicable to the substance of the dispute,[104] and the settlement.[105] Some of these adopted Articles of the ML make massive changes in Turkish arbitration law.

Article 20 of the Draft allows the parties to make amendments and supplements with the approval of the arbitral tribunal whereas, under Turkish law, claimants and respondents are not entitled to amend or supplement their claims and defences during the arbitration process.[106] In spite of the criticism,[107] a massive change is made in the Draft regarding the subject matter of the dispute.

Another innovation in Turkish law takes place in the evaluation of experts' reports. The Draft, parallel to the ML, gives the opportunity to the parties to choose and present expert witnesses and to question the experts in the hearing. According to Article 276 of the CCP, an expert can only be appointed by the tribunal. Moreover, the participation of the expert in a hearing or the questioning of the expert is a very unusual procedure for Turkish lawyers.

Article 26(3) of the Draft and Article 28(3) of the ML require that "the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so." The relevant provisions of the CCP are silent on the rules applicable to the substance of the dispute if it is not determined by the parties. The Turkish Court of Appeal delivered judgment stating that "in the absence of such a choice by the parties, the tribunal shall decide *ex aequo et bono.*"[108]

The drafters also provide an advisory provision in this chapter. Article 21 deals with the same matter as stated in Article 18 of the Rules of Arbitration of the ICC. It is not a mandatory provision and does not impose any obligation on the arbitral tribunal. According to the Article, the tribunal may provide 'terms of reference,' which states some introductory information regarding the proceedings. This contains the following: the names and description of the parties, the addresses of the parties, the summary of the claims and defence, the amounts claimed or counter-claimed, the list of issues to be determined, the names and addresses of the arbitrators, the place of the arbitration, the explanation regarding the applicable procedural rules, and the reference to the power conferred to the arbitral tribunal to act as *amiable compositeur*.

In addition to the provisions of the ML, the Draft adds some details to the subject of arbitral awards.

Article 28 focuses on an exceptional situation. The general rule is that all decisions are to be made by a majority of the arbitral tribunal, which consists of more than one arbitrator. In the event of a deadlock, the ML does not provide any appropriate solution. In fact, the subject matter of the question was discussed by the drafters of the ML and some suggestions were made.[109] However, such a provision was not adopted in the final text of the ML. In contrary, the Turkish drafters felt a necessity to clarify the issue by stating that "if there is no majority in the tribunal, the presiding arbitrator shall deliver the decision."

The authors of the Draft also preserve the provisions of the ML regarding the form and content of the award. However, they add some supplementary provisions to the appropriate Article 29 of the Draft. They include partial awards as it is provided for in Article 188 of SIPL by stating "unless the parties have agreed otherwise, the arbitral tribunal may make partial awards." There is no doubt that the Working Group desired to utilise the useful features of partial awards in arbitral proceedings as, for instance, the saving of cost and time, the providing for sufficient proceedings and so on.

Unlike the ML, Article 29(4) of the Draft provides for dissenting opinions stating that dissenting arbitrator(s) have the right to express their opinion as an attachment to the award. The Article also requires that dissenting opinions have to be written by the arbitrator(s) within one month after receiving the award. Here again the text stipulates a time limit, which may cause delays whereas in practice international arbitrators fre-

quently attach dissenting opinions directly to their awards.[110] Therefore, the Turkish Draft constitutes an unnecessary and long time limit.

Article 29(7) deals with a procedural issue. A party has the right to request the delivery of the case and award to the competent court by paying the delivery costs. In this sense, the documents are kept in the court's archives.

The last paragraph of Article 29 requires an administrative act regarding the registration and deposit of the award and makes massive changes to the substance of the ML. According to the provision, a writ of execution can only be obtained from the competent court after the expiry of the setting-aside period (three months) or at the time when the competent court delivered the final judgment on the application for setting-aside. This is a mandatory rule, which obliges the winning party to register and deposit the award and wait for a long time to enforce the award. Such a provision contradicts the ideas of the ML. Firstly, the ML, and the New York Convention aim to avoid the requirement regarding the registration or deposit of the award at a local court or authority.[111] The reason is to ensure the enforcement of all international awards in the same way whether enforcement was sought in the awarding state under the ML or in another state under the Convention. This step is considered as a "major achievement" by the UNCITRAL Secretariat.[112] Secondly, the award is not enforceable at the date when the award is delivered to the parties. Therefore, the winning party has to wait at least three months to enforce the award. In some occasions, such a delay causes irreparable damages. It is also contrary to the idea of the establishment of an international arbitration centre in Turkey because it is much easier and quicker to enforce a foreign arbitral award in Turkey under the New York Convention rather than an award delivered in accordance with the provisions of the Draft. The subject matter of the issue received only brief attention in the second meeting of the Working Group.[113] The only arguments brought forward against the provision were not persuasive as they did not focus on the real reasons for opposing it.

The Draft preserves the grounds for the termination of arbitral proceedings as stated in the ML. It also adds that a proceeding is terminated when the arbitrators fail to deliver the award unanimously if the parties agree on the unanimous vote.

6. *Recourse Against Award*

"The rules on setting-aside proceedings thus constitute a core element of every modern arbitration law and their perceived or actual quality and value have a decisive impact on the success of the arbitration law in the world wide competition for international arbitration."[114] Recourses against arbitral awards are described as an issue that is central to the success of the ML as a whole.[115] Modern arbitration laws tend to reduce or disclose court control on arbitral awards. The ML aims to constitute only one type of course of action among the drafting states and to create an exclusive list of limited setting-aside grounds which has been taken from Article V of the New York Convention.

Although the Drafting Committee proposed to adopt Article 34 of the ML the proposal was criticised in the meetings of the Working Group and re-formulated in the Final Draft.

Article 32(1) of the Draft provides that recourse against an arbitral award may be made only by application of setting-aside before the competent court. The application is de-

cided with priority by the court. Types of recourses against arbitral award vary from state to state providing different standards such as appeal or setting-aside. Article 32(6) also gives the right to appeal before the Turkish Court of Appeal regarding the judgment of the competent court. Although the provision does not allow any action for 'correction of decision' and states that such an examination is delivered by priority, the consequences of the long proceeding might be enough to destroy the purposes of international arbitration.

Firstly, the winning party has to wait for a very long time to enforce the award, because an award is not enforceable until the end of the setting-aside period in accordance with Article 29(8). Secondly, one of the main purposes of international arbitration is to keep the nature of the dispute in private. However, it is almost impossible to preserve the principle of confidentiality in such a judicial review system. Finally, parties from different countries and legal systems, choose international arbitration law because of their distrust in an unfamiliar environment and law system. Such a judicial review may be contrary to the spirit and underlying principle of international arbitration.

In fact, paragraph 4 of the Article provides that the parties may exclude all or part of the setting-aside proceedings listed in Article 32. It can be made by an express statement in the arbitration agreement or by a subsequent agreement in writing. However, this only applies where all the parties in an arbitration process do not have any business establishment or domicile in Turkey. Therefore, the application of the provision is limited and most of the parties do not benefit from this flexibility in practice. The provision also states that if any kind of exclusion is subject to an award, provisions of the New York Convention will apply to the recognition of the award by analogy.

Sub-section 2 of Article 32 lists the grounds of setting-aside. Under the Article, an award may be set aside only if:

a) either party was under some incapacity at the time when the agreement was concluded, or the arbitration agreement is not valid under the Law to which the parties have subjected it or under Turkish law, or

b) the tribunal was not composed in accordance with the agreement, or

c) the award was not delivered within the time limit, or

d) the decision of the tribunal regarding its jurisdiction was against the Law, or

e) the award has gone beyond the claims submitted to the arbitral tribunal, or failed to decide one of the claims, or

f) the adjudication did not take place in accordance with procedural rules determined by the parties or the provisions of the Law in the absence of such an agreement, or

g) the principle of equal treatment of the parties or their right to be heard in adversarial procedure has not been observed, or

h) the award conflicted with public policy.

An application for setting aside with a stated reason may be brought within three months. The time limit commences from the date when the party received the final award. A party may require the setting-aside of the award alleging the grounds stated in the Article. In other words, the judges of the competent court cannot set aside the award on the basis of any listed reason if the party does not rely on it.

The last paragraph of Article 32 states that if an award was set aside in accordance with sub-section 2(b),(d),(e),(f),(g) and (h), the time limit and arbitration tribunal is re-established unless otherwise agreed by the parties. The parties also have the right to appoint the same arbitrators who delivered the previous award. Therefore, the text does not allow the dispute to go to arbitration if the award was set aside on the grounds that (i) the award was delivered after the expiry of the time limit, or (ii) the award was contrary to public policy, or (iii) either party was under some incapacity at the time when the arbitration agreement was concluded or the arbitration agreement is not valid under the law to which the parties have subjected it or under Turkish law.

7. Arbitration Costs

The Turkish drafters also regulate some rules relating to arbitration costs and fees under Chapter VII which consists of four Articles. The subject matter of the question is not directly concerned with the substance of international arbitration. Therefore, this area will not be examined in this study.

Conclusion

In spite of the constitutional obstacles and political hesitations, the Turkish law has taken a great step forward with regard to international arbitration. In this respect, Turkey ratified the major international conventions and amended the relevant Articles of its Constitution. Therefore, the legal investor-friendly environment has been provided for major infrastructure contracts.

In the beginning of the recent century, Turkey had succeeded to adopt the modern and secular law regime to its structure without any discomfort. The idea of the adoption of the ML would complete a perfect picture of a modern international law regime. Such an adoption would be much easier for Turkey compared with some other adopting countries such as, for instance, Iran and Russia, because Turkey's liberal political, economic and legal system is much more suitable for this task.

However, the detailed examination of the final text of the International Arbitration Bill reveals that some provisions of the Draft deform the harmony among the Articles. It can be argued that the text may cause delays and undesired bureaucracy in an arbitration process. Moreover, unlike the ML, the Bill reserves a wide field for court intervention. Consequently, the focus on judicial review with regard to arbitral awards has created a very long and time-consuming process. The drafters have considered the law on international arbitration in its old guise and failed to provide some solutions for the contemporary problems in international arbitration, such as third party intervention and joining cases. The authors have probably also distanced themselves from fulfilling the main aim to create an arbitration centre in Turkey. On the other hand, the Bill has also

introduced fundamental principles of international arbitration into the Turkish legal system, such as *Kompetenz-Kompetenz* and interim awards.

To conclude, Turkey has shown determination to improve its legal system, and therefore, will probably have sufficient potential to encounter the practical and future problems in International Commercial Arbitration.

ENDNOTES

1. Ismail Doganay, "Can the Arbitrators Make a Decision of Persistence against the Decision of Reversal given by the Court of Cassation?" (Hakem Mahkemesi Kararlarinin Yargitay Tarafindan Bozulmasi Halinde Hakemler Bu Bozma Kararina Karsi Direnme Karari Verebilirlermi?), Ankara 1997, pp. 30-94.
2. Mecelle is the name of the Ottoman Civil Code. The nature of the Code was a mixture of secular and Islamic law.
3. Law No. 1086, The Official Gazette, Vol. 622/3/4, 02/03/04.07.1927.
4. Law No. 2675, The Official Gazette, Vol. 17701, 22.05.1982.
5. The Official Gazette, Vol. 21002, 25.09.1991; came into force on 30.09.1992.
6. The Official Gazette, Vol. 21000, 23.09.1991; came into force on 30.09.1992.
7. The Official Gazette, Vol. 19830, 06.12.1988; came into force on 02.04.1989.
8. See infra I.B.1.
9. Code de Procedure Civile came into force on 07.04.1925.
10. Kemal Dayinlarli, *"Domestic Arbitration Provided in the Code of Civil Procedure (HUMK'da Duzenlenen Ic Tahkim),"* Ankara 1997, p. 13.
11. Supra note 1, p. 31.
12. Banka ve Ticaret Hukuku Arastirma Enstitusu (The Research Institute of Banking and Commercial Law), *"Arbitration and its Organisation (Hakemlik ve Orgutlendirilmesi),"* Ankara 1971.
13. See infra III.
14. 15th Civil Panel of the Turkish Court of Appeal, Decision dated 04.11.1986, Case No. 86/19, Decree No. 86/3650, reported in Yargitay Kararlari Dergisi, Vol. I (1987), p. 590.
15. 11th Civil Panel of the Turkish Court of Appeal, Decision dated 02.10.1979, Case No. 79/3855, Decree No. 79/4351, reported in Yargitay Kararlari Dergisi, Vol. II (1980), p. 245.
16. The General Board of the Civil Panel of the Turkish Court of Appeal, Decision dated 06.06.1956, Case No. 56/3, Decree No. 56/11, reported in the Official Gazette, Vol. 9383, 16.08.1956.

17. The General Board of the Civil Panel of the Turkish Court of Appeal, Decision dated 28.01.1994, Case No. 93/4 Decree No. 94/1, reported in the Official Gazette, Vol. 2194, 13.04.1994.

18. Doganay, supra note 1, pp.56-59; Turgut Kalpsuz, "Reasons to Appeal against the Decisions of the Arbitral Tribunal in Turkish Law (Turk Hukukunda Hakem Kararlarinin Temyizi Sebepleri)," 1 *Batider* 1-41 [1997]; Ziya Akinci, *The Research Institute of Banking and Commercial Law-Drafts for International Arbitration Law, Debates, Proposals (Banka ve Ticaret Arastirma Enstitusu — Milletlerarasi Tahkim Konusunda Yasal Duzenleme Gerekirmi)*, Ankara 1999, p. 54.

19. Articles 537-545 of the Turkish Code of Civil Procedure.

20. Engin Nomer, "The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated June 10, 1958 and Turkish Arbitration Law (Yabanci Hakem Kararlarinin Taninmasi ve Icrasi 10 Haziran 1958 tarihli New York Sozlesmesi ve Turk Tahkim Hukuku), *The Research Institute of Banking and Commercial Law* — Symposium on the European (Geneva) and New York Conventions and Turkish Arbitration Law (Banka ve Ticaret *Arastirma Enstitusu, Avrupa (Cenevre) — New York Sozlesmesi ve Turk Tahkim Hukuku Sempozyumu)*, Ankara 1990, p. 81.

21. See infra I.B.2.a.

22. Law No. 3533, The Official Gazette, Vol. 3961, 16.07.1938, p. 796.

23. By the decision of the Cabinet, No. 91, 03.10.1983. See in Kemal Dayanirli, *Ic Tahkim (Domestic Arbitration)*, Ankara 1997, p. 11.

24. Law No.4077, The Official Gazette, Vol. 11642, 23.02.1995.

25. Law No.1163, The Official Gazette, Vol. 13195, 10.05.1969.

26. Law No.1136, The Official Gazette, Vol. 13168, 20.02.1973.

27. See on <www.worldbank.org/icsid/treaties/turkey.htm>.

28. The International Private and Procedural Act. Article 1(2): "The provisions of international treaties are not prejudiced by the Act."

29. See in *The Research Institute of Banking and Commercial Law — Symposium on the European (Geneva) and* NewYork Conventions and Turkish Arbitration Law (Banka ve Ticaret Arastirma Enstitusu, Avrupa (Cenevre) — *New York Sozlesmesi ve Turk Tahkim Sempozyumu, Ankara)*, Ankara 1990.

30. See infra I.B.

31. The Official Gazette, Vol. 19830, 02.06.1998.

32. T.M.C. Asser Instituut, Washington Convention, <www.asser.nl/ica/wash_sign.htm>.

33. Contracts between Turkey and the Netherlands, Belgium — Luxembourg, Bangladesh, the United States, Austria, Kuwait, Denmark, South Korea, China.

34. Contracts between Turkey and Argentina, Hungary, Albania, Bulgaria, Tajikistan, Sweden, Estonia, Letonia.

35. Oktay Varlier, "The Importance of the BOT Model in Turkish Economy (Yap — Islet — Devret Modelinin Turk Ekonomisindeki Onemi)," *The Research Institute of Banking and Commercial Law — The Symposium Relating to* Problems arising from the BOT Model and Proposals for Solutions (Banka ve Ticaret Hukuku Arastirma Enstitusu *Yap-Islet-Devret Modelinin Uygulanmasinda Ortaya Cikan Sorunlar ve Oneriler Sempozyumu)*, Ankara 1996, p. 3.

36. The Official Gazette, Vol. 18619, 19.12.1984.

37. The Official Gazette, Vol. 18390, 02.06.1988.

38. H. Elizabeth Kroeger/Timothy J. Kautz/Ercan Acikel, "Developments in Energy Project Arbitration in the Context of Bilateral Investment Treaties and ICSID," 9 **Mealey's *International Arbitration Report***, p. 38, Footnote 18, (1999).

39. The Official Gazette, Vol. 21958, 13.06.1994.

40. The Official Gazette, Vol. 22130, 03.12.1994.

41. 1st Panel of the Turkish Supreme Administrative Court, Decision dated 24.09.1992, Case No. 92/232, Decree No. 92/294, reported in Danistay Dergisi, Vol. 87 (1993), p. 33; 10th Panel of the Turkish Supreme Administrative Court, Decision dated 29.04.1993, Case No. 91/1, Decree No. 93/1752, reported in Danistay Dergisi, Vol. 92 (1994), p. 41.

42. The Turkish Constitutional Court, Decision dated 28.06.1995, Case No. 94/71, Decree No. 95/23, reported in the Official Gazette, Vol. 22586, 31.03.1996, p. 37.

43. 1st Panel of the Turkish Supreme Administrative Court, Decision dated 01.07.1996, Case No. 95/246, Decree No. 96/138, See in Ali Yesilirmak, Footnote 60, 2 *Batider* 161 [1999].

44. See supra I.B.1.

45. See infra II.

46. The Commercial Panel of the Turkish Court of Appeal, Decision dated 25.03.1949, Case No.4700, Decree No.1495 in Erol Ertekin, Izzet Karatas, *"Arbitration and the Recognition and Enforcement of Foreign Arbitral Awards in Practise (Uygulamada Ihtiyari Tahkim ve Yabanci Hakem Kararlarini Tenfizi Taninmasi),"* Ankara 1997, pp. 430-1.

47. 15th Civil Panel of the Turkish Court of Appeal, Decision dated 10.03.1976, Case No. 1617, Decree No. 1052, in Karatas, *ibid.*, pp. 437-50.

48. Rabi Koral, *"Nationality of Arbitration (Hakemligin Milliyeti ve Yargitay),"* Istanbul 1979, pp. 236-42; Baki Kuru, *"Civil Procedure (Hukuk Muhakemeleri Usulu),"* Vol. IV, Ankara 1984, pp. 1436-48; Sulhi Tekinay, *"International Commercial Arbitration (Uluslararasi Ticari Tahkim),"* Istanbul 1990, pp. 255-57.

49. Craig/Park/Paulson, "International Commercial Arbitration, ICC Arbitration," London 1990, pp. 13, 15, 348; M. Rubino — Sammarano, "The Keban Arbitration" 241 *Arbitration* 1 [1980]; J. EL-Hakim, "Sould the Key Terms Award, Commercial and Binding be Defined in the New York Convention" 6 *Journal of International Arbitration* 163 [1989].

50. See infra I.B.2.b.

51. 11th Civil Panel of the Turkish Court of Appeal, Decision dated 28.12.1978, Case No. 5258, Decree No. 5916, see in supra note 46, pp. 450-61.

52. 11th Civil Panel of the Turkish Court of Appeal, Decision dated 19.12.1985, Case No. 7355, Decree No. 7099, see in supra note 46, pp. 503-4; 15th Civil Panel of the Turkish Court of Appeal, Decision dated 20.06.1996, Case No. 2781, Decree No. 3533, see in supra note 46, pp. 543-46.

53. Engin Nomer, *"The Recognition of Foreign Arbitral Awards in Turkish Law (Turk Hukukunda Yabanci Hakem Kararlarinin Tenfizi),"* Istanbul 1993, pp. 56-7; Turgut Kalpsuz *"The Concept of Turkish Arbitral Awards (Turk Hakem Karari Kavrami),"* Ankara 1983, p. 83.

54. See supra note 46, 15th Civil Panel of the Turkish Court of Appeal, Decision dated 10.07.1991, Case No. 2383, Decree No. 3667, pp. 531-5; 15th Civil Panel of the Turkish Court of Appeal, Decision dated 01.10.1992, Case No. 1736, Decree No. 4425, p. 535.

55. See supra note 46, p. 535.

56. See details in Felix Ehrat, A Case Study: Turkey in Marc Blessing (ed.), ASA Conference Special Series No. 9, Zurich 1996, p. 225.

57. 15th Civil Panel of the Turkish Court of Appeal, Decision dated 01.02.1996, Case No. 6209, Decree No. 527, See supra note 46, pp. 535-43.

58. Hurriyet, 09.02.1999, p. 5.

59. Cumhuriyet, 12.08.1999, p. 4.

60. The Official Gazette, Vol. 23786, 14.08.1999.

61. See supra I.B.1.

62. See supra I.B.2.a.

63. Ali Yesilirmak, "The End of a Prolonged Era: Disputes Arising from Turkish Concession Contracts are Now Arbitrable" 9 ***Mealey's International Arbitration Report*** 27 [1999].

64. H. Elizabeth Kroger, Timoty J. Kautz, Ercan Acikel, "Turkey Revisited: Developments in Energy Projects Arbitration in the Context of Bilateral Investment Treaties and ICSID" 9 ***Mealey's International Arbitration Report*** 32 [1999].

65. See infra II.C.

66. Law No.4492, the Official Gazette, Vol. 23913, 18.12.1999.

67. Law No.4493, the Official Gazette, Vol. 23914, 22.12.1999.

68. Richard H. Kreindler, Timothy J. Kautz, "Issues in Drafting and Performance of Arbitration Agreements in the Context of Bilateral Investment Treaties and Energy Projects: The Example of Turkey," 5 ***Mealey's International Arbitration Report*** 25 [1997].

69. Law No. 4501, the Official Gazette, Vol. 23941, 22.01.2000.

70. See supra note 64, footnote 52.

71. The relative regulations can be seen on <www.hazine.gov.tr/english/tug/inven.htm>.

72. See supra I.B.2.a.

73. See supra note 17.

74. 15th Civil Panel of the Turkish Court of Appeal, Decision dated 20.06.1996, Case No. 2781, Decree No. 3533, see in supra note 46.

75. The Turkish Daily News, 24.05.2000.

76. The symposium was held on 11.04.1997 and organised by the Research Institute of Banking and Commercial Law.

77. The Committee consists of Prof. Dr. Ejder Yilmaz (Chairman), Doc. Dr. Turgut Turhan and Dr. Ali Cem Budak. After the first meeting it was agreed to increase the number of members and Prof. Dr. Turgut Kalpsuz as well as Prof. Dr. Saim Ustundag joined the Committee.

78. The Working Group consists of 15 lawyers.

79. The first meeting was held between 26.-28.09.1997.

80. The second meeting was held on 06.06.1998.

81. This study is based on the final draft, which is considered in the Parliamentary Commission of Justice in these days. The Bill is expected to be submitted to the General Assembly of the Turkish Parliament shortly.

82. See for the records of the meetings, The Research Institute of Banking and Commercial Law (Banka ve Ticaret Hukuku Arastirma Enstitusu), *Drafts for International Arbitration Law-Debates-Proposals (Milletlerarasi Tahkim Konusunda Yasal Bir Duzenleme Gerekir mi-Taslaklar-Tartismalar-Oneriler), Ankara 1999.*

83. See supra note 82, pp. 74-91, 207-215.

84. See supra note 82, pp. 209-211.

85. Jamal Seifi, "The New International Commercial Arbitration Act of Iran," 2 *Journal of International Arbitration* 5–35, [1998].

86. See supra I.A.1.a.

87. See supra note 82, pp. 92–95.

88. See infra III.B.5.

89. See supra note 82, pp. 101.

90. Klaus Peter Berger, International Economic Arbitration, Boston 1993, p. 156.

91. Article 188 of the CCP provides: "Preliminary objections are not admissible if they are not made altogether at the commencement of the proceedings and before going into the merits of the case (. . .)".

92. See supra note 82, pp. 109-116, 222-224.

93. See supra note 82, pp. 130-132, 236-241.

94. Article 35 of the Act of Lawyers.

95. Article 3 of the Act of Lawyers.

96. Article 15 of the Draft.

97. Article 16 of the Draft.

98. Article 19 of the Draft.

99. Article 20 of the Draft.

100. Article 22 of the Draft.

101. Article 23 of the Draft.

102. Article 24 of the Draft.

103. Article 25 of the Draft.

104. Article 26 of the Draft.

105. Article 27 of the Draft.

106. Turkish CCP, Articles 185 and 202.

107. See supra note 82, pp. 141-143, 257-260.

108. 11th Civil Panel of the Turkish Court of Appeal: dated 28.12.1978, Case No. 5258, Decree No. 5916; dated 09.01.1985, Case No. 3318, Decree No. 4338, see in supra note 46, pp. 493-97, p. 498.

109. Howard M. Holtzmann and Joseph E. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Deventer/Boston 1989, pp. 809-821.

110. See supra note 90, p. 840.

111. The New York Convention, Article III, IV.

112. See supra note 109, p. 840.

113. See supra note 82, p. 275-276.

114. See supra note 90, p. 648.

115. See supra note 109, p. 911. ■