INTERNATIONAL ARBITRATION IN TURKEY WITH SPECIAL EMPHASIS ON THE INTERNATIONAL ARBITRATION ACT

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Avec l'adoption, le 21 juin 2005, de sa nouvelle loi sur l'arbitrage international, la Turquie a adapté sa législation aux besoins contemporains d'une économie en pleine ouverture. La loi nouvelle est inspirée de la Loi-modèle CNUDCI, avec cependant des apports originaux, tirés par exemple de la législation suisse, et d'amples emprunts au Règlement d'arbitrage de la Chambre de Commerce Internationale. On trouve là, ainsi que le témoignent les dispositions de la loi turque sur l'acte de mission, une intéressante illustration du rayonnement d'une grande institution arbitrale et de son influence sur l'évolution des droits nationaux. La Turquie rejoint ainsi le peloton des pays favorables à l'arbitrage, donnant aux acteurs du commerce international un instrument prévisible et moderne pour le règlement de leurs différends.

I. Historical development of international arbitration in Turkey

The concept of arbitration was first introduced in Turkish law by Art. 516-536 of the Civil Procedure Code ("CPC") in 1927. However, these provisions govern domestic arbitrations which do not involve any foreign element and take place in Turkey. They regulate the form and validity of arbitration agreements, the appointment and challenge of the arbitrators, and the arbitration procedure. Arbitral awards rendered according to CPC are subject to appeal before Turkish courts. In case none of the parties appeal the award, the court needs to approve the award in order for it to be binding and enforceable.

However, the CPC is not applicable to international arbitration. Until 1982, the Turkish Supreme Court decided that foreign arbitral awards were subject to the enforcement procedure applicable to foreign judgments[2]. The Code of International Private and Procedural Law ("CIPPL"), which entered into force in 1982, now applies to the enforcement of foreign arbitral awards. Such legislation complies with international law standards[3].

In 1988, Turkey ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID)[4] and the Multilateral Investment Guarantee Agency (MIGA)[5]. It also entered into bilateral agreements with many states[6]. In 1991, the

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[2] Decision of the Unified Civil Chambers of the Court of Cassation dated 7.11.1951 and numbered 126 E., 109K.; Decision of the 15th Civil Chamber of the Court of Cassation dated 10.03.1976 and numbered 75/1617E., 76/1052K.

[3] Birsel/Budak: "Milletlerarasi Tahkim Konusunda Turk Hukuku Acisindan Sorunlar ve Oneriler – Turk Tahkim Hukuku ve UNCITRAL Kanun Ornegi", Milletlerarasi Tahkim Konusunda Yasal Bir Duzenleme Gerekir Mi?" ("Problems and Suggestions on International Arbitration in the Turkish Law – Turkish Arbitration Law and the UNCITRAL Model Law" Is a Legal Regulation Needed on International Arbitration?"), Ankara, 1997, p. 183-190.

[4] For more information on the application of ICSID arbitration in Turkey, see, Yilmaz, I.: Uluslararasi Yatirim Uyusmazliklarinin Tahkim Yoluyla Cozumu ve ICSID (The Resolution of International Investment Disputes by Arbitration and ICSID), Istanbul 2004; Nomer/Eksi/Oztekin: Milletlerarasi Tahkim (International Arbitration), Istanbul 2003.

[5] For both international conventions, Official Journal ("OJ"), 6.12.1988, no. 20011.

European Convention on International Commercial Arbitration[7] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[8] were ratified[9].

During the 90's, the increase of infrastructure investments and the development of the build-operate-transfer or build-operate models made arbitration a more convenient way to resolve disputes. In the late 90's, arbitration had therefore become more popular in Turkey, leading to several constitutional and legal amendments in favour of such system of dispute resolution[10]. Subsequently, efforts were made to enact a special regulation regarding international arbitration[11], leading to the acceptance of the International Arbitration Act 4686 dated 21.06.2001 (hereinafter referred to as the IAA)[12]. The IAA is a modern law which has been prepared on the basis of UNCITRAL Model Law (the "Model Law"). However, the Model Law is not adopted in its entirety in the IAA, and several of its provisions have been modified on the basis of the International Chamber of Commerce Rules of Arbitration, and of the 12th Chapter of the Swiss Federal Act on International Private Law of 18 December 1987[13].

II. The International Arbitration Act

A. The scope of application of International Arbitration Act

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[6] Turkey has entered into bilateral investment agreements with many states whereby the resolution of the disputes arising out of such investments are subject to international arbitration. Some of the countries with which Turkey has a bilateral investment agreement are: Spain (OJ, 1.12.1997, no. 23187), Crotia (OJ, 11.4.1998, no. 23310), Ukraine (OJ, 17.4.1998, no. 2316), Georgia (OJ, 4.6.1995, no. 22303) and Jordan (OJ, 17.11.2005, no. 25996).

[7] OJ, 23.9.1991, no. 21000.

[8] OJ, 25.9.1991, no. 22002.

[9] For more detail see; Sit, B.: Kurumsal Tahkim ve Hakem Kararlarinin Taninmasi ve Tenfizi (Institutional Arbitration and the Recognition and Enforcement of Arbitral Awards), Istanbul 2005; Akinci, Z.: Milletlerarasi Ticari Hakem Kararlari ve Tenfizi (International Commercial Arbitral Awards and Enforcement), Ankara 1994; Sanli, C.: "21 Nisan 1961 Tarihli Avrupa Anlasmasi ve Turk Tahkim Hukuku", Avrupa (Cenevre) ve New York Sozlesmeleri ve Turk Tahkim Hukuku Sempozyumu ("The European Convention dated 21 April 1961 and Turkish Arbitration Law" European [Geneva] and New York Conventions and Turkish Arbitration Law Symposium), Ankara 1991; Nomer, E.: "Yabanci Hakem Kararlarinin Taninmasi ve İcrasi 10 Haziran 1958 tarihli New York Sozlesmesi ve Turk Tahkim Hukuku", Avrupa (Cenevre) ve New York Sozlesmeleri ve Turk Tahkim Hukuku Sempozyumu ("The New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards dated 10 June 1958" European [Geneva] and New York Conventions and Turkish Arbitration Law Symposium), Ankara 1991.

[10] In summary, these amendments were made in order to permit the resolution of disputes by arbitration regarding the concession agreements for public services where one of the parties will be the Turkish state and to restrict the authority of the State Council over such agreements. For the amendments of the Constitution see OJ, 13.8.1999, no. 23786; for the amendments of the Code of State Council and Administrative Procedure see OJ, 21.12.1999, no. 23913; for the other amendments in the codes relating to build-operate-transfer model agreements, see OJ, 22.12.1999, no. 23914 and for the new code on the resolution of disputes by arbitration in public concession agreements referred to below see OJ, 21.01.2000, no. 23941.

[11] For the preparatory works, see: "Milletlerarasi Tahkim-Tutanak, Abant Toplantisi", Milletlerarasi Tahkim Konusunda Yasal Bir Duzenleme Gerekir Mi? II ("International Arbitration-Minutes, Abant Meeting" Is a Legal Regulation Needed on International Arbitration? II), Ankara 1998, p. 73-91.

[12] OJ, 5.7.2001, no. 24453.

[13] This technique is highly critised in doctrine. See Kalpsuz, T: "Milletlerarasi Tahkim Kanununda ICC Tahkim Kuralları ile IPL'den Esinlenen Hükümler", Milletlerarasi Tahkim Semineri ("The provisions of the International Arbitration Act inspired from ICC Arbitration Rules and the IPL" International Arbitration Seminar), Ankara 2003, p. 17-18; Akinci, Z.: Milletlerarası Tahkim (International Arbitration), Ankara 2003, p. 55.

Art. 1 of the IAA enumerates the cases where the IAA applies[14]. These are three:

1. Disputes involving a foreign element when the place of arbitration is in Turkey

The IAA Art. 2 lists the cases where a "foreign element" will be deemed to exist. Accordingly, the arbitration will be considered as international when:

a) the domiciles, habitual residences or places of business of the parties to the arbitration agreement are in different states;
b) the domiciles, habitual residences or places of business of the parties are in a state different than the (i) place of arbitration determined by the arbitration agreement itself or by interpretation of it, (ii) the place where a significant part of the obligations arising out of the main agreement will be performed or the place with which the dispute is most closely connected with;
c) at least one of the shareholders of the company which is a party to the main agreement contributed foreign investment in accordance with the foreign investment promotion legislation or it is necessary to enter into credit and/or warranty agreements in order to provide foreign investment for the validity of the main agreement;
d) the main agreement or legal relationship realizes the transfer of capital or goods from one state to the other.

2. Choice of the IAA by the parties or the arbitrators

The IAA is applicable to disputes where it is selected as applicable law either by the parties or by the arbitral Tribunal (IAA Art. 1/II). Such choice of law is permitted only when the legal relationship at stake has a foreign element (CIPPL Art.1 and 24). Therefore, the IAA will not be applicable between Turkish citizens or, save Art. 2/3, Turkish legal entities. The choice may be made before or after the disputes arises, and explicitly or implicitly. When a party initiated the arbitral procedure in accordance with the IAA without the objection of the other, it will be deemed that the parties agreed implicitly on the application of the IAA to their dispute.

3. Disputes arising out of Act no. 4501

Concession agreements related to public services that carry foreign elements, and which are subject to the "Act numbered 4501 and dated 21 January 2000 on Principles Which Need to Be Obeyed in Case of Arbitration for the Disputes Deriving from the Concession Stipulations and Agreements that Relates to the Public Services", will also be governed by the IAA.[15]

4. Exclusions and reserved matters

The IAA is not applicable to disputes arising out of real estate disputes and rights over immovable goods, and to disputes of which the parties cannot dispose of on their own motion (IAA Art. 1/IV). According to Turkish jurisprudence, cases of divorce, descent, bankruptcy, and labor contracts shall therefore not be resolved by arbitration[16].

[14] See in detail Akinci, op. cit. p. 49; Akinci, Z.: "Yeni Milletlerarasi Tahkim Kanunu ve Uygulama Alani" ("The New International Arbitration Act and its Scope of Application"), IzBD, Y. 66, V.4, Ekim 2001.
[15] Art.5 of Act no. 4501 is abolished by the Art. 17 IAA.
[16] Kuru, B.: Hukuk Muhakemeleri Usulu (Civil Procedure), 6th ed., V. VI, Istanbul 2001, p. 5951-5953.

Pursuant to Art. 1/VI, the IAA is applied without prejudice of the provisions of the international conventions to which Turkey is a party. Consequently, the European Convention 1961 will be applied to arbitration proceedings arising from an arbitration agreement concluded for the purpose of settling disputes arising from international trade between persons having their habitual residences or domiciles in different Contracting States. The IAA will be applied in other cases, when the arbitration may be deemed international according to its provisions, and when the habitual residence or domicile of one of the parties is in a non-Contracting State.

B. The arbitration proceedings

1. The Arbitration Agreement

Art. 4 of IAA defines the arbitration agreement as the agreement by which the parties agree to refer to arbitration all or part of the disputes that have arisen or that may arise between them in respect to a present legal relationship, whether contractual or not. The arbitration agreement may be concluded separately, or may be inserted as an arbitration clause in the main agreement (Art. 4/I IAA).

The arbitration agreement shall be in writing. The written form requirement is complied with if the arbitration agreement is included in a written document signed by the parties, or in an exchange of a communications such as letters, telegrams, telex, fax or electronic mail, or if it has not been objected in the respondent's reply to the request of arbitration. An arbitration agreement will also be deemed validly concluded in the case of reference to a document containing an arbitration clause so as to make it a part of the main contract (Art. 4/II IAA).

The validity of the arbitration agreement is governed by the law chosen by the parties to be applied to the arbitration agreement or, failing such a choice of law, by the Turkish law (Art. 4/III IAA).

The IAA recognizes the principle of the autonomy of the arbitration agreement from the main contract: it can therefore not be objected against the arbitration agreement that the main contract is not valid, or that the arbitration agreement relates to a dispute that has not yet arisen (Art. 4/IV IAA).

If the dispute has been referred to a State court, the defendant may object that the parties agreed on an arbitration. If such objection is accepted, the court will strike out the case (Art. 5/II IAA).

2. Arbitrators and their appointment

The appointment, the powers and the duties of the arbitrator or of the board of arbitrators are regulated by the third part of the IAA.

The parties are free to determine the number of arbitrators, but such number needs to be odd. If the parties do not determine the number of arbitrators, such number is three (IAA Art. 7/A).

a. Sole Arbitrator

If there is only one arbitrator to be chosen by the parties and if there is a dispute as to the

appointment of the arbitrator, then, upon demand, the civil court of first instance will appoint the arbitrator (IAA Art. 7B/I/2). The civil court of first instance having jurisdiction under the IAA is the court where the respondent has his domicile, his habitual residence or place of business in Turkey. If the respondent does not have any of them in Turkey, the court of Istanbul will have jurisdiction (IAA Art. 3/I)[17].

b. Several Arbitrators

If there are three arbitrators to be appointed, each party will select one arbitrator. The two arbitrators chosen by the parties will then appoint the third arbitrator. If a party fails to appoint his arbitrator within 30 days from receiving a request of appointment from the other party, or if the third arbitrator cannot be appointed after 30 days from the date of appointment of the first two arbitrators, then, upon demand of either party, the appointment of the arbitrator is made by the civil court of first instance. The third arbitrator will act as the chairman of the Tribunal (IAA Art. 7B/I/3).

If the parties decide to have more than three arbitrators, each party will appoint an equal number of arbitrators as provided herein above. The appointed arbitrators will nominate the chairman (IAA Art. 7/B/I/4).

Notwithstanding the agreed procedure of selection of the arbitrators, the civil court of first instance may nevertheless, in the following cases, and upon demand of one party, appoint an arbitrator (IAA Art. 7B/II).

a) if any of the parties breaches the arbitration agreement;
b) if there is an incompatibility either between the arbitrators appointed by the parties or between the parties regarding the appointment of the arbitrator despite the fact that under the determined procedure, the parties or the arbitrators are to decide together on the appointment of the arbitrators;
c) if the third person or the institute that is authorised to appoint the arbitrator fails to select the arbitrator or the board of arbitrators.

The decision of the civil court of first instance is final and binding. The court has to make sure that the arbitrators are independent and impartial. To that effect, if there is one arbitrator to be appointed, the arbitrator is not allowed to have the same nationality as that of any of the parties. This rule applies as well where there are three arbitrators to be chosen: two arbitrators out of three are not allowed to have the same nationality as any of the parties (IAA Art. 7B/III).

3. Request for arbitration and answer

Unless otherwise agreed by the parties, a request for arbitration is deemed to have been filed when the claimant chooses his arbitrator and informs the counterpart thereof (IAA Art. 10/A). If the arbitrator's name is provided in the agreement, it is sufficient that the arbitration request has reached the counterpart. If the appointment is made by the court or by an institution, the date of the application to said court or institution will be the date at which the request for arbitration has been made (IAA Art. 10A/I).

[17] The courts are authorized to intervene to the disputes arising out of international arbitration only in accordance with the IAA (IAA Art. 3/II).

The request for arbitration will contain the names, titles and addresses of the parties, the parties' representatives, the arbitration clause or the arbitration agreement, the legal relationship or the contract to which the dispute is either related or derived from, the facts supporting the claim, the subject matter of the dispute, the amount in dispute and the claims. The defendant will, in turn, submit a petition that contains his answer. The request for arbitration and the answer will be submitted within the period determined by the parties or by the arbitrator or arbitral tribunal (IAA Art. 10/D/I). The parties may attach the relevant evidence to their petitions or refer to the evidence that will be presented during the arbitral proceeding (IAA Art. 10D/I).

Unless otherwise agreed, during the arbitration proceedings, the parties are entitled to amend or extend their claims and defences within the limits of the scope of the arbitration (IAA Article 10D/II). However, the arbitrator or the arbitral tribunal may not allow such amendments or extensions if they are made belatedly or create an unfairly great difficulty for the other party.

4. Conduct of the arbitration proceedings

a. Rules of procedure, due process and attorneys

The parties may freely agree on the rules of procedure to be applied, provided that the mandatory provisions of the IAA be respected, either directly or by reference to a law or to rules of international or institutional arbitration. In the absence of such an agreement, the arbitrator or the arbitral tribunal shall conduct the arbitral proceedings according to the IAA (IAA Art. 8/A).

During the arbitration proceedings, the parties need to have equal opportunities to raise their defences and claims (IAA Art. 8B/I). The breach of the rule of equality between the parties is a ground for nullity of the arbitration award (IAA Art. 15A/II/g).

The IAA abrogated the monopoly of the lawyers to represent the parties during the proceedings. The parties can therefore be represented by foreign individuals or by legal entities. However, this provision is not applicable to court proceedings regarding the arbitration (IAA Art. 8B/II).

b. Terms of reference

Unless otherwise agreed by the parties, following the submission of the request for arbitration and answer, the arbitrator or the arbitral tribunal prepares terms of reference[18]. The terms of reference show the names and titles of the parties, their addresses for notification during the arbitration, the summary of the claims and defences, the claims, the explanation of the dispute, the names, titles, and addresses of the arbitrators, the place of arbitration, the time-limit for rendering the award, the date of commencement of said time-limit, the procedural rules to be applied, and matters such as whether or not the arbitrators have been granted with the power to act as *amiable compositeur.* The terms of reference shall be signed by the arbitrators and by the parties (IAA Art. 10/E).

[18] The terms of reference provided by the IAA are very similar to the terms of reference of the ICC Arbitration Rules. Fort the terms of reference in ICC Arbitration Rules see Schaefer, A.: "Terms of Reference in the Past and at Present", ICC Ct. Bull., Vol. 3, No.1 (1992).

c. Hearings

The arbitral tribunal is entitled to decide that the proceedings will be conducted by holding hearings in order to allow the presentation of evidence, oral statements, and the hearing of expert-witnesses. The tribunal may also conduct the proceedings on the basis of documents. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal may hold hearings at an appropriate stage of the proceedings. The date of any type of site inspection, meeting or hearing and the consequences of the absence of the parties will be notified to them sufficiently in advance. The arbitral tribunal will transmit to the parties copies of any statement, information or other document that it may have received (IAA Art. 11/A).

d. Evidence

The parties shall submit their evidence to the arbitral tribunal within the stipulated time. The arbitrators may request assistance from the court of first instance in taking evidence (IAA Art. 12/B). The IAA does not provide any restriction as to the nature of such evidence.

The tribunal may appoint one or more expert-witness to report on specific subject matters and require the parties to provide explanations, documents and information to the expert-witness. The IAA grants to the arbitrators the right to carry out a site inspection (IAA Art. 12/A). Unless otherwise agreed, the experts are entitled to attend the hearings after having presented their oral or written reports. At such hearings, the parties may cross-examine them, and present their own expert-witnesses (IAA Article 12/A).

If any of the parties fails to attend a hearing without a justified reason or abstains from producing evidence, the arbitrator or the arbitral tribunal may continue the proceedings and render the award in light of the existing evidence (IAA Art. 11C/4).

e. Seat of the arbitration

The seat of the arbitration may be freely determined by the parties or by an arbitration institution appointed by them. Failing such an agreement, the seat of arbitration shall be determined by the arbitrators in accordance with the characteristics of the case (IAA Art. 9/I). If necessary, the arbitrators may also meet in another place, provided that the parties have been informed in advance (IAA Art. 9/II).

f. Language

The arbitration proceedings may be held in Turkish or in an official language of a State recognized by the Republic of Turkey. The language to be used, if not agreed upon by the parties, shall be determined by the arbitrators. The language so determined, unless otherwise provided in the parties' agreement or in the relevant decision of the arbitrators, shall be used in all written statements of the parties, at the hearings, in the interim decisions, the final award, and in all written communications of the arbitrators (IAA Art. 10/C/I).

g. Governing law

The parties may decide on the law to be applied to the substance of the dispute. The arbitrators shall also take into account the contract between the parties, as well as, for the interpretation of the contractual terms, the trade customs and usages. Unless otherwise agreed,

any reference to the laws of a particular state shall be deemed to be made to the substantive law of that state, to the exclusion of the rules of conflict of laws (IAA Art. 12/C/I). In the absence of any agreement of the parties on the governing law, the arbitrators shall decide according to the substantive law of the state which has the closest connection with the dispute (IAA Art. 12/C/II).

The IAA recognizes the possibility for the arbitrators to decide *ex aequo et bono* or as *amiable compositeur*, provided that the parties authorized them to do so. (IAA Art. 12/C/III). This provision of the IAA is a novelty in Turkish procedural law.

5. Provisional and conservatory measures

The IAA regulates in a detailed manner one of the most controversial questions in international arbitration, i.e. provisional and conservatory measures. The IAA distinguishes the provisional measures granted by a court and those ordered by the arbitrators[19].

a. By the Court

The parties may apply for provisional and conservatory measures before the courts, either before or during the arbitration proceedings. Such a claim will not be in breach of the arbitration agreement (IAA Art. 6/I). If the court decides on a provisional measure before the arbitration proceedings, the requesting party shall initiate the arbitration procedure within thirty days. Otherwise, the provisional measure will be automatically removed (IAA Art. 10A/II).

The provisional measures decided by the courts before or during the arbitration proceedings are automatically removed once the arbitral award becomes enforceable, or when the claim is dismissed by the arbitral tribunal (IAA Art. 6/IV).

b. By the Arbitrators

Unless otherwise agreed by the parties, the arbitral tribunal may order any provisional or conservatory measures subject, if necessary, to the constitution of a warranty. The arbitral tribunal, however, cannot order provisional measures or provisional attachments (i) which need to be enforced by state bodies or official authorities, or (ii) which affect third parties. In the event that the party who is supposed to perform the provisional measure ordered by the arbitral tribunal fails to do so, the other party may seek the assistance of the competent court (IAA Art. 6/II).

The provisional measures decided by the arbitral tribunal can be enforced only within Turkey. Enforcement outside Turkey is not subject to Turkish law[20].

C. Termination of the arbitration proceedings

The arbitration proceedings will come to an end when the final award is made or when the

[19] See also Pekcanitez, H.: "Milletlerarasi Tahkimde Geçici Koruma Önlemleri", Milletlerarasi Tahkim Semineri ("The Provisional Measures in International Arbitration" International Arbitration Seminar), Ankara 2003, p. 115-152.

[20] Eksi, N.: "Milletlerarasi Tahkim Kanunu Hakkinda Genel Bir Degerlendirme" ("A General Evaluation on International Arbitration Act"), Prof. Dr. Guloren Tekinalp'e Armagan, MHB, Y.23, V. 1-2, 2003, p. 312.

circumstances set forth in this IAA in the respect materialize.

1. The Award

a. Making of the award

Unless otherwise agreed by the parties, the board of arbitrators will render the award by a majority of votes. If the parties or the other arbitrators delegate their authority to him, the chairman of the tribunal will be entitled to decide himself on certain issues regarding the procedure (IAA Art. 13/A). The award shall be reasoned and specify the remedies (IAA Art. 14/A/2).

If the parties come to an amicable settlement, the arbitration proceedings will be terminated. If the arbitral tribunal finds such demand as adequate, the amicable settlement may be recorded under the form of a arbitration award (IAA Art. 12/D).

Unless otherwise agreed, the arbitral tribunal may render partial awards (IAA Art. 14A/II). Awards are notified to the parties by the arbitral tribunal (IAA Art. 14A/III). The parties can ask that they are deposited to the civil court of first instance, provided that the related expenses are paid. In such a case, the award and the file of the case will be kept by the court at the clerk's office (IAA Art. 14A/IV).

b. Time Limit for rendering the award

Unless otherwise agreed by the parties, the award will be given by the arbitral tribunal within one year. The one year period starts to run from the date of appointment of the arbitrator where there is only one arbitrator, and from the date of issuance of the report of the first meeting of the board of arbitrators where there is more than one arbitrator. The arbitration period may be extended by agreement of the parties and, in the absence of such an agreement, by a decision of the civil court of first instance. In case the extension request is refused, the proceedings will be terminated at the end of the arbitration period. The decision of the court in respect of the time-limit is final and binding (IAA Art. 10/B).

c. Correction and interpretation of the award

Each party, within 30 days from the date of notification of the arbitration award, is entitled to make an application to the arbitral tribunal, provided that it has informed its counterpart. The party may request (i) the correction of material errors in the award such as calculation or clerical errors, and (ii) the interpretation of all or part of the award (IAA Art. 14/B/I). If the arbitral tribunal, after having heard the other party, finds the demand justified, the error will be corrected or the interpretation will be made within 30 days from the date of demand (IAA Art. 14/B/II). The arbitral tribunal is also entitled to correct material errors of the award on its own motion within 30 days from the date of award.

Each party, within 30 days from the notification of the arbitration award, is entitled to demand to have a supplemental arbitration award on issues that would not have been decided despite the fact that those issues have been raised during the arbitration proceedings. It must be borne in mind that the counterpart needs to have been informed before such application is made to the arbitrators. The arbitrator or the board of arbitrators will render the supplemental arbitration award within 60 days, if the request is found justified (IAA Art. 14/B/III).

The decision to correct, interpret or complete the award will be notified to the parties, and shall constitute part of the award (IAA Art. 14B).

2. Other events terminating the arbitration proceeding

Pursuant to the Art. 13/B/I of IAA, the arbitration proceeding shall terminate if any of the following events occur:

a) If the claimant withdraws its claims, save where, upon the defendant's objection, the arbitral tribunal decides that there is a legal benefit for the defendant to obtain an award;
b) If the parties agree on the termination of the arbitration proceedings;
c) If the arbitral tribunal decides that it is impossible or unnecessary to continue the arbitration proceedings;
d) If the demand to extend the period for the arbitration proceedings is rejected;
e) If the arbitral tribunal fails to decide by unanimity, when the parties have agreed that the decision will be made by unanimously;
f) One party loses his capacity to act as a party to the dispute, or the arbitration proceedings cannot be continued due to the impossibility to notify the concerned persons to continue with the proceedings for a period of 6 months, or because of the failure of the notified persons to announce clearly that they want to continue with the proceedings.
g) If the advance payment is not made for the expenses of arbitration.

D. The annulment of the award

By virtue of the IAA, the action for nullity against an arbitration award is regulated as a special remedy. The action for nullity needs to be brought to the authorised civil court of first instance, and the hearing of the case will be expedited (IAA Art. 15A/I). However, the parties whose domiciles or habitual residence are outside Turkey are entitled to waive their right to commence an action of annulment in whole or part (i.e. on one or more annulment grounds) by either inserting a clear clause in the arbitration agreement or by later entering into a written agreement to final effect (IAA Art. 15A/IV).

The arbitration award can be annulled in limited circumstances:

1. If the requesting party proves that:

    a) The counterpart to the arbitration agreement does not have the capacity to sue or the arbitration agreement is not valid according to the law chosen by the parties to apply to the arbitration agreement, or according to Turkish law if the parties did not choose any applicable law;
    b) the procedure of appointment of arbitrators agreed by the parties has not been followed;
    c) The award has not been given within the period of arbitration;
    d) The arbitral tribunal lacked jurisdiction, or wrongfully declined its jurisdiction;
    e) The award is not related to the subject matter of the arbitration agreement or the award does not embrace all issues that referred to arbitration, or was made in excess of powers;
    f) The arbitration proceedings were not conducted according to the agreement of the parties, or, in absence of such an agreement, with the provisions of the IAA, and this

default affects the substance of the award;

g) The rule of equality of the parties was not complied with; or

2. If the court ascertains that

a) Under Turkish law, the dispute is not arbitrable;
b) The award is in breach of public policy (IAA Art. 15A/II).

The action for annulment of the award can be brought within 30 days. Such time-limit commences when the award, or the decision of correction, completion or interpretation of the same, is notified to the parties. The action of annulment stays the enforcement of the award (IAA Art. 15A/IV).

The decision given in the action of annulment is subject to appeal pursuant to the relevant provisions of the CPC. However, the parties are not entitled to demand the rectification of the decision given by the Court of Appeal. The appellate review will urgently be made only on the basis of the listed annulment grounds, and the case will be heard with priority (IAA Art. 15/A/V).

If the action of annulment is dismissed, or if the parties fail to challenge the award within the applicable time-limit, or if the parties waive their right to bring such action, the civil court of first instance will give the document permitting the enforcement of the arbitration award. In absence of a decision dismissing a request for annulment of the award, the civil court of first instance will consider, on its own motion, whether, under Turkish law, the dispute subject to the arbitration award is capable of being resolved by arbitration and whether the award is in compliance with public policy. (IAA Art. 15/B).

E. Costs of the arbitration

Unless otherwise agreed by the parties, the fees of the arbitrators will be determined by the arbitral tribunal with the parties. While determining the fees, the amount in dispute, the characteristics of the dispute and the time-limit for rendering the award, shall be taken into account. The parties are also entitled to determine the fees of the arbitrators by reference to international customary rules or to institutional arbitration rules. If there is no such agreement, the arbitrator's fees can be determined according to a schedule prepared by the Ministry of Justice[21]. Such schedule will be applicable only if there is a disagreement between the parties and the arbitrators, or if there is no provision regarding the determination of the fees in the arbitration agreement, or if the parties did not refer to any of the international customary rules or institutional arbitration rules (IAA Art. 16A).

The arbitrators are entitled to ask for an advance on the expenses to the claimant (IAA Art. 16C/I). Unless otherwise agreed by the parties, the expenses are allocated to the losing party. If both parties' claims are held to be partially grounded, the expenses will be shared between the parties proportionally (IAA Art. 16D/I).

III. Enforcement of arbitral awards in Turkey

The enforcement of foreign arbitral awards in Turkey (those not falling within the scope of

[21] See, the Regulation on Schedule of Charges for International Arbitration prepared by the Ministry of Justice. OJ, 28 December 2001, no. 24624.

the IAA) will be subject to the New York Convention if the place of arbitration or the country under whose law the arbitral proceedings took place is a Contracting State. If the other country involved is not a Contracting State, then the enforcement of the foreign arbitral award will be subject to the CIPPL.

The enforcement of Turkish arbitral awards is easier. The issuance of a document of execution will be sufficient to the effect of authorizing the enforcement of the award. This is one of the main novelties that have been introduced by the IAA[22].

[22] Nomer/Sanli: Devletler Hususi Hukuku (Private International Law), Istanbul 2003, p. 477; Nomer/Eksi/Oztekin, p. 35; Eksi, p. 320.