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Recent Developments In International Commercial Arbitration In Turkey

by SERDAR BEZEN

1. INTRODUCTION

Until the beginning of the 1980s, arbitration law developed slowly in Turkey and faced a number of problems, domestic and international. Most countries have been affected by globalisation in international business, which in the last two decades has led developing countries, including Turkey, to provide a sufficient economic and legal environment for foreign investment. These requirements have compelled Turkey to amend its Constitution and to improve its legal system in relation to international arbitration.

The constitutional amendments and the new legislation deal only with foreign investment projects and are far from satisfying all the needs of international arbitration in Turkey. The recently drafted International Arbitration Bill, the latest piece in these developments, closely follows the form of the UNCITRAL Model Law. The differences between the Turkish text and the Model Law and the reasons for them are examined here and an attempt will be made to assess the effects of the new legislation and its chances of success.

2. THE LEGAL FRAMEWORK OF TURKISH ARBITRATION LAW BEFORE THE RECENT DEVELOPMENTS

2.1 Legal Aspects of Turkish Arbitration

Arbitration, as a concept, is not new in Turkish law. It was regulated in art1790 of the *Mecelle*.¹ However, it started to be modified, in the meaning of secular and modern legislation, only in the late 1920s, being mainly regulated by the Code of Civil Procedure (CCP)² and the International Private and Procedural Law (IPPL).³

In the last decade Turkey has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958,⁴ the European Convention on International Commercial Arbitration 1961⁵ and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Foreign States (ICSID) 1965.⁶ Moreover, a great many bilateral investment treaties (BITs) have been signed between Turkey and major industrialised states in order to facilitate foreign investment and formulate how to access international arbitration in spite of some contrary articles of the Turkish Constitution.

¹ *Mecelle* is the name of the Ottoman Civil Code, a mixture of secular and Islamic law; Ismail Doganay, *Can the Arbitrators Make a Decision of Persistence against the Decision of Reversal given by the Court of Cassation? (Hakem Mahkemesi Kararlarının Yargıtay Tarafından Bozulması Halinde Hakemler Bu Bozma Kararına Karşı Direnme Kararı Verebilirlermi?)*, (Banka ve Ticaret Hukuku Arastırma Enstitüsü, Ankara, 1997) 30-94.

² Law 1086, Official Gazette, 622/3/4 02/03/04.07.1927.

³ Law 2675, Official Gazette, 17701 22.05.1982.

⁴ Official Gazette, 21002 25.09.1991; came into force on 30.09.1992.

⁵ Official Gazette, 21000 23.09.1991; came into force on 30.09.1992.

⁶ Official Gazette, 19830 06.12.1988; came into force on 02.04.1989.

2.2 Domestic Law

Code of Civil Procedure

In 1927, Turkey took its CCP from the Civil Procedural Code of Neuchâtel 1925.⁷ It deals with domestic arbitration only, in Chapter VIII arts 516–36. A commission established by the Research Institute of Banking and Commercial Law in 1966⁸ prepared a draft law making essential changes to the arbitration rules in the CCP, and submitted it to the Ministry of Justice. No legislation followed. Once the International Arbitration Act comes into force, the CCP will deal only with domestic arbitration, remaining applicable only where disputes do not fall within the International Arbitration Act or international treaties.

Articles 516 and 517 deal with the arbitration agreement. According to art 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 certain. For instance, a contractual provision that disputes are to be settled either under arbitration or in state courts would render the arbitration clause invalid.⁹ 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.¹⁰ However, the Court also found that other means of telecommunication, which provide a record of agreement, are not valid under Turkish law. Article 518 requires '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 520–23 govern the composition of the arbitral tribunal. The parties are free to appoint whomever they wish as arbitrators and to determine their number. There is no restriction on non-lawyers or foreigners. However, if the parties fail to do so, the competent state court has the power to appoint arbitrator(s) on the request of one of the parties. If the parties cannot come to a conclusion then, unless otherwise agreed between the parties, the court will appoint three arbitrators. If a party fails to appoint an arbitrator within seven days of receipt of a request to do so from the other party, the appointment will be made by the court.

Article 521(1) provides that the articles of the Code regarding the challenge of judges also apply to arbitrators. The challenge can be made by the first hearing or within five days of when the party knows or ought to know of the appointment of the arbitrator. The mandate of arbitrators cannot be terminated unless the parties agree. The CCP does not recognise the principle of *Kompetenz–Kompetenz*. Under art 519, the State Court has the power to deliver summary judgment on a conflict regarding the jurisdiction of arbitral tribunals.

Articles 523–9 provide the legal framework of the arbitral proceeding. The arbitral tribunal has power to determine the procedural rules and the timetable of the process unless otherwise agreed by the parties. Nevertheless, art 529 states the maximum time for the arbitral tribunal to deliver the award as 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

⁷ Kemal Dayınlarlı, *Domestic Arbitration Provided in the Code of Civil Procedure (HUMK'da Düzenlenen İc Tahkim)*, (Dayanirli Hukuk Yayınları: Ankara, 1997) 13.

⁸ Banka ve Ticaret Hukuku Araştırma Enstitüsü (The Research Institute of Banking and Commercial Law), *Arbitration and its Organisation (Hakemlik ve Örgütlenilmesi)*, (Ankara, 1971).

⁹ 15th Civil Panel of the Turkish Court of Appeal, Decision dated 04.11.1986, Case 86/19, Decree 86/3650, reported in (1987) *I Yargıtay Kararları Dergisi* 590.

¹⁰ 11th Civil Panel of the Turkish Court of Appeal, Decision dated 02.10.1979, Case 79/3855, Decree 79/4351, reported in (1980) *II Yargıtay Kararları Dergisi* 245.

party. A judgment on the extension of the time limit is not appealable.¹¹ According to art528, if 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 counted in the time limit.

Article 526 dealing with rules of evidence refers to the general rules applicable to the courts. However, in some circumstances the tribunal must seek the assistance of the competent Justice of the Peace. These circumstances are (art527): administration of oaths, summoning or swearing of witnesses who refuse to appear, rogatory letters to a foreign court, and obtaining documents as described in articles 322, 323 and 333.

Articles 530–2 concern the arbitral award. An arbitral tribunal is able to render its award by majority. Article 530 states that an arbitral award must contain a description of the dispute, an explanation of the facts and reasons, the substance of the dispute, and a statement of the costs and reasons for them. Awards must be signed and dated by arbitrators and the arbitration agreement must be attached to the final award. Article 532 requires awards to be registered and deposited and delivered to the parties by the competent court. An award comes into force on notification to the parties.

The final articles deal with recourses against the award. The CCP simply limits the grounds for attacking arbitral awards. According to art533, an award may be set aside only if it is delivered after the expiry of the arbitration time limit, or deals with an issue which is not claimed by the parties or not within the scope of the submission, or does not deal with all the issues.

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. Moreover, the Court of Appeal has created new grounds of appeal. For instance, an arbitral award can be challenged if it does not contain the necessary explanations, as stated in art530, or if counsel of a party is appointed arbitrator. One judgment of the Court of Appeal¹² has been criticised by many writers.¹³ The debate has arisen from art533(3). 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. The criticisms are mainly based on two grounds. First, art533 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. Secondly, the principle of party autonomy is essential for arbitration proceedings. However, such a decision does not allow the parties to settle the dispute under the arbitration process. Article 533 does not vest in the Court of Appeal the power to review the merits of the arbitral awards. In addition, arbitrators 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 retrial from the Court of Appeal. However, this might not modify the outcome as the final appeal authority remains the Court of Appeal.

¹¹ The General Board of the Civil Panel of the Turkish Court of Appeal, Decision dated 06.06.1956, Case 56/3, Decree 56/11, reported in the Official Gazette, 9383 16.08.1956.

¹² The General Board of the Civil Panel of the Turkish Court of Appeal, Decision dated 28.01.1994, Case 93/4, Decree 94/1, reported in the Official Gazette, 2194 13.04.1994.

¹³ See Doganay, above n1 at 56–9; Turgut Kalpsuz, 'Reasons to Appeal against the Decisions of the Arbitral Tribunal in Turkish Law (Turk Hukukunda Hakem Kararlarinin Temyizi Sebepleri)', [1997] 1 *Batider* 1–41; Ziya Akinci, *Drafts for International Arbitration Law, Debates, Proposals (Milletlerarasi Tahkim Konusunda Yasal Duzenleme Gerekirmi)*, (Banka ve Ticaret Hukuku Arastirma Enstitusu: Ankara, 1999) 54.

The last articles of Chapter VIII provide that parties cannot by agreement waive their right to challenge an arbitral award and that an award is not enforceable if a party still has legal remedies against the award.

International Private and Procedural Law

Law 2675 brought the IPPL into force on 22 November 1982. It repealed the articles¹⁴ in the CCP in respect of recognition and enforcement of foreign judgments. This was the first legislation to deal specifically with foreign arbitral awards. Previously, the repealed articles had been applied by analogy.

The ratification of the New York Convention in 1991 restricted in practice arts43–5 of the IPPL. First, according to artI(3) of the New York Convention, the IPPL is only applicable to non-contracting states' arbitral awards. Secondly, though a party relying on artVII of the New York Convention may choose to have the award recognised and enforced in accordance with the CCP, that would not be advantageous, because the New York Convention is much more efficient and wider than the CCP. Furthermore, although the Convention was taken as an example during the drafting of the CCP,¹⁵ it does not cover all issues as extensively as the Convention.

Articles 43 and 44 embody the procedure for recognition and enforcement of a foreign award. They address the competent court and require necessary documents, which are stated in artIV of the Convention. However, there are a number of differences between the IPPL and the Convention. First, in spite of mentioning the words 'foreign arbitral awards' in the heading of art43, the CCP does not define the terms. In fact, the concept is not defined in any Turkish statute. Therefore, the interpretation has been left to the Turkish Court of Appeal, which has 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. Other differences have arisen from the reasons of the rejection of the application. CCP art45(i) and artV(e) of the Convention have almost the same wording except that the CCP provides 'the award has not yet become conclusive or capable of execution ...' instead of 'the award has not yet become binding on the parties ...' However, both provisions similarly stress that the parties do not have any legal remedies against the award in respect of the procedural rules of the arbitration process. Finally, artV2(b) of the Convention states that 'recognition or enforcement may be refused if the award would be contrary to the public policy of that country'. CCP art45(b) adds 'common moral principles' as an additional reason for refusal.

Other legislation

Other legislation concerns only domestic arbitration, mostly non-commercial. However, it is necessary to mention some of it to show the approach of legislators and the historical background of Turkish arbitration law. Most of the legislation does not allow the parties to choose their method of dispute resolution, and makes arbitration obligatory. Nor do the parties have the power to appoint their arbitrators. Obligatory arbitration might be imposed either where the parties are, for example, councils or government establishments,¹⁶ or

¹⁴ CCP arts537–45.

¹⁵ Engin Nomer, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated June 10, 1958 and Turkish Arbitration Law (Yabancı Hakem Kararlarının Tanınması ve İcrası 10 Haziran 1958 tarihli New York Sözleşmesi ve Türk 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 Arastırma Enstitüsü, Avrupa (Cenevre)—New York Sözleşmesi ve Türk Tahkim Hukuku Sempozyumu*, (Ankara, 1990) 81.

¹⁶ Law 3533, Official Gazette, 3961 16.07.1938 796.

members of the stock exchange;¹⁷ or where the dispute arises in a particular context such as under the Consumer Rights Act (arts22–3).¹⁸

2.3 Treaties

Until 1989, when it ratified 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 September 1992.

Turkey has also signed 37 bilateral international treaties that contain international arbitration provisions, and ratified 21 of them.¹⁹ Furthermore, the majority of these BITs provide for ICSID or UNCITRAL arbitration.

The ratification power with regard to international treaties is regulated under art90 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 art90(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.²⁰ Ratified international treaties therefore have a special place compared with other statutes in Turkish law.

The New York Convention

The provisions of the IPPL are absolutely harmonious with the New York Convention but Turkey ratified the Convention with two reservations. First, the Convention applies only 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, IPPL art38(a) indicates the principle of reciprocity regarding recognition and enforcement of foreign judgments. Legislators thought that such a reservation would prevent a conflict between the Code and the Convention. Second, the Convention applies only to legal relations, contractual or not, which are considered as commercial under Turkish law. It seems that such a reservation makes the application of the Convention narrower. However, the meaning of commercial relations is the same in Turkish law as in other modern legal systems.

European Convention on International Commercial Arbitration

Turkey joined the working group during the preparation of the Convention and signed the final text. However, it did not ratify the Convention until 1991. During the discussions on ratification, many Turkish lawyers were in favour of the Convention.²¹ The fundamental principles of the Convention and Turkish arbitration law are in a harmonious relationship. The Convention was the first legislation with regard to international commercial arbitration in Turkish law and contributed to other new legislation on this matter.

¹⁷ By the decision of the Cabinet, 91 03.10.1983. See Kemal Dayanirli, *İc Tahkim (Domestic Arbitration)*, (Dayanirli Hukuk Yayinlari: Ankara, 1997) 11.

¹⁸ Law 4077, Official Gazette, 11642 23.02.1995; there are also restrictions under the Co-operative Act art95 Law 1163, Official Gazette, 13195 10.05.1969 and Act of Lawyers art95(5) Law 1136, Official Gazette, 13168 20.02.1973.

¹⁹ See on <www.worldbank.org/icsid/treaties/turkey.htm>.

²⁰ The International Private and Procedural Act art1(2): 'The provisions of international treaties are not prejudiced by the Act.'

²¹ *Symposium on the European (Geneva) and New York Conventions and Turkish Arbitration Law (Avrupa (Cenevre)—New York Sozlesmesi ve Turk Tahkim Sempozyumu, Ankara)*, (Banka ve Ticaret Hukuku Arastirma Enstitusu: Ankara, 1990).

The Washington Convention on the Settlement of Investment Disputes

The importance of ICSID is twofold. First, it was the first major international convention on international commercial arbitration which Turkey accepted. Secondly, the fast growing economy and necessity of foreign investment made Turkey conclude many more investment treaties within the scope of the Convention. In spite of the recent problems, Turkey seems to be able to solve legal obstacles to provide for arbitration under the Convention. At the time of its ratification, Turkey notified the Centre that disputes relating to real property would remain outside its jurisdiction.²² Moreover, Turkey made a reservation with respect to art64, by denying the powers of the International Court of Justice over the interpretation and application of the Convention, preferring to have such disputes resolved 'through meaningful negotiations between the parties'.²³

Bilateral investment treaties

BITs regulate relations between investors and host countries. Their aim is to create a secure environment for foreign investors. In general, BITs deal with the definition of investors and investment, currency exchange regulations between the states, guarantees of investors' assets, dispute resolution and so on. They are relevant here only if they contain any provision relating 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 for the negotiation stage varies from contract to contract but is usually either one year or six months, during which the parties must solve the dispute by negotiation or conciliation.²⁴ After expiry of the time limit, the parties are free to invoke international arbitration or national litigation.²⁵ The treaties mainly refer to UNCITRAL and ICSID arbitration.

3. PROBLEMS OF INTERNATIONAL COMMERCIAL ARBITRATION IN TURKEY

3.1 Problems of Access to International Commercial Arbitration

Concession agreements and international commercial arbitration

Turkey is a developing country with a fast growing infrastructure which Turkey itself cannot afford. For example, there were 5,221 public investment projects on the waiting list in 1996. However, merely 14.7 per cent of the budget could be allocated for public investment projects, which was only enough to cover one-sixteenth of the total.²⁶ Therefore, in the 1980s Turkey started to attract and regulate foreign investment.

Foreign lenders were invited to invest in electricity in 1984 by Law 3096²⁷ and in motorways by Law 3465²⁸ in 1988, which both provided for concession agreements regarding public services between investors and public sectors on the build-operate-transfer (BOT) model. However, there were two main problems regarding implementation. First, the Turkish Supreme Administrative Court had the power to review the conditions of concessions and

²² Official Gazette, 19830 02.06.1998.

²³ T.M.C. Asser Instituut, Washington Convention <www.asser.nl/ica/wash_sign.htm>.

²⁴ Contracts between Turkey and the Netherlands, Belgium-Luxembourg, Bangladesh, the United States, Austria, Kuwait, Denmark, South Korea and China.

²⁵ Contracts between Turkey and Argentina, Hungary, Albania, Bulgaria, Tajikistan, Sweden, Estonia and Latvia.

²⁶ 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) 3.

²⁷ Official Gazette, 18619 19.12.1984.

²⁸ Official Gazette, 18390 02.06.1988.

concession contracts under art155 of the Turkish Constitution. In practice, this type of examination caused delays and modifications of the contracts which the parties did not want. Some of the Supreme Court's criteria were very severe, especially in relation to international arbitration. Secondly, the Turkish administrative courts have exclusive jurisdiction over any dispute arising from concession agreements. Though this law is not unique—concession agreements are generally not arbitrable under French, German and Belgian law²⁹—BOT agreements are not attractive to foreign investors under these conditions.

In order to allay foreign investors' suspicions, Law 3996³⁰ was enacted in 1994; it added other sectors and projects to the electricity and motorway sectors, such as the construction and operation of bridges, tunnels, telecommunications, dams, sewer systems, railways and seaports, thereby enlarging the scope of the implementation of BOT agreements. Moreover, art5 stipulates that BOTs 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 and are therefore not administrative agreements. In order to reinforce this argument the last sentence of art5 states that BOTs are governed by private law. They would not fall, therefore, within the jurisdiction of the Turkish Supreme Administrative Court but would be subject to international arbitration.

The battle had begun between the legislature and the various courts. First, the Turkish Supreme Administrative Court delivered a number of judgments³¹ against the provisions of the law. However, these judgments were not sufficient to set aside the provisions of the law. Then some Members of Parliament invoked the Constitutional Court by alleging that art5 was contrary to the Constitution. The Court held that art5 was contrary to arts2, 11, 37, 125 and 155 of the Constitution and set it aside.³² However, the Court took nine months, after delivering the decision, to state its reasons:

— 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 over 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

²⁹ H. Elizabeth Kroeger, Timothy J. Kautz and Ercan Acikel, 'Developments in Energy Project Arbitration in the Context of Bilateral Investment Treaties and ICSID', (1999) 9 *Mealey's International Arbitration Report* 38 fn18.

³⁰ Official Gazette, 21958 13.06.1994 amended by Law 4047, Official Gazette, 22130 03.12.1994.

³¹ 1st Panel of the Turkish Supreme Administrative Court, Decision dated 24.09.1992, Case 92/232, Decree 92/294, reported in (1993) 87 *Danistay Dergisi* 33; 10th Panel of the Turkish Supreme Administrative Court, Decision dated 29.04.1993, Case 91/1, Decree 93/1752, reported in (1994) 92 *Danistay Dergisi* 41.

³² The Turkish Constitutional Court, Decision dated 28.06.1995, Case 94/71, Decree 95/23, reported in the Official Gazette, 22586 31.03.1996 37.

decision of the Court closed the way to international arbitration in respect of the concession agreements.

Bilateral investment treaties as alternatives

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 disputes between the host country and the contracting country's investors. Moreover, the inconsistency of treaties with the Turkish Constitution cannot be alleged under art90(5) of the Constitution. In other words, treaties have immunity under the Constitution. Therefore, Turkish courts must accept the superiority of international treaties over Turkish law. Nevertheless, the Supreme Administrative Court set aside an arbitration clause in a concession agreement during its review and approval examination.³³ The Court relied on the same reasons as those stated in the BOT decision of the Constitutional Court. However, this dispute over jurisdiction seems to have been ended by the constitutional and other amendments discussed below.

The implementation of BITs can be illustrated by their relations with ICSID arbitration. The exclusive jurisdiction of the Supreme Administrative Court can be overruled by the Convention, if the conditions of art25 of ICSID are satisfied. The Court cannot deny the jurisdiction of the Centre if an investor is a national of another contracting state, the parties give consent in writing to the jurisdiction of the Centre and the dispute is a legal dispute which has arisen directly from an investment.

Besides, art25(1) of ICSID states: 'when the parties have given their consent, no party may withdraw its consent unilaterally'. Therefore, Turkey, as a contracting state, cannot unilaterally revoke its consent to ICSID arbitration, which it has given in a BIT. Consent may be given in three ways: first, 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; secondly, under the internal legislation of the state—there is no such provision in Turkish law; lastly, in an international treaty between the host-state and the state of the private investor. On the last point, BITs may illustrate the consent of Turkey. By the strength of the fusion of the ICSID Convention and a BIT, it may be possible to bring a dispute under ICSID arbitration.

3.2 Enforcement Problems

Although arbitration is based on the parties' consent, differences between them may arise at any stage of the process. Disagreement about the mechanism for enforcement of an award may be the core issue, as it may deprive the winning party of the benefit of the award. The history of commercial arbitration in Turkey shows that problems of enforcement have been one of the main issues and have initiated debates not only in Turkey but on international platforms. In Turkey they can be divided into those which arise from the inconsistent judgments of the Court of Appeal on the nationality of arbitral awards and the refusal of enforcement on the grounds of Turkish public policy.

Nationality of arbitral awards

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 agree-

³³ 1st Panel of the Turkish Supreme Administrative Court, Decision dated 01.07.1996, Case 95/246, Decree 96/138; see Ali Yesilirmak [1999] 2 *Batider* 161 fn60.

ments came into existence from the parties' consent and were valid anywhere in the world, like any other commercial agreement.

In 1949, the Court of Appeal reached a different decision known as *Argentina*.³⁴ A foreign arbitral award would be enforceable in respect of the relevant provisions of the CCP regarding the enforcement of foreign judgment by analogy. The Court, for the first time, distinguished a foreign award from a domestic award. It 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'.

However, the Court changed its mind in *Keban*³⁵ in 1976. It created an additional criterion, criticised by many lawyers in Turkey³⁶ as well as internationally.³⁷ In *Keban*, the contract was concluded between French-Italian construction companies and a state-owned Turkish water authority regarding the construction of a dam 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. A dispute was brought before an ICC tribunal which convened in Lausanne and rendered an award in favour of the construction companies. The award was submitted to the ICC Secretary and approved by the ICC Court of Arbitration. The claimants brought an action in the competent Turkish court to enforce the award. The court held in favour of the enforcement and the defendant appealed. The 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 within the sovereignty of another state, was a foreign award. Thus, the award could not be recognised or enforced. By this decision, the Court redefined the concept of an award delivered outside the territory of Turkey, and reversed its previous decisions. The Court also found the award was contrary to Turkish public order.

Two years later, the Court of Appeal returned to its previous decision and rejected the 'territorial principle',³⁸ holding that an award cannot be defined as a foreign award according to the nationality of arbitrators or the place where it had been rendered. The criterion was the nationality of the procedural law which regulates the arbitration process. This criterion has been applied to distinguish foreign awards ever since. Although the Court of Appeal mentioned the 'territorial principle' in later decisions,³⁹ its judgments have not been based on that principle. Some lawyers⁴⁰ are of the opinion 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.

³⁴ The Commercial Panel of the Turkish Court of Appeal, Decision dated 25.03.1949, Case 4700, Decree 1495 in Erol Ertekin and İzzet Karatas, *Arbitration and the Recognition and Enforcement of Foreign Arbitral Awards in Practice (Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarını Tenfiz Tanınması)*, (Yetkin Yayınları: Ankara, 1997) 430-1.

³⁵ 15th Civil Panel of the Turkish Court of Appeal, Decision dated 10.03.1976, Case 1617, Decree 1052, in Ertekin and Karatas, above n35 at 437-50.

³⁶ Rabi Koral, *Nationality of Arbitration (Hakemliğin Milliyeti ve Yargıtay)* (Sulhi Garan Matbaası: İstanbul, 1979) 236-42; Baki Kuru, *Civil Procedure (Hukuk Muhakemeleri Usulu)*, IV (Yetkin Yayınları: Ankara, 1984) 1436-48; Sulhi Tekinay, *International Commercial Arbitration (Uluslararası Ticari Tahkim)*, (Beta Basım Yayım: İstanbul, 1990) 255-7.

³⁷ L.W. Craig, W.W. Park and Jan Paulsson, *International Commercial Arbitration, ICC Arbitration* (Oceana Publications: London, 1990) 13, 15, 348; M. Rubino-Sammarano, 'The Keban Arbitration' (1980) 46 *Arbitration* 241-6; J. El-Hakim, 'Should the Key Terms Award, Commercial and Binding be Defined in the New York Convention?' (1989) 6 *Journal of International Arbitration* 163-8.

³⁸ 11th Civil Panel of the Turkish Court of Appeal, Decision dated 28.12.1978, Case 5258, Decree 5916.

³⁹ 11th Civil Panel of the Turkish Court of Appeal, Decision dated 19.12.1985, Case 7355, Decree 7099; 15th Civil Panel of the Turkish Court of Appeal, Decision dated 20.06.1996, Case 2781, Decree 3533.

⁴⁰ Engin Nomer, *The Recognition of Foreign Arbitral Awards in Turkish Law (Türk Hukukunda Yabancı Hakem Kararlarının Tenfizi)*, (Beta Basım Yayım: İstanbul, 1993) 56-7; Turgut Kalpsuz, *The Concept of Turkish Arbitral Awards (Türk Hakem Kararı Kavramı)*, (Seckin: Ankara, 1983) 83.

The ratification of international treaties has disposed of most of the uncertainty, but not the possibility of further problems like those which arose in *Keban*, if the dispute falls outside the scope of international treaties.

Contrariety to Turkish public order

In Turkish law, provisions regarding public order are scattered in different codes concerned with procedural or substantive laws. They may be mandatory rules or may leave the matter to be determined at the court's discretion.

Public order has 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 most obvious example was *Keban*. The 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 itself an interference with the immunity and freedom of the arbitrators. The parties had agreed by contract that any dispute must be settled by ICC arbitration under the Turkish procedural law. 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. The Court of Appeal failed to point out that the Court of Arbitration does not examine errors of facts or law. Its function is to review the formal sufficiency of the award, such as its enforceability under the assumed law and so on. Consequently, the Court of Appeal, in previous decisions,⁴¹ had held that the approval of the Court of Arbitration was not contrary to Turkish public order.

Another example can be seen in *Metex*. The Commercial Court of Ankara⁴² held that an arbitral tribunal has to deliver its award in accordance with the stipulated procedural law, 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 to foreign arbitral awards because the parties' choice of Turkish procedural law was not clear in the contract.⁴³ On appeal, the Court of Appeal did not comment on the reasons of the Commercial Court of Ankara. However, it held that such a failure to enforce the award was in violation of artVI(d) of the New York Convention.⁴⁴

3. 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. Developing countries which cannot finance all their spending from their own economic sources, are in desperate need of foreign investment for major projects. There has therefore been competition among states to attract foreign investment. 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 sought 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 by relying on BITs or ICSID. However, the pre-inspection power of the Supreme Court of Administration has caused undesired modifications and delays for investment contracts. In addition, the framework of the law was convoluted and complicated for foreign investors and insufficient to cover investors of all

⁴¹ 15th Civil Panel of the Turkish Court of Appeal, Decision dated 10.07.1991, Case 2383, Decree 3667 531-5; 15th Civil Panel of the Turkish Court of Appeal, Decision dated 01.10.1992, Case 1736, Decree 4425 535.

⁴² *Ibid.* at 535.

⁴³ Felix Ehrat, 'A Case Study: Turkey' in Marc Blessing (ed.) ASA Conference Special Series No. 9 (Zurich, 1996) 225-37.

⁴⁴ 15th Civil Panel of the Turkish Court of Appeal, Decision dated 01.02.1996, Case 6209, Decree 527, 535-43.

nationalities. Nevertheless, there was serious opposition to concession agreements and international arbitration, which delayed reform.

3.1 Arguments against Constitutional Amendments

In the 19th and early 20th centuries the implementation of major economic development was left to foreign investors and non-Muslim citizens with concession agreements. These capitulations caused economic dependence and political interference. It is commonly said that this was one of the main reasons for the fall of the Ottoman Empire. Such painful historical experiences turned Turkish public opinion against foreign investment, and consequently against international arbitration.

In the light of the historical experiences and to protect social economic policy, reasons were put forward against the new legal regime mainly by social democrat politicians and writers. The criticisms can be divided into two main groups. The first argued against the economic structure itself,⁴⁵ which the legal measures were trying to build. According to these critics, the government ought to develop some sectors on a non-profit making basis, such as electric and water supply, public transport and so on. The private sector, foreign or not, would naturally want to make a profit from the operation of these sectors, which would damage public interests. The second group was not against the economic structure itself.⁴⁶ However, it was concerned about the way the privatisation and concession transactions were implemented in practice. It suspected that politicians would use such big projects to make political or personal profit or as negotiation tools in international relations. The developments would prosper against the interests of the public and the country. It was in favour of a new legal process which would allow inspection of all transactions in this field. Despite this opposition, governments in the last 15 years have tried to create an investor-friendly environment. This could not be done without constitutional amendments. But no government had the necessary parliamentary majority to amend the Constitution until 1999, when the necessary constitutional amendments were passed. Law 4446⁴⁷ came into force on 14 August 1999, followed by the relevant amendments to several codes.

3.2 The Substance of the Amending Law

The aim of the amendment is to clear all obstacles out of the way of concession agreements in order to attract foreign investment. The BOT decision in 1995 is said to have guided the spirit of the amendment. The legislature tried to get rid of every hindrance stated in that decision.

The first article of the law changes the heading of art47 of the Constitution from 'Nationalisation' 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.

Declaring that 'agreements relating to infrastructure projects are concession contracts and must be governed by administrative law', the Constitutional Court set aside art5 of Law 3996 as contrary to several articles of the Constitution. Therefore, the legislature removed those constitutional obstacles, making it possible to stipulate 'the principles and procedures of

⁴⁵ *Hurriyet*, 09.02.1999 5.

⁴⁶ *Cumhuriyet*, 12.08.1999 4.

⁴⁷ Official Gazette, 23786 14.08.1999.

privatisation' by statute and exclude the concession agreements from the category of administrative contracts by mentioning 'private law agreements'. Thereafter, the parties would be able to make an agreement regarding public sectors which could be determined by an ordinary parliamentary Act.

Article 2 of Law 3996 adds a new sentence to the end of the first subsection of art125 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 is involved in the subject matter of the dispute.

According to art125 of the Constitution, the Turkish administrative courts have exclusive jurisdiction over most administrative acts of the government. The amendment provides that concession contracts regarding public services can be subject to domestic or international arbitration if the parties so stipulate in the contract. However, the last sentence imposes a condition; a dispute must contain a 'foreign element'. 'Foreign element' and 'international arbitration' have not been defined in Turkish law, which may lead to further problems. The determination of arbitral awards has been subject to inconsistent decisions of the Court of Appeal in the past, but the debate over definitions⁴⁸ has been resolved by Law 4501, art3 of which amended art155(2) of the Constitution as follows:

The Supreme Administrative Court is empowered to give advisory opinions 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 legislature wanted to get rid of two negative effects of the Supreme Administrative Court on concession contracts. By the amending law, the power of 'examination and review' is restricted to giving an 'advisory opinion'; the Court has no power to make any changes to concession contracts at all. Besides, to prevent delay, the law imposes a two-month time limit, commencing with the submission of the case.

4. THE RELEVANT LEGISLATION

Despite the fundamental changes made by the constitutional amendment, there was still a need for further legislation. First, the definitions of 'foreign element' and 'international arbitration' had to be clarified. Secondly, there were gaps to be filled. This produced three new pieces of legislation.

The Law Regarding the Amendment of some Articles of the Supreme Administrative Court and the Administrative Procedural Law⁴⁹ provides that the administrative courts have no jurisdiction over concession contracts which contain an arbitration clause and removes the power of the Supreme Administrative Court to review and approve concession agreements. The Court may only give advisory opinions within two months and they have no effect on concession contracts.

The Law Amending Some Articles of Law Concerning Realization of Some Investments and Services under the Framework of Build-Operate-Transfer Model⁵⁰ amends some articles of Law 3996, which was the subject of the BOT decision of the Constitutional Court.

⁴⁸ Ali Yesilirmak, 'The End of a Prolonged Era: Disputes Arising from Turkish Concession Contracts are Now Arbitrable' [1999] 9 *Mealey's International Arbitration Report* 27; H.E. Kroger, T.J. Kautz and Ercan Acikel, 'Turkey Revisited: Developments in Energy Projects Arbitration in the Context of Bilateral Investment Treaties and ICSID' [1999] 9 *Mealey's International Arbitration Report* 32.

⁴⁹ Law 4492, Official Gazette, 23913 18.12.1999 brought into force on 18.12.1999.

⁵⁰ Law 4493, Official Gazette, 23914 22.12.1999.

Article 1 enlarges the scope of BOT projects in electricity energy investments. It adds other types of business to art2 of Law 3996, including transmission, distribution, and trade in electricity. Turkey's immediate electricity needs compelled the government to take these measures.⁵¹ Article 2 resuscitated the previous art5 of Law 3996 and again declared that BOT contracts are governed by private law and are arbitrable. There was no need to do this because it was stated both in the constitutional amendment and Law 4492 that concession contracts are governed by private law. Furthermore, even the Constitutional Court in the BOT decision had held that BOT contracts created concessions in favour of investors. However, it seems that the government was concerned to put the matter beyond doubt.

The Law on Principles That Shall be Complied with When There is an Access to Arbitration for Disputes Arising from Concession Contracts⁵² attempts to answer whatever questions remained concerning definitions of concepts, the situation of existing investors and concession agreements, and the relations between the new scheme and arbitration under BITs and ICSID. Article 1 states its aim to be to determine the binding principles and procedures of concession contracts, which contain an arbitration clause. Parties have to follow these principles and procedures when they conclude concession contracts.

Article 2 spells out the meaning of '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 for initiating an arbitration process in accordance with art3. The foreign element exists where either of the two following circumstances is satisfied. First, at least one of the owners of the corporation which is a party to the concession agreement must be a foreigner in accordance with the regulations on the encouragement of foreign capital.⁵³ The subject-matter of the corporation must be either already established or about to be established. Second, there is a foreign element if it is necessary to raise foreign capital, or make a loan or security agreement, in order to operate the concession contract.

Article 3, under the caption 'resolution of disputes involving foreign element by international arbitration', states that a dispute arising from a concession contract which includes a foreign element can be settled by arbitration regulated in accordance with any of the alternatives listed in the article. These give the parties plenty of room to determine the place of arbitration, the applicable law and whether the arbitration should be institutional or *ad hoc*. 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 brought to an international arbitration institution, which has its own procedural rules. The drawback is that neither art3 nor the other articles of the law determined the nationality of arbitral awards. Therefore, an award rendered by an arbitral tribunal, constituted in accordance with art3, may be subject to review by the Turkish Court of Appeal because domestic awards can be appealed under Turkish law and the Court of Appeal defines a domestic award as an award that is not pending under the authority of a foreign law. Such an award may be appealed and set aside by the Court of Appeal, for instance on the ground of error in applying Turkish substantive law to the merits of the dispute. The Court of Appeal has, for example, ruled that an ICC award, delivered in Turkey in accordance with Turkish substantive and procedural law, was a

⁵¹ R.H. Kreindler and T.J. Kautz, 'Issues in Drafting and Performance of Arbitration Agreements in the Context of Bilateral Investment Treaties and Energy Projects: The Example of Turkey' [1997] 5 *Mealey's International Arbitration Report* 25.

⁵² Law 4501, Official Gazette, 23941 22.01.2000.

⁵³ The relevant regulations can be seen on www.hazine.gov.tr/english/tug/inven.htm.

domestic award.⁵⁴ Moreover, art5 of the amending law clearly states that 'awards in respect of contracts shall be appealed to the Court of Appeal . . .' and does not state the specific types of award which are subject to the Court's review.

This may lead to judicial debate and further problems in the recognition and enforcement stage. There is no doubt that international treaties, especially art1 of the New York Convention and art54 of ICSID, play a major role in clarifying the nationality of awards. Law 4501 art6 addresses this issue: 'where there is no provision in this law and in international treaties duly in force, the relevant provisions of the CCP and the IPPL shall be applicable'.

According to the CCP, an arbitration clause may be concluded either in a concession contract or in a separate agreement; it also sets out what the parties may include in an arbitration agreement, such as the place of arbitration, the applicable law, the number and composition of the arbitral tribunal, and the language of the tribunal.

Article 7 concerns existing concession contracts and amends art1(2) of Law 3996. Concession contracts concluded in accordance with the provisions of Laws 3096 and 3465 may be reconcluded under private law and arbitrable in an international arbitral process. Investors had to apply to the relevant department within a month from the effective date of Law 4501, which was 22 January 2000. If approved by the Cabinet, the contract could be reconcluded 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 had three months to reconclude the agreement. That time limit could be extended for three months with the parties' consent.

Another type of retroactivity relates to concession contracts commenced under the previous concession regime of Law 3996, by following the same process. Contracts set aside by final judgments were excluded.

By this amendment the legislature intended to satisfy existing investors but a group in Parliament have brought proceedings before the Turkish Constitutional Court, claiming that the retroactivity provisions of Law 4501 are unconstitutional.⁵⁵

4. ADOPTION OF THE MODEL LAW

4.1 The Specific Needs and Background of the Regulation

The recent developments in international arbitration in Turkey demonstrate the necessity for modern legislation. The articles of the CCP are outdated and do not address all relevant issues. A reliable legal environment is needed if Turkey is to become a dispute settlement centre for Central Asia and the Middle East. The subject was considered in a symposium entitled 'Is There a Need for New Legislation in International Arbitration?' by leading academics, practitioners and High Court Judges.⁵⁶ It was decided to establish a Drafting Committee to draft a Bill. A draft was submitted to a Working Group at its first meeting which strictly adopted the UNCITRAL Model Law. However, the Final Draft incorporated some changes.⁵⁷

⁵⁴ 15th Civil Panel of the Turkish Court of Appeal, Decision dated 20.06.1996, Case 2781, Decree 3533.

⁵⁵ *The Turkish Daily News*, 24 May 2000.

⁵⁶ The symposium was held on 11 April 1997 and organised by the Research Institute of Banking and Commercial Law.

⁵⁷ 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 (Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi-Taslaklar-Tartismalar-Oneriler)*, Ankara, 1999. This study is based on the final draft. [At the time this article went to the publishers, 5 February 2001, the Bill had still not been laid before the Turkish Parliament, where the government has a sufficient majority to ensure its acceptance without major changes—Editor.]

4.2 Comparison of the Draft with the Model Law

General Provisions

At its first meeting, the Drafting Committee proposed to adopt art1 of the Model Law, including its footnote regarding the definition of the term 'commercial'. Opposition came from two main groups. First, there were those who alleged that the definition and interpretation of the term 'commercial' might cause confusion and narrow the scope in practice. Second, art1 is more complicated than other comparable legislation, such as the Swiss. Article 1 of the Draft was therefore rewritten to take account of Swiss Private International Law (SIPL).

The Draft now provides for all disputes whether commercial or not. Nevertheless, art1 includes a number of limitations. The first is that the text applies only to arbitration processes which take place in Turkey. Secondly, it adds a further condition to the territorial criterion: at least one of the parties must have had neither its domicile nor its habitual residence in Turkey at the time when the arbitration agreement was concluded. Despite these limitations, art1 tries to ensure a wide field of application, by stating that the law shall apply to any arbitration process if the parties agreed on it. Conversely, parties can exclude its application to their dispute, even if it falls within its scope. Therefore, the Draft gives the parties as much autonomy as possible in the determination of the applicable law.

Nevertheless, art1(5) states that disputes regarding immovable property in Turkey do not fall within the scope of the law. Surprisingly, the Working Group did not pay much attention to the arguments against this limitation, which does not fit its general attitude towards ensuring a wide field of application.⁵⁸ In addition, the Draft excludes those disputes which are not arbitrable under Turkish law under art518 of the CCP.⁵⁹

Finally, art1 establishes that the law shall not affect international treaties ratified by Turkey.

Unlike the Model Law, the Bill does not contain definitions or rules of interpretation. Some members of the Working Group objected that such a technique was contrary to the spirit of the civil law. Besides, the definition of some terms (arbitration, arbitral tribunal, and court) in art2 of the Model Law is not necessary in Turkish law. The meaning of these terms has been elaborated in Turkish law, close to the definitions of the Model Law, and there is no interpretation problem.

The Final Draft excludes art3 of the Model Law regarding the delivery of various written communications. This could raise problems if the parties do not agree on how the receipt of written communications will be regulated. However, the drafters hoped that art21 would provide answers. They also omitted art4 on the ground that the subject matter is regulated under general principles of Turkish law.

According to art2 of the Draft, the competent court is the commercial court of the seat of arbitration. Nevertheless, art32 provides 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 the articles which attract judicial intervention, the Draft simply states 'certain functions as stated in the law'. Art2 is also reinforced by art4, which states that no court shall interfere in the arbitral procedure unless the law allows it to do so. Though the approach of the Turkish text is slightly different from the Model Law, both texts reach the same point.

⁵⁸ Disputes arising out of immovable property are not arbitrable under Iranian law; Jamal Seifi, 'The New International Commercial Arbitration Act of Iran' (1998) 2 *Journal of International Arbitration* 5-35.

⁵⁹ See 2.2 above.

Arbitration agreement

The concept of arbitration agreement is defined in art4 of the Draft. That part of art7 of the Model Law which deals with the formal validity of arbitration agreements is directly transferred to the Turkish text, which also contains a provision regarding the substantive validity of arbitral agreements. This question is a conflict of laws problem and the Model Law leaves the question to be tackled by the regulations of each state. No country except Switzerland has specifically dealt with the question in its arbitration law.⁶⁰ Art178(2) of the SIPL is based on the principle *in favorem validitatis*. However, unlike the SIPL, Turkish authors adopted a dual rather than a triple alternative to avoid conflict between the Draft and the New York Convention. Under Swiss law, an arbitration agreement is valid if it conforms to one of three independent alternatives: the law chosen by the parties, the law governing the subject matter of the disputes or Swiss law. On the other hand, artV(1)(a) of the New York Convention states that the substantive validity of an arbitration agreement is determined in accordance with the law chosen by the parties, or in the absence of such a choice, by the law of the country where the award was made. Where the validity of arbitration agreements is determined by the law governing the subject matter of the dispute, there may be problems in enforcing an award in a foreign country which is a party to the Convention. Therefore, the Bill omits that part of SIPL art178(2) ('the law governing the subject matter of the dispute') for the sake of harmonisation with the New York Convention.

Moreover, the Draft incorporates SIPL art178(3), which 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 that the arbitration agreement is invalid on the ground that the main contract is not valid.

Article 5 of the Draft follows art8(1) of the Model Law, and provides that the court shall refer a matter to arbitration unless it finds the arbitration agreement null and void, inoperative or incapable of being performed. The court can only refer a case to arbitration if one of the parties asks it to do so. There is, however, one difference. The Model Law states that the request must be made 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.⁶¹

Although art8 was adopted into the First Draft, the Working Group criticised subs2 on the ground that it might lead to inconsistent decisions by state courts and arbitral tribunals. However, the Working Group did not evaluate the advantage of art8(2) in avoiding delay and needless court intervention.

Under Turkish law, an arbitral tribunal has no power to grant interim measures. Art6 of the draft would give the arbitral tribunal 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 the parties otherwise agree. Articles 9 and 17 of the Model Law provide for interim measures. By art6 of the Draft, the arbitral tribunal may require a party to provide appropriate security in connection with such measures. Moreover, the requesting party has the right to seek court assistance in the event of a failure to obey. On the other hand, art6 limits the power of arbitral tribunals. First, the arbitral tribunal cannot order an interim measure binding third parties. Secondly, any interim measures have to be enforced by the executive state departments or

⁶⁰ Klaus Peter Berger, *International Economic Arbitration* (Kluwer Law and Taxation Publishers: Boston, 1993) 156.

⁶¹ 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 ...'.

government offices. Parties can also request interim measures from state courts in accordance with Turkish law.

Composition of arbitral tribunals

The provisions of the Draft regarding the composition of the arbitral tribunal and challenge of arbitrators closely follow the Model Law, though there are some differences.

The parties are free to determine the number of arbitrators and to set the rules regarding their appointment. In the absence of such a choice, the Draft provides that the number of arbitrators will be three. If there are three, each party has the right to appoint one arbitrator and those two determine the third, who chairs the tribunal in accordance with art2(a). If one of the parties fails to appoint an arbitrator within 30 days of receipt of a request by the other party, or the appointed arbitrators cannot agree on the third within thirty days of their appointment, 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, if the parties cannot agree. The Draft also states, going further than the Model Law, that if there are more than three arbitrators these provisions will apply by analogy.

Article 8 of the Draft states that the competent court may be requested to appoint arbitrators, even though the parties agree on the appointment procedures, if one of the parties does not comply with the existing agreement; or the parties or their appointed arbitrators cannot reach an agreement under the procedure; or the appointing authority or institution cannot select arbitrators in accordance with the procedure.

A judgment of the competent court is not appealable. Article 8 also states that the court must take into consideration the parties' agreement, the impartiality and independence of the arbitrators and their nationality. Turkish law and the Draft do not contain any restriction regarding their nationality but the Draft requires the court to appoint an arbitrator of a different nationality from that of the parties unless the parties otherwise agree.

The Draft entirely adopts the Model Law provisions on grounds of challenge of arbitrators but the procedure is somewhat different. The parties are free to determine the challenge procedure but, if they do not, art10 provides that a party who challenges an arbitrator must notify the tribunal and the other parties in writing within 15 days. The time begins 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 30 days of receiving notice of the tribunal's decision. However, if the tribunal consists of a single arbitrator or all the arbitrators are challenged at once, any challenge may be made to the court. The decision of the court is not appealable. Unlike the Model Law, the Draft has no provision regarding the period when the decision is pending in the competent court. Thus, according to the established opinion of the High Court and arts187 and 195 of the CCP, the tribunal must wait for the competent court's decision. This will no doubt cause delay.

The last sentence of art10 deals with a matter which neither the Model Law nor SIPL provides for. 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 perform their duty, 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. Article 10 allows the parties to agree to a different procedure in this matter.

Articles 11 and 12 of the Draft deal with the failure or impossibility to act as an arbitrator and the appointment of a substitute. The only difference from arts14 and 15 of the Model Law

is the strict time limit. Article 17 imposes a one-year time limit; the parties are free to extend the time limit by agreement or a party may request an extension from the competent court.

Jurisdiction of arbitral tribunal

Article 13 of the Draft adopts from the Model Law the principle *Kompetenz-Kompetenz*. For the first time in Turkish arbitration law, arbitral tribunals will be able to decide on their own competence.

Implementation of arbitral proceedings

The Turkish drafters put together Chapters V and VI of the Model Law but without change except for some additions which may be of some importance.

According to Turkish law, a party in an arbitration tribunal can be represented only by a lawyer who is a member of one of the Bars in Turkey,⁶² and foreigners are not allowed to be lawyers.⁶³ Article 14 of the Draft, 'Equal Treatment of Parties', provides that foreign persons will be able to represent their clients in an arbitration conducted in accordance with the Draft.

Some provisions, such as arts 5, 10 and 29(4) may cause delay. There is no equivalent to art 3 of the Model Law. 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. But 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.

Article 18 states that, 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 person with power to determine the arbitrators in accordance with the agreement between the parties, or (in an arbitration with three arbitrators) the respondent receives a request to appoint an arbitrator.

The Draft preserves some articles of the Model Law without change, such as the determination of rules of procedure (Draft art 15), place of arbitration (art 16), language of arbitration (art 19), the submission of the statement of claim and defence (art 20), hearings and written pleadings (art 22), default of a party (art 23), appointment of experts by the arbitral tribunal (art 24), court assistance in taking evidence (art 25), the rules applicable to the substance of the dispute (art 26) and settlement (art 27). Some of these 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 once the arbitration process has begun.⁶⁴

Another innovation is in relation to experts' reports. The Draft follows the Model Law and allows the parties to choose and present expert witnesses and to question the experts at the hearing. According to art 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 art 28(3) of the Model Law require that 'the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly

⁶² Article 35 of the Act of Lawyers.

⁶³ *Ibid.*

⁶⁴ CCP arts 185 and 202.

authorised it to do so'. The CCP is silent but the Court of Appeal had the opposite opinion: 'in the absence of such a choice by the parties, the tribunal shall decide *ex aequo et bono*'.⁶⁵

Article 21, which imposes no obligation on the arbitral tribunal, deals with the same matter as art18 of the ICC Rules of Arbitration. It enables the tribunal to provide 'terms of reference', which contain the names and description of the parties, their addresses, summaries of the claim and defence, the amounts claimed or counterclaimed, the list of issues to be determined, the names and addresses of the arbitrators, the place of the arbitration, an explanation of the applicable procedural rules, and a reference to the arbitral tribunal's power to act as *amiable compositeur*.

The general rule is that all decisions are to be made by a majority. The Model Law provides no solution in the event of deadlock.⁶⁶ Article 28 of the Draft provides: 'if there is no majority in the tribunal, the presiding arbitrator shall deliver the decision'.

The Draft also preserves the provisions of the Model Law regarding the form and content of the award, adding some supplementary provisions in art29, including partial awards as provided for in art188 of SIPL, stating 'unless the parties have agreed otherwise, the arbitral tribunal may make partial awards'. The Working Group no doubt desired to take advantage of such useful features of partial awards as the saving of cost and time.

Unlike the Model law, art29(4) of the Draft provides for dissenting opinions, stating that dissenting arbitrators have the right to express their opinion as an attachment to the award. Dissenting opinions have to be written within one month of receiving the award. This may cause delays because in practice international arbitrators frequently attach dissenting opinions directly to their awards.

Article 29(7) deals with a procedural issue. A party has the right to request the delivery of the pleadings and award to the competent court by paying the delivery costs. These documents will then be kept in the court's archives.

The last paragraph of art29 requires an administrative act of registration and deposit of the award. 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 time to enforce it. It is in direct contravention of the spirit of the Model Law and the New York Convention,⁶⁷ which aim to ensure the enforcement of all international awards in the same way, whether enforcement is sought in the awarding state under the Model Law or in another state under the Convention. This was considered as a 'major achievement' by the UNCITRAL Secretariat. Moreover, this provision means that 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. Such delay may cause irreparable damage. This provision will work against 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. This matter received only brief attention in the second meeting of the Working Group.

⁶⁵ 11th Civil Panel of the Turkish Court of Appeal: dated 28.12.1978, Case 5258, Decree 5916; dated 09.01.1985, Case 3318, Decree 4338.

⁶⁶ H.M. Holtzmann and J.E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers: Deventer/Boston, 1989) 809–21.

⁶⁷ The New York Convention, artsIII and IV.

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

Recourse against an award

Modern arbitration laws tend to reduce court control over arbitral awards. A jurisdiction's rules on setting proceedings aside greatly influence the popularity of its arbitral services. The issue is central to the success of the Model Law, which aims to create a limited list of grounds for setting awards aside, which has been taken from artV of the New York Convention. Although the Drafting Committee proposed to adopt art34 of the Model Law, the proposal was criticised in the Working Group and reformulated in the Final Draft.

Article 32(1) of the Draft provides that recourse against an arbitral award may be made only by application for setting-aside to the competent court. The application is given priority by the court. Article 32(6) also gives the right to appeal to the Court of Appeal from 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 delay may well be enough to destroy the purposes of international arbitration.

First, the winning party has to wait a long time to enforce the award, because it is not enforceable until the end of the setting-aside period in accordance with art29(8). Secondly, one of the main purposes of international arbitration is to keep the dispute 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 of an unfamiliar environment and legal system. Such opportunities for judicial review are contrary to the spirit and underlying principle of international arbitration.

Article 32(4) provides that the parties may exclude all or part of the grounds for setting-aside, either by an express statement in the arbitration agreement or by a subsequent agreement in writing. However, this only applies where none of the parties has any business establishment or domicile in Turkey. Therefore, this benefit is limited in practice. The provision also states that if any kind of exclusion is the subject of an award, the provisions of the New York Convention will apply to the recognition of the award by analogy.

Article 32(2) provides that 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 from the date when the party received the final award. A party may require the setting-aside of an award by alleging any of 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 unless the party relies on it.

The last paragraph of art32 states that, if an award was set aside in accordance with subsections 2(b), (d), (e), (f), (g) or (h), the time limit and arbitration tribunal are re-established, unless otherwise agreed by the parties. The parties also have the right to appoint the same arbitrators who delivered the previous award. This does not allow the dispute to go to arbitration if the award was set aside on the grounds that the award was delivered after the expiry of the time limit, or was contrary to public policy, or 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.

Arbitration costs

Chapter VII of the Draft regulates arbitration costs and fees but this is not directly concerned with international arbitration.

Conclusion

In spite of the constitutional obstacles and political hesitations, Turkish law has taken a great step forward with regard to international arbitration, by ratifying the major international conventions and amending the relevant articles of its Constitution. Therefore, an investor-friendly environment has been provided for major infrastructure contracts. At the beginning of the last century, Turkey had adopted a modern and secular legal system without discomfort. Adoption of the Model Law would have completed the modern law regime for international arbitration. Such an adoption should have been easier for Turkey than for some other adopting countries such as Iran and Russia, because of Turkey's liberal political, economic and legal system.

However, detailed examination of the final text of the International Arbitration Bill reveals that some provisions of the Draft spoil the harmony of the articles. They may cause delays and undesired bureaucracy. Moreover, unlike the Model Law, the Bill reserves a wide field for court intervention. Consequently, the focus on judicial review of awards has created a time-consuming process. The drafters have failed to provide solutions for contemporary problems in international arbitration, such as third party intervention and joinder. They have probably made it more difficult to create an arbitration centre in Turkey. On the other hand, the Bill has 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 future practical problems in international commercial arbitration.