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## Turkey—doors now open for ISTAC arbitration in public procurement agreement disputes

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**Arbitration analysis: Pelin Baysal and Bilge Kağan Çevik of Turkish law firm Gün + Partners discuss the availability of Istanbul Arbitration Centre (ISTAC) arbitration for the resolution of public procurement agreement disputes following a policy change instigated by the Turkish government.**

[ISTAC](#) was established in the third quarter of 2015 as an independent and autonomous international arbitration centre for resolving national and international commercial transactions in an effective and efficient manner. The ISTAC Arbitration Rules are heavily influenced by the International Chamber of Commerce (ICC) Rules of Arbitration, and, therefore, constitute a set of rules that are already familiar to parties participating in international arbitration.

On 19 November 2016, in line with the objective of making ISTAC an international centre for the resolution of national and international commercial transactions, the Prime Minister's office issued Circular No. 2016/25 inviting Turkish public authorities to consider inserting ISTAC arbitration clauses into their national and international contracts.

Shortly after this encouragement, the Turkish Public Procurement Authority amended the standard contracts annexed to the Regulations on the Implementation of Public Procurements effective as of 19 January 2018. These amendments aim to encourage public authorities to use arbitration, in particular, ISTAC Arbitration, as an alternative to the Turkish courts.

### What was the former regime?

The previous regime considered using the Turkish courts as the main dispute resolution mechanism for disputes arising from Public Procurement Agreements (PPA), implying that arbitration clauses can only be inserted in PPAs under exceptional circumstances.

Indeed, standard contracts prevented public authorities from inserting arbitration agreements into PPAs without foreign elements. While in this context, it is not possible to easily list what constitutes foreign elements, the following circumstances can constitute a foreign element namely: if the usual residence, domicile or place of business of any party to the contract is located outside Turkey; if at least one of the shareholders of a company that is a party to the contract has injected foreign capital into the company under applicable foreign investment legislation or when a loan or a guarantee agreement is executed to bring foreign investment to Turkey for the performance of the contract, and the contract permits the flow of capital or goods from one country to another.

In other words, only PPAs involving a foreign element could include arbitration clauses. Even in such cases, standard contracts required that such arbitration had to be an *ad hoc* arbitration with a three-member tribunal, with a seat in Turkey. Further, standard contracts required that arbitration had to be in the Turkish language and Turkish Law and International Arbitration Code No: 4686 (IAC) applied.

### What is the new regime?

In contrast with the previous regime, the new regime views arbitration and Turkish courts as true alternatives for the resolution of public procurement disputes. The new wording of the standard contracts provides that

public authorities can insert either arbitration or Turkish courts into PPAs regardless of the presence of any foreign elements.

If the agreement does not have a foreign element and public authorities wish to insert arbitration clauses, standard contracts allow inserting ISTAC Arbitration before the three-member tribunal in the Turkish language. Additionally, standard contracts also require that the arbitral seat has to be in Turkey and Turkish law shall apply.

If there is a foreign element, standard contracts allow settling the disputes by either ISTAC or *ad hoc* arbitration. Should the public authorities select ISTAC Arbitration, the seat of arbitration will be in Turkey, arbitral tribunal will consist of three members, and the arbitration language will be in Turkish. Moreover, public authorities will determine and insert the appropriate applicable law.

Alternatively, if the public authorities select *ad hoc* arbitration, the standard clause only requires that arbitral tribunal will consist of three members and International Arbitration Act No: 4686 (IAA) will apply. Any other issue, such as the applicable law, the language used for the arbitration and the seat of arbitration will be determined as the public authorities deem appropriate.

### **What may be the implications of this change?**

The circular of the Prime Minister's office and the Turkish Public Procurement Authority's recent amendments to the standard contracts demonstrate the Turkish public authorities' enthusiasm and determination to make ISTAC an internationally respected arbitration centre. Indeed, not only the advantages of international arbitration but also the disadvantages of the Turkish national courts, in particular, the length of proceedings, were important factors to create an alternative dispute resolution mechanism for all disputes arising from complex transactions, in particular, PPAs.

It is anticipated that once such recognition combined with the amendments explained above, arbitration clauses, in particular ISTAC Arbitration clauses, will be routinely inserted into PPAs. Further, considering that new amendments give discretion to public authorities to determine certain important issues on arbitration such as the applicable law and language, parties may have more chance to amend those provisions in PPAs before actual tenders take place.

*The views expressed are not necessarily those of the proprietor.*