

PERSPECTIVES

# ISTANBUL – RISING STAR OF INTERNATIONAL ARBITRATION


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The foundation of the Istanbul Arbitration Centre (IAC), under law no. 6570, which entered into force on 1 January 2015, will contribute to Turkey's competitiveness among the world's established and popular arbitration centres while providing an impartial, convenient and specialised solution for both domestic and international disputes.

To achieve this, Turkey has made significant progress in becoming more arbitration-friendly and making arbitration and ADR methods more accessible through legislative drafting. Of note is the International Arbitration Law (Law 4686), the

main piece of legislation for international arbitration seated in Turkey. The Code of Civil Procedure (Law 6100) governing arbitration which does not have international nature and Mediation Law (Law 6325) which were drafted based on UNCITRAL Model Law.

Within this legislative framework, there are three institutional arbitration centres which currently provide services for arbitration on disputes of an international nature in Turkey: Istanbul Chamber of Commerce (ITO), Izmir Chamber of Commerce (IZTO) and the Union of Chambers and Commodity Exchanges of Turkey (TOBB). However, these institutions cannot respond to the needs of



developing businesses due to an insufficient number of specialised arbitrators and a lack of publicity at both a domestic and international level.

Until the foundation of the IAC, there was a strong need for an institution where disputes of an international nature could be resolved, pursuant to international standards and with the involvement of specialised arbitrators. As deputy prime minister Ali Babacan announced in 2013, the IAC, predominantly led by actors from the private sector, is expected to be a strong alternative to the state courts, providing fast and accurate resolution of commercial disputes.

The IAC will provide arbitration and ADR services for all private disputes of both a foreign

and domestic nature. The IAC is likely to be fully operational within one year as Law 6570 foresees approximately six months until the preparation and execution of the rules and principles governing arbitration proceedings.

### **Advantages of arbitration proceedings in Istanbul**

It is evident that the most well-known arbitration centres around the world (e.g., Paris, London, Geneva, Zurich, Stockholm, Dubai and Singapore) owe their popularity to distinctive aspects arising from their commercial and intellectual backgrounds.

In this respect, Turkey, being located on a commercial route between the Middle East and Europe, and with an economy attracting large-scale markets including those of Asia and Middle East, has the potential to be a notable finance centre. Ease of travel, thanks to Turkey's relatively relaxed visa requirements and its convenient geographical position, is another fact that could attract arbitration proceedings.

There is significant motivation for Turkey to have an arbitration institution which is both independent and autonomous, and able to compete in the international markets. To that end, an action plan was announced in 2009 and the General Assembly – the administrative organ of the IAC – was designed in such a way to make use of the contribution of all interest groups, including the Union of Bar Associations.

In the studies undertaken by the commission drafting Law 6570, the structures of a number of significant institutions were taken into consideration. The German Institution of Arbitration and the Czech Republic Arbitration Act were chosen as a model for the IAC. Accordingly, Law 6570 provides that the General Assembly has 25 members composed of representatives assigned by various chambers of commerce, industry and exchange; lawyers appointed by the Union of Bar Associations; faculty members specialised in arbitration; representatives of the banking and capital markets sector; as well as exporters, tradesman and labour unions. The

board of directors – with at least three members out of five being graduates of a law faculty – will reach decisions under the supervision of the Advisory Board, composed of members having five years of experience in mediation and arbitration. Clearly, the structure of the institution is based on fundamental legal and industry-specific experience.

Law 4686, which governs the arbitration proceedings, also provides the proper environment for the IAC to be regarded as an international arbitration centre, since it is based on the UNCITRAL Model Law. The existence of a separate law for international arbitration is considered to be an advantage in this respect. Additionally, the New York Convention (1958), the European Convention on International Commercial Arbitration (1961) and the ICSID Convention, as well as other bilateral agreements, support the maintenance of an arbitration-friendly environment.

### **Challenges in Istanbul's ability to attract arbitration proceedings**

While the list of advantages of Istanbul as an arbitration centre goes on, certain factors such as the impartiality and independency of the institution, and the assistance (or intervention) of the public courts, may yet hinder the promotion of one arbitration centre over another.

The fact that the IAC was founded as a result of legislation – rather than as an independent, volunteer venture – may compromise its impartiality

and independence. Additionally, one of the members of the General Assembly is appointed by the Ministry of Justice among high level judges vested with administrative duties. Even though these may be regarded as a threat to the independence and stability of the institution, scholars and practitioners point out that it is the arbitrators, not the institution itself, who are responsible for examining the dispute and rendering the arbitral award.

That said, the stance of the state courts is important in order to help the promotion of an arbitration-friendly environment. In this respect, the courts assist the arbitration proceedings by ordering preliminary injunctions and attachments, appointing the arbitrators and granting extension for the tribunal to render its award upon request of the parties.

Parties who cannot agree on the time extension for the finalisation of the arbitration proceedings should resort to the courts. Otherwise, awards that are not rendered within the agreed time can be cancelled by the courts. Cancelling awards that are not rendered in due time is considered by many to be a rather heavy-handed outcome that may hamper the convenience of conducting arbitration in Turkey going forward.

Another area where the courts can have an impact on arbitration is with setting aside and enforcement

proceedings. Setting aside, the only remedy against the validity of the arbitration awards, is subject to an expedited and simple procedure. It is also possible for the parties to withdraw from resorting to setting

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aside with an agreement in written form clearly indicating their intention.

Notable grounds for setting aside include invalidity of arbitration agreements, awards being not rendered in due time, misapplication of *Kompetenz-Kompetenz*, violating equality between the parties, non-arbitrability and public policy. Turkish courts are very sensitive to public policy and often use it arbitrarily as a basis for cancellation, as well as recognition and enforcement, of awards. Public policy is evaluated as an exception to the principle that the courts cannot make a determination on the merits of the case. This approach is another

point to be criticised for not being compatible with international arbitration standards.

Lastly, another area which requires attention lies with the fact that the Supreme Court could not establish a unified jurisprudence for setting aside and enforcement proceedings. Its reason is the lack of a specialised Chamber of the Supreme Court on such appeal requests. Some Chambers adopt an arbitration-friendly approach, whereas the stance of others does not fulfil the goal of being an international arbitration centre. Moreover, even the same Chamber may render two contradictory awards on the same subject. This suggests that Turkish courts have a way to go in adopting consistent and foreseeable case law, especially when it comes to setting aside and enforcement actions.

Considering the cumbersome proceedings before the state courts, the advantages offered by the IAC are beyond comparison. In particular, Turkey's role in international politics and economic relationships, its geographical proximity to significant markets

and the progress made with its fundamental codes to regulate commercial life have created a golden opportunity despite carrying many of the obstacles associated with being an international arbitration centre. With this in mind, the IAC will be extending arbitration practice as it provides a faster, more secure and more sound settlement of complex commercial disputes which have been common in Turkey for a number of decades. 



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