

INTERNATIONAL COMMERCIAL ARBITRATION FROM A COMPARATIVE PERSPECTIVE: THE ENFORCEMENT OF FOREIGN AWARDS IN TURKEY AND CHINA

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ABSTRACT

Examining different legal foundations of different countries is increasingly crucial in the trend toward globalization and essential in improving and maintaining communication among countries. This thesis attempts to meet this goal by presenting the international commercial arbitration rules of Turkey in comparison with the legal basis for international commercial arbitration in China. The research mainly adopts both *black letter methodology* and *sociological methodology* by referring to qualitative data based on the use of primary and secondary sources; interpreting cases on the basis that it forms a system of inter-related rules; as well as understanding how the legal proceedings impact the parties involved. Whereas the primary sources refer to the national and international regulations, and case law, the secondary sources include books, journals, articles, newspapers, study researches and online sources.

The thesis is comprehensive in its sweep of the law and practice of arbitration in Turkey and China. The thesis is divided into three main chapters. Following *Introduction*, *Chapter 1* gives an overview of the history of international commercial arbitration and the main sources of the present regulations in Turkey and China; available arbitration types under the Turkish and Chinese arbitration legislation; the approaches of domestic courts in international arbitration in Turkey and China. This chapter also touches upon the local arbitration institutions in both countries and compares the Arbitration Rules of ISTAC and CIETAC which became the prominent arbitration institutions among others.

The intention of *Chapter 2* is to identify the international arbitration procedure in Turkey in comparison with the Chinese legal system. It starts from explaining the formation, validity and legality of an arbitration agreement; arbitrability; drafting of an arbitration agreement; and the determination of the law applicable to an arbitration agreement. It next moves to examine the two important doctrines of arbitration, which are *separability* and *competence-competence*, in regard to the New York Convention, Model Law, UNCITRAL Arbitration Rules, ICC Arbitration Rules, TIAL Act No. 4686, Arbitration Law of the PRC, and as well as Arbitration Rules of ISTAC and CIETAC. Conclusively, these requirements and principles play an important role in drafting an arbitration agreement.

Chapter 3 focuses on legislations governing the enforcement of foreign arbitral awards in Turkey and China, mainly in regard to the New York Convention and Model Law. This

chapter allows us to understand the differences and similarities between two countries' jurisdictions.

Finally, both scholars in the Turkish and Chinese legal systems are confronted by similar criticisms as to the practice of international arbitration, which are *the local court's intervention* and *the recognition of arbitral awards*. The research concludes that strengthening existing laws at national and international levels; adopting international instruments such as confidentiality of proceedings, procedural flexibility and high rates of enforceability of foreign arbitral awards; and learning from the leading arbitration centers and closely modeling the best practice and at the same time, defining unique approaches that could be applicable to Turkey and China are crucial matters.

This comparative review is intended to highlight issues in international commercial arbitration, therefore, domestic arbitration and/or investment arbitration are not being discussed in this academic essay. In addition, it shall focus on the influence of the UNCITRAL Model Law and New York Convention as opposed to the arbitration regulatory framework in Turkey and China, including the legislative framework and enforcement, and etc.

摘 要

在全球化的背景下，对比不同国家法律系统之间的不同显得尤为重要，同时保持国家间的交流也十分关键。本文旨在对比土耳其和中国的国际商事仲裁法律规则，主要采用了关键词研究方法和社会学方法论，援引了一手和二手文献里的数据，在一系列相互关联的规则基础上解释相关案件，并试图阐释这些法律程序是如何影响涉案当事人的。一手文献包括国内、国际立法，以及案例，二手文献包括书籍、期刊、文章、报刊、学术报告以及网络资源。

论文综合的梳理了土耳其和中国仲裁领域的法律和实践，主要包括三个章节。引言之后的是第一章，主要阐述了国际商事仲裁的历史和土耳其、中国两个国家在国际商事仲裁方面的立法、国际商事仲裁法案下规定的仲裁案件类型以及两国国内法院在国际仲裁里所适用的方法。本章还讨论了土耳其和中国两国国内的仲裁机构，并对比了伊斯坦布尔仲裁规则和中国国际经济贸易仲裁委员会仲裁规则这两个具有影响力的仲裁规则。

第二章旨在对比土耳其和中国在国际商事仲裁程序方面的不同，本章从仲裁协议的形成、效力以及合法性开始，讨论了可仲裁性、仲裁协议的起草以及仲裁协议所适用的法律。接下来本章解释了仲裁的两个重要原则，分别是独立性原则和自裁管辖原则，涉及的规则包括《承认及执行外国仲裁裁决公约》（《纽约公约》）、《联合国国际贸易法委员会国际商事调解示范法》（《示范法》）、《联合国国际贸易法委员会仲裁规则》、《国际商会仲裁规则》、《土耳其第 4686 号国际仲裁法案》、《中华人民共和国仲裁法》、《伊斯坦布尔仲裁规则》以及《中国国际经济贸易仲裁委员会仲裁规则》，这些规则所规定的要求和原则在起草仲裁协议的过程中扮演了重要的角色。

第三章在《纽约公约》和《示范法》框架下集中讨论了土耳其和中国在承认与执行外国仲裁裁决方面的立法，对比了两国法律系统的相似与不同。

最后，土耳其和中国的仲裁法律系统在国际仲裁实践中都面临相似的批评，即地方法院的干涉以及仲裁裁决的承认问题，作者认为应当同时在国内法和国际法层面加强并完善目前的法律，在仲裁程序的保密性、程序灵活性以及加强外国仲裁裁决执行方面多参考、采用国际性法律文件，向世界领先的仲裁机构和国际最佳实践学习，以便土耳其和中国两国能够确立各自具有特色的仲裁方法。

本文中的比较性研究旨在关注国际商事仲裁中的问题，因此国内仲裁以及投资仲裁不在本文的讨论范围内。另外，本文会集中讨论了《示范法》和《纽约公约》对土耳其和中国国内仲裁制度的影响，主要是针对两国的立法框架以及执行等方面。



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LIST OF ABBREVIATIONS

2006 Interpretation – Interpretation of the SPC on Certain Issues Relating to Application of the Arbitration Law of the PRC

2015 Interpretation – Interpretation of the SPC on Several Issues Concerning the Application of the Civil Procedure Law of the PRC

CCPIT – China Council for the Promotion of International Trade

CIETAC – China International Economic and Trade Arbitration Commission

European Convention – European Convention on International Commercial Arbitration

FTAC – Foreign Trade Arbitration Commission (of the PRC)

Geneva Convention – Geneva Convention on the Execution of Foreign Arbitral Awards

Geneva Protocol – Geneva Protocol on Arbitration Clauses

ICC – International Chamber of Commerce

ICOC – Istanbul Chamber of Commerce

ICSID – International Centre for Settlement of Investment Disputes

ISTAC – Istanbul Arbitration Center

ITOTAM – Istanbul Chamber of Commerce Arbitration Institute

LIAC Act No. 6570 – Law on the Istanbul Arbitration Center Act No. 6570

Model Law – UNCITRAL Model Law on International Commercial Arbitration

New York Convention – New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

NPC – National People's Congress (of the PRC)

PRC – People's Republic of China

SPC Reply – Reply to Several Problems Concerning the Validity of the Arbitration Agreement

TCPL Act No. 1086/6100 – Turkish Civil Procedure Law No. 1086/6100

TIAL Act No. 4686 – Turkish International Arbitration Law No. 4686

TOBB – Turkish Union of Chambers and Commodity Exchanges Center

TPIPL Act No. 5718 – Turkish Private International and Procedure Law No. 5718

UNCITRAL – United Nations Commission on International Trade Law

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INTRODUCTION

Today, international commercial activities involve a wide range of stakeholders such as contractors, subcontractors, clients and suppliers from all over the world, which means misunderstandings are likely to happen when there is a lack of communication among them. In this cross-cultural business environment, conflicts arise from differences; occurs whenever parties disagree with each other's values, motivations, perceptions, ideas, desires or interests. Therefore, conflict is inevitable in business relationships, but dispute can be avoided when conflict is well managed.

Arbitration is regarded as a means of solution for the securing of international contracts among international actors who have started to do business in the other countries. It has been increasing its efficiency as an optional judicial remedy over the last decades.

Significantly, the rapid increase in bilateral trade between Turkey and China¹ shows that both countries need to learn each other's legal systems to handle such disputes respectfully, promptly, privately and economically. Due to the potential for international business disputes; the fear of foreign businessmen to litigate in national courts as a result of differences in legal systems; and the lack of an international court for private parties' business disputes, international commercial arbitration helps to bridge the gap between legal systems. From this point of view, this thesis puts emphasis on the international commercial arbitration rules of Turkey' and China' legal systems. The purpose of this thesis is to provide a realistic overview of the strengths and limitations of the international arbitration systems of Turkey and China.

¹ Today, China is Turkey's *second largest trade partner* after Germany, and principal trade partner in East Asia. Beside this, Turkey's acceptance as a *dialogue partner* in the *Shanghai Cooperation Organization* and increasing business activities under the *One Belt and One Road* project are the most crucial events of the last decade.

<https://www.chinadialogue.net/article/show/single/en/10047-China-s-role-in-Turkey-s-energy-future>;

http://www.mfa.gov.tr/turkey_s-commercial-and-economic-relations-with-china.en.mfa (Accessed on 20.10.17)

CHAPTER 1: OVERVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION IN TURKEY AND CHINA

1.1. A Brief History of International Commercial Arbitration

1.1.1. Turkey

The concept of arbitration was first introduced in the legislation of Turkey by Article 516-536 of the Turkish Civil Procedure Law No. 1086 (hereinafter referred as the “*TCPL Act No. 1086*”),² enacted on 18 June 1927. However, these provisions govern domestic arbitrations which do not involve any foreign element and take place in Turkey.³ 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 this law are subject to appeal before Turkish courts.⁴ 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 TCPL Act No. 1086 was not applicable to international commercial arbitration. Until 1982, the Turkish Supreme Court decided that foreign arbitral awards were subject to the enforcement procedure applicable to foreign judgments.⁵ The Turkish Private International and Procedure Law No. 5718 (hereinafter referred as the “*TPIPL Act No. 5718*”),⁶ enacted on 27 November 2007, now applies to the enforcement of foreign arbitral awards. Such legislation complies with international law standards.⁷ In 1991, the European Convention on International Commercial Arbitration (hereinafter referred as the “*European Convention*”) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred as the “*New York Convention*”) were ratified.⁸

² Published in the Official Gazette No. 622-4, dated on 4/7/1922

³ Akinci (2016) p: 17; Tuzcu & Bayar (2007) p: 186-192

⁴ Ibid.

⁵ Turkish Court of Appeals, Unified Civil Law Chambers, 7/11/1951, File No. 126E, Decision No. 109K; Turkish Court of Appeals, 15th Civil Law Chamber, 10/3/1976, File No. 75/1617E, Decision No. 76/1052K

⁶ Published in the Official Gazette No. 26728, dated on 12.12.2007

⁷ Akinci (2016) p: 423. Mainly based on the New York Convention of 1958 which regulates the recognition and execution of international arbitral awards.

⁸ Ibid, p: 34-36.

During the 90's, the increase of infrastructure investments and 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 favor of such system of dispute resolution.⁹ In 1999, with the amendment made on Article 125 of the Constitution of the Republic of Turkey, it was allowed to resolve the issues and disputes arising from public service related concession agreements through domestic or international commercial arbitration.¹⁰

Subsequently, efforts were made to enact a special regulation regarding international arbitration,¹¹ leading to the acceptance of the Turkish International Arbitration Law No. 4686 (hereinafter referred as the "*TIAL Act No. 4686*"), enacted on 21 June 21 2001.¹² The TIAL Act No. 4686 is a modern law which has been prepared on the basis of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred as the "*Model Law*"), enacted on 11 December 1985, with amendments as adopted 4 December 2006.

To sum up, the Model Law is not adopted in its entirety in the TIAL Act No. 4686, and several of its provisions have been modified on the basis of the International Chamber of Commerce Rules of Arbitration (hereinafter referred as the "*ICC Arbitration Rules*"), and of the 12th Chapter of the Swiss Federal Private International Law of 1987.¹³

⁹ 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 Official Gazette, No. 23786, dated on 13/8/1999; for the amendments of the Law of State Council and Administrative Procedure see Official Gazette, No. 23913, dated on 21/12/1999

¹⁰ See Article 125 of the Turkish Constitution "...in concession, conditions and contracts concerning public services and national or international arbitration may be suggested to settle the disputes arising from them..."

¹¹ "*Milletlerarasi Tahkim-Tutanak*", Abant Toplantisi: Milletlerarasi Tahkim Konusunda Yasal Bir Duzenleme Gerekir mi? ("*International Arbitration-Minutes*", Abant Meeting: Is a Legal Regulation Needed on International Arbitration?) 1998, Ankara, p: 73-91

¹² Published in the Official Gazette No. 24453, dated on 5/7/2001

¹³ This technique highly criticized in doctrine. Akinci (2016) p: 49-51

1.1.2. China

It is often said that arbitration commenced its journey in China in the early 1900s.¹⁴ In 1912, the Chinese government promulgated the *Constitution for Business Arbitration Office*, followed by the *Working Rules for Business Arbitration Office* in 1913.¹⁵ The rules, however, provided that an arbitral award would not become legally binding without the consent of the disputing parties. In circumstances where the consent of the disputing parties could not be obtained, a disputing party was at liberty to file civil proceedings in court. This development may have formed the basis for the positive attitude shown today towards the consensus-building mediation and conciliation services available within the Chinese arbitral framework.

Modern China foreign-related arbitration has its roots in the *Protocol for General Conditions of Delivery of Goods* signed by China and the Soviet Union in April 1950.¹⁶ This Protocol provided that any dispute arising from a contract should be settled through arbitration. Where the respondent was a Soviet party, the arbitration would be conducted in the Soviet Union; if the respondent was a Chinese party, the arbitration would be conducted in China. In order to implement such an undertaking, it was necessary to establish a dedicated arbitration body, separate and distinct from the traditional domestic arbitration commissions.

On 6 May 1954, in an attempt to bring China's foreign-related arbitration system into line with international practice, the PRC Government Administration Council¹⁷ adopted the *Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade*.¹⁸ The Decision authorized the China Council for the Promotion of International Trade (hereinafter referred as the "CCPIT")¹⁹ to establish the Foreign Trade Arbitration Commission (hereinafter referred as the "FTAC"), and detailed the provisions relating to such establishment, including provisions pertaining to its

¹⁴ Fan (2013) p: 7-13

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Presently the State Council

¹⁸ Adopted on 6/5/1954 at the 215th Session of the Government Administration Council.

¹⁹ CCPIT is the national state body charged with the promotion of international trade in China. CIETAC is the one of its administrative departments.

jurisdiction, organization, the formation of an arbitral tribunal, the effectiveness of an arbitral award, and enforcement procedures.

In 1956, in accordance with the Decision, CCPIT promulgated the Provisional Rules of Arbitral Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade²⁰ and appointed twenty-one experts.²¹

In the late 1970s with the *opening-up* policy and reform, China adopted the Chinese-Foreign Equity Joint Venture Law²² which provides that if the board of an equity joint venture fails to resolve a dispute between the venture parties through consultation, then the dispute may be settled via mediation or arbitration before an arbitration institution either in China or elsewhere, provided that the seat of arbitration is agreed upon by the disputing parties.²³

In 1982, the Standing Committee of the National People's Congress (hereinafter referred as the "NPC") adopted the (Trial) Civil Procedure Law of the PRC,²⁴ which includes a chapter specifically addressing foreign-related arbitration.

Subsequently, in September 1986, China acceded to the New York Convention with two reservations.²⁵ In order to implement the Convention, the SPC issued the *Notice of the SPC Regarding the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China*,²⁶ which details the reservations and defines the extent of judicial jurisdiction over recognition and enforcement applications.

²⁰ Adopted on 31/3/1956 at the 4th Session of the CCPIT, revised by the CIETAC Arbitration Rules on 12/9/1988. The Rules has been revised respectively in 1994, 1995, 1998, 2000, 2005, 2012 and the latest revision was adopted on 14/11/2014 and effective as of 1/1/2015.

²¹ Fan (2013) p: 15

²² Adopted on 1/7/1979 at the 2nd Session of the 5th NPC, and revised in accordance with the Decision of the NPC Regarding the Revision of the Law of the PRC in Chinese-Foreign Equity Joint Ventures adopted on 4/4/1990 at the 3rd Session of the 7th NPC.

²³ See Article 14 of the Chinese-Foreign Equity Joint Venture Law

²⁴ Adopted at the 22nd Session of the Standing Committee of the 5th NPC and implemented on a trial basis from 1/10/1982, revoked and replaced by the Civil Procedure Law of the PRC, effective as of 9/4/1991.

²⁵ The New York Convention became effective in the PRC as of 22/4/1987.

²⁶ Notice of the SPC Regarding the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China issued by the SPC on 10/4/1987.

In 1994, the Standing Committee of the NPC adopted the *Arbitration Law of the PRC*, which, together with the 1994²⁷ and 1995²⁸ versions of the Arbitration Rules of CIETAC, represents a milestone in the history of China's arbitral development. Chapter 7 of the Arbitration Law contains dedicated provisions pertaining to foreign-related arbitration.

1.2. Main Sources of International Commercial Arbitration Rules

1.2.1. Turkey: National Legislation and International Conventions

It is fair to say that the arbitration has become better known and popular in the 1990s in Turkey. Accordingly, several constitutional and legal reforms were put in place to encourage the development and spread of arbitration.²⁹ It has been argued by many scholars that the lack of modern international commercial arbitration law and the court interference was a major hindrance of the development of international arbitration commercial in Turkey.³⁰ The practice of the Turkish Court of Appeals in respect of the application of the New York Convention was considered to be another big hindrance to the development of international commercial arbitration. The case law demonstrates that the Turkish Court of Appeals widely invoked public policy exception as a ground for refusal of enforcement of arbitral awards.³¹

National Legislation:

By 2001, Turkish Parliament enacted the TIAL Act No. 4686 in order to create reliable arbitration environment in Turkey and making the country a preferable arbitration venue. The lack of international arbitration act was keeping Turkey apart from globalization of modern business world and in the harmonization of Turkish law with the western legal order.³² This law is inspired by the Model Law and international arbitration section of the Swiss Federal

²⁷ CIETAC Arbitration Rules, revised and adopted on 17/3/1994 by the the National Congress of the CCPIT and effective as of 1/6/1994.

²⁸ CIETAC Arbitration Rules, revised and adopted on 5/9/1995 by the China Chamber of International Commerce and effective as of 1/10/1995.

²⁹ Sural (2010)

³⁰ Akinci (2011) p: 33

³¹ Ibid.

³² Candaner Elver (2004) p: 453

Private International Law of 1987.³³ The TIAL Act No. 4686 mainly governs arbitrations that are *seated in Turkey* and involve a *foreign element*.³⁴

When it comes to the matter of *arbitrable* subjects, Article 1 of the TIAL Act No. 4686 provides that disputes regarding issues independent of the parties' wills may not be arbitrated. Therefore, commercial matters may be referred to arbitration, yet disputes that concern criminal issues, family law or issues related to employees' payments arising from labor contracts are not eligible.³⁵ Furthermore, Article 1 also provides that disputes relating to rights in rem over immovable properties located in Turkey are not arbitrable. Thus, any disputes regarding ownership of real estate may not be submitted to arbitration, a position that the Turkish Court of Appeals has upheld. In one case regarding the cancellation of title deeds,³⁶ the Court ruled that a dispute requiring a change in the land register is non-arbitrable as such a matter pertains to public order. It has also been held by the Turkish Court of Appeals that only disputes capable of being settled by the parties' agreement without requiring a court decision are arbitrable. In this particular decision,³⁷ the Turkish Court of Appeals found that the arbitration clause in the company's articles of association was invalid because general assembly resolutions may only be cancelled by the courts.

The TIAL Act No. 4686 also governs a number of procedural issues, including the *form and validity* of the arbitration agreement, the appointment of arbitrators and any challenges to arbitrators.³⁸ Moreover, the TIAL Act No. 4686 codifies the procedure for challenging awards and determining arbitration expenses.³⁹ Article 4 of the TIAL Act No. 4686, which governs the form and validity of the arbitration agreement, states that agreements to arbitrate may either be

³³ Akinci (2011) p: 14-18

³⁴ The seat of arbitration in Turkey is one of the conditions of application of the TIAL Act No. 4686 and is used as binding point. Even if the seat of arbitration is not Turkey, the parties, the sole arbitrator or the arbitral tribunal can subject the arbitration to the TIAL Act No. 4686, provided the dispute has a *foreign element*; See Article 1(B)

³⁵ Turkish Court of Appeals, Plenary Session of Civil Law Chambers, 18/7/2007, File No. 2007/15-444, Decision No. 2007/554;

Turkish Court of Appeals, 13th Civil Law Chamber, 17/4/2012, File No. 2012/8426, Decision No. 2012/10349

³⁶ Turkish Court of Appeals, 9th Civil Law Chamber, 22/3/2004, File No. 2004/5846, Decision No. 2004/5621

³⁷ Turkish Court of Appeals, 15th Civil Law Chamber, 18/6/2007, File No. 2007/2680, Decision No. 2007/4137; Turkish Court of Appeals, 15th Civil Law Chamber, 10/10/2011, File No. 2011/4411, Decision No. 2011/5792

³⁸ Akinci (2016) p: 49-89

³⁹ Ibid.

included in a contract as an arbitration clause or in the form of a separate agreement, whether or not the legal relationship between the parties is contractual in nature.

The form of an arbitration agreement is also regulated by Article 4 of the TIAL Act No. 4686. It is provided under this article that the agreement to arbitrate must be in writing, even though there are a number of ways to record it. As a result, the agreement to arbitrate may range from a written, signed document to a letter, telegram, telex, or fax exchanged between the parties or in an electronic medium. Pursuant to Article 4, a valid arbitration agreement is considered to have been made in cases where a party advances the existence of a written arbitration agreement in a statement of claim and the other party fails to respond and object to this in its statement of defense, or where there is a reference to a document containing an arbitration clause that is intended to constitute a part of the main contract. In a case, the Turkish Court of Appeals affirmed the decision of a lower court, which found that the charter party agreement executed between the parties in an electronic medium gave rise to a valid arbitration agreement, as the agreement contained a reference to the GENCON 1994 Charter, which provides for an arbitration clause.⁴⁰

As regards validity, the Turkish Court of Appeals has held that for an arbitration agreement to be binding there must be clear intent, without any doubt, that the parties intended to submit the issue to arbitration.⁴¹ In this case, the parties had agreed that the dispute would be submitted to arbitration, but also that the dispute shall be resolved at the courts. Since it was unclear whether the parties actually intended to submit the dispute to the courts or to arbitration, the Turkish Court of Appeals ruled there was insufficient intent to arbitrate, and, as a result, the arbitration agreement was invalid.

The Turkish Court of Appeals has also dealt with the question of whether a representative can sign an arbitration agreement, and if so, under what conditions. In a 2007 decision,⁴² the Court applied Article 388/3 of the Law of Obligations, which legislates that an arbitration agreement signed by a representative not granted special powers regarding his or her power of attorney will be invalid, to a case where an attorney had signed an arbitration

⁴⁰ Turkish Court of Appeals 11th Civil Law Chamber, 5/12/2012, File No. 2011/13485, Decision No. 2012/19915

⁴¹ Turkish Court of Appeals, 11th Civil Law Chamber, 18/4/2013, File No. 2012/6961, Decision No. 2013/7612

⁴² Turkish Court of Appeals, 15th Civil Law Chamber, 18/6/2007, File No. 2007/2680, Decision No. 2007/4137

agreement on behalf of his client.⁴³ Thus, it was ruled that if a representative signs an arbitration agreement, the power of attorney authorizing him to act on behalf of his principal must clearly specify that the attorney has been granted the authority to sign an arbitration agreement or to bind his or her principal to arbitrate.

Observing the principle of competence-competence as codified in the Model Law, the TIAL Act No. 4686 governs the procedure for jurisdictional challenges to be brought before the arbitral tribunal.⁴⁴ Since a jurisdictional objection is decided by the tribunal as a preliminary matter, any objection should be made with the first reply brief at the latest. However, Article 7(H) goes on to provide further parameters for jurisdictional challenges. When ruling on the tribunal's jurisdiction, an arbitration clause shall be treated as independent from the other terms of the contract. Therefore, even if the main contract is decided by the tribunal to be null and void, the arbitration clause is not invalidated.

In accordance with the TIAL Act No. 4686, challenges to an arbitral award may only take the form of an *annulment* action, although the court's decision regarding annulment may be appealed.⁴⁵ Article 15 of the TIAL Act No. 4686 states that an arbitral award may be annulled if certain grounds is proven by the party filing an annulment action. The Turkish Court of Appeals has issued decisions relating to the partial annulment of an arbitration award and the scope of a potential re-adjudication in such circumstances. In one case,⁴⁶ the Court held that an arbitration award may be partially or wholly annulled. If only partially annulled, those parts not annulled will be considered to be procedural rights enjoyed by the party that has prevailed on the non-annulled parts. Arbitrators will then re-examine only the annulled parts and issue an award regarding them.

In one dispute where it was found that the defendant did not have a residence, habitual residence or place of business in Turkey, the Turkish Court of Appeals ruled that the Istanbul

⁴³ Pursuant to Article 5 of the TIAL No. 4686, if a dispute subject to an arbitration agreement was brought before the courts, the counter party may raise an arbitration objection. If the court accepts such objection, it dismisses the case based on procedural grounds.

⁴⁴ Sural (2010)

⁴⁵ Sural (2010)

⁴⁶ Turkish Court of Appeals, 15th Civil Law Chamber, 27/6/2007, File No. 2007/2145, Decision No. 2007/4389

Commercial Court of First Instance was the competent court to hear the annulment action.⁴⁷ First, the Court held that the location of a subsidiary incorporated in Turkey cannot be considered as the place of business of the defendant itself, which was a French company with its headquarters in France. Thus, as the defendant did not have residence in Turkey, the Court found that pursuant to Article 3 of the TIAL Act No. 4686, which states that any reference to a court in the TIAL Act No. 4686 will refer to the Istanbul Civil Court of First Instance in those cases where the respondent is not domiciled in Turkey, the Istanbul Civil Court of First Instance would be competent to hear the annulment case.⁴⁸

The TPIPL Act No. 2675⁴⁹ was annulled with the TPIPL Act No. 5718⁵⁰ and the special provisions regarding the enforcement of international arbitral awards were amended in 2007.⁵¹ The scope of the conflict of laws was expanded and some changes were done to the existing provisions on the recognition and enforcement of arbitral awards with the adaptation of the new TPILP Act No. 5718.⁵² With the adaptation of the TPIPL Act No. 5718, the recognition and enforcement of international arbitral awards were brought into conformity with the international agreements.

For the arbitral awards rendered in countries that are not party to the New York Convention, enforcement in Turkey is regulated by the TIPPL Act No. 5718. The grounds for enforcement as codified in the TIPPL Act No. 5718 are very similar to those in the New York Convention.⁵³ Under Article 62 of the TIPPL Act No. 5718, the court will reject enforcement of a foreign arbitral award under certain conditions.

According to Article 56(1) of the TIPPL Act No. 5718, the court may decide to enforce the whole or a part of the award, or refuse to enforce it. In a case where one of the three agreements between the parties did not include an arbitration clause, the Turkish Court of Appeals stated that the partial enforcement of the foreign arbitral award, as decided by the court

⁴⁷ Turkish Court of Appeals, 11th Civil Law Chamber, 16/7/2009, File No. 2007/13799, Decision No. 2009/8820

⁴⁸ Sural (2010)

⁴⁹ Published in the Official Gazette No. 23786, dated on 14/8/1999

⁵⁰ Published in the Official Gazette No. 26728, dated on 12/2/2007

⁵¹ Budak (1997) p: 183-190

⁵² Tekinalp (2007) p: 313-341

⁵³ Ibid.

of first instance, was impossible and the request for enforcement should be rejected. The Turkish Court of Appeals ruled that it was not possible to determine which portion of the damages awarded resulted from the agreement that did not contain an arbitration clause.⁵⁴ Decisions on enforcement requests can be appealed and be subject to rectification; appeal stays the execution of the enforced award according to Article 57(2) of the TPIPL Act No. 5718.

The Turkish Civil Procedure Law No. 6100 (hereinafter referred as the “*TCPL Act No. 6100*”),⁵⁵ enacted on 12 January 2011 and came into effect on 1 October 2011 is made to regulate domestic arbitration in accordance with the Model Law and made Civil Procedure Law and International Arbitration Law compatible by resolving the differences between them.

The TCPL Act No. 6100 deals with domestic arbitrations between local parties where a) no foreign elements are involved; and b) Turkey agreed as the seat of arbitration. The arbitration section of the TCPL Act No. 6100 resolved long-standing conflicts between the TIAL Act No. 4686 and the arbitration section of the now-defunct TCPL Act No. 1086, and the TCPL Act No. 6100 aligned itself with both the TIAL Act No. 4686 and the Model Law.⁵⁶ The arbitration section regulates domestic arbitral proceedings and the enforcement of domestic awards with a view to encouraging domestic arbitration in Turkey. Finally, the TCPL Act No. 6100 has a place in *competence-competence* doctrine. This will be discussed further in the following chapters.

International Conventions:

Turkey has ratified major international conventions on arbitration, that is, the New York Convention and the European Convention. These conventions have become the main sources of Turkish legislation on arbitration, because the Constitution of the Republic of Turkey states that international agreements approved by Parliament in the form of a Law have the effect of any Law enacted within the system.⁵⁷

⁵⁴ Turkish Court of Appeals, 6th Civil Law Chamber, 14/4/2014, File No. 2014/3906, Decision No. 2014/4941

⁵⁵ The TCPL Act No. 1086 of 1927 was annulled with the TCPL Act No. 6100 of 2011.

⁵⁶ Akinci (2016) p: 17-33

⁵⁷ See Article 90 of the Constitution of the Republic of Turkey

In addition to these, it is worth to mention that Turkey is also party to the Geneva Protocol on Arbitration Clauses (hereinafter referred as the “*Geneva Protocol*”), dated on 24 September 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards (hereinafter referred as the “*Geneva Convention*”), dated on 26 September 1927. But since the New York Convention was established as a result of dissatisfaction with the Geneva Protocol and the Geneva Convention, it also replaced both the Geneva Protocol and the Geneva Convention.⁵⁸ Accordingly, I will not include these documents as a special title within the scope of this study, but I will mention if any comparison needs.

The majority of foreign arbitral awards enforced in Turkey are subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred as the “*New York Convention*”), enacted on 10 June 1958.⁵⁹ Consequently, the Turkish Court of Appeals has issued a number of decisions regarding enforcement under the New York Convention. As the New York Convention replaces the Geneva Protocol and the Geneva Convention, as a result, the New York Convention has been rightly eulogized as the *single most important pillar on which the edifice of international arbitration rests*, and as a convention that *perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law*.⁶⁰

It is worth to mention that the New York Convention was approved with two reservations.⁶¹ The first reservation is that Turkey required *reciprocity* as a condition for enforcing a foreign arbitral award in Turkey, and the second one is that the application of the New York Convention be limited to commercial disputes only.

In a decision,⁶² the Turkish Court of Appeals ruled on interim attachment requests made prior to the enforcement of foreign arbitral awards. In this case, the Court held that an interim attachment order may be granted in the enforcement proceeding of a foreign arbitral award even if an enforcement decision has not yet been issued on the basis that the assets or rights of

⁵⁸ Akinci (2016) p: 34-35; Blackaby & Partasides QC (2015) p: 617 (11.40)

⁵⁹ Ratified by Turkey, Law No. 371, 8/5/1991; Published in the Official Gazette No. 22002, 25/9/1991

⁶⁰ Blackaby & Partasides QC (2015) p: 617 (11.40)

⁶¹ Akinci (2016) p: 35; Tuzcu & Bayar (2007) p: 190

⁶² Turkish Court of Appeals, 11th Civil Law Chamber, 15/3/2012, File No. 2012/ 2110, Decision No. 2012/3915

the debtor are only temporarily attached by the interim attachment orders. Consequently, an enforcement decision of a foreign arbitral award is not a condition required to grant an interim attachment order.

The European Convention on International Commercial Arbitration (hereinafter referred as the “*European Convention*”), enacted on 21 April 1961 and adopted by the United Nations Economic Commission for Europe in Geneva.⁶³ The European Convention is one of the world’s most important regional commercial arbitration treaties. Thirty-one States are currently party to this Convention.⁶⁴ The European Convention consists of nineteen articles and a detailed annex dealing with certain procedural matters.

The European Convention addresses three principal phases of the international arbitral process – arbitration agreements, arbitral procedure and arbitral awards.⁶⁵ With regard to the arbitration agreement, the Convention recognizes the validity of international arbitration agreements,⁶⁶ while providing for a specified, limited number of bases for invalidity of such agreements in proceedings concerning recognition of awards.⁶⁷ With regard to the arbitral procedure, the Convention limits the role of domestic courts and confirms the autonomy of the parties and the arbitrators to conduct the arbitration proceedings.⁶⁸ With regard to arbitral awards, the European Convention is designed to supplement the New York Convention, essentially dealing only with the effects of a judicial decision annulling an award in the arbitral seat in other jurisdictions.⁶⁹

Turkey is party to the European Convention since 1991.⁷⁰ This Convention applies to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual

⁶³ Akinci (2016) p: 36-37

⁶⁴ Most European States (*except the United Kingdom and the Netherlands*), and *ten non-EU States* such as *Turkey*, *Russia*, *Cuba*, *Burkina Faso* etc. *China is not a party to the European Convention*.

⁶⁵ Born (2010) p:102

⁶⁶ See Article II, IV, V of the European Convention

⁶⁷ Ibid, Article V(1)

⁶⁸ Ibid, Article III, IV, V, VI

⁶⁹ Ibid, Article IX. See Born (2009) Vol.1; p: 103

⁷⁰ Ratified by Turkey, Law No. 3730, 8/5/1991; Published in the Official Gazette No. 21000, 23/9/1991

place of residence or their seat in different Contracting States; and to arbitral procedures and awards based on these agreements.⁷¹ It provides for a number of general issues concerning party's rights in arbitration and specific limited reasons for when the setting aside of an award under the national law of one Contracting State can constitute a ground for refusing to recognize or enforce an award in another Contracting State.⁷²

The European Convention regulates the establishment of the arbitral tribunal and the arbitration procedures while the New York convention opens the way solely to the recognition and enforcement of foreign arbitral awards in Turkey.⁷³ In this regard, in terms of regulating the consecutive stages of international commercial arbitration, both conventions are like twins, and the two of them together complete the international commercial arbitrations in many aspects.

1.2.2. China: National Legislation and International Conventions

Since China's opening up and reform policy in 1978, China has progressively integrated itself into the global economy. As discussed below, China has ratified international treaties related to arbitration, enacted arbitration laws, developed arbitral institutions and rules. These changes represent a commitment to the development of a more comprehensive legal system, in line with international standards.⁷⁴

National Legislation:

Before the enactment of the Arbitration Law of the PRC, there was no single unified body of law that governed arbitration. However, in 1991, Chapter 26 of the Civil Procedure Law, amended in 2013, began to govern arbitration procedures. In 1994, the Standing Committee of the NPC passed the Arbitration Law of the PRC, which came into effect on 1 September 1995. This legislation, amended but with no substantial change in 2009, governs

⁷¹ See Article I of the European Convention

⁷² Ibid, Article IX

⁷³ Moses (2012) p: 8

⁷⁴ Tao (2012) p: 22

both domestic and foreign-related arbitrations throughout the country.⁷⁵ The Arbitration Law of the PRC, however, is not the only source of national law on international arbitration to be considered. In addition to this, the Civil Procedure Law, Chinese-Foreign Equity Joint Venture Law, and other laws contain some provisions concerning arbitration or enforcement of arbitral agreements and awards.⁷⁶ The SPC's interpretations are also fundamental in clarifying the Chinese arbitration system and the role of arbitration commissions.⁷⁷

While there is need for improvements through the adoption of the Model Law, most of the widely recognized principles of international arbitration are reflected in the current Arbitration Law of the PRC.⁷⁸ First, promoting *party autonomy* is one of its primary goals, although in alignment with building a socialist market system. Article 1 of the Arbitration Law of the PRC states that “*the law is formulated with a view to ensure fair and timely arbitration of economic disputes, reliable protection to legitimate rights and interests of parties concerned and a healthy development of the socialist market economy.*” Second, the Arbitration Law of the PRC expresses the principle that arbitration institutions are independent from the government. Article 14 of the law makes all “*arbitration committees independent from the administrative organs, and they are not subject to any administrative organs and neither are they affiliated to each other.*” Hierarchical relationships between arbitration commissions and administrative authorities were also prohibited.

Moreover, Article 4 of the Arbitration Law of the PRC provides that the submission of parties to arbitration can only be on the basis of an arbitration agreement arrived at through the parties' *free will*. Article 5 *forbids courts to accept cases for litigation* if a valid arbitration agreement is found. In the event that a party refuses to execute the arbitral award, Article 62 provides that courts are obliged to *enforce* the arbitral award on the application of the other party for enforcement. Article 71 allows courts to refuse to enforce a foreign-related award, but only based on limited *grounds* provided in the Civil Procedure Law.⁷⁹ The independence of the entire arbitral process is also safeguarded by Article 8 of the Arbitration Law of the PRC,

⁷⁵ Ibid.

⁷⁶ Fan (2013) p: 19

⁷⁷ Ibid.

⁷⁸ Tao (2012) p: 42-46

⁷⁹ See Article 274 of the Civil Procedure Law of the PRC

which provides that arbitration shall be conducted independently from interference by administrative organs, public organizations or individuals.

The Arbitration Law of the PRC was widely welcomed as a fundamental step forward in the rise of Chinese arbitration. However, unlike the Model Law, it sets out rather stringent requirements for the validity of an arbitration agreement. Pursuant to *Article 16* of the Arbitration Law of the PRC, a valid arbitration agreement must contain:

- (1) an expression of the parties' mutual wish to resort to arbitration;
- (2) a description of the subject matter to be arbitrated;
- (3) the selected arbitration commission.

The first two requirements are common to most legal systems and reflect the contents of Article 7 of the Model Law, which refers to both the subjective (*the will to arbitrate*) and objective (*the scope of the agreement*) elements of the arbitration agreement. The third requirement, however, is unique to the Chinese system. The parties must select an arbitration commission, which will administer the proceedings. Therefore, if the parties agree to arbitrate a certain dispute but do not appoint an institution, the arbitration agreement must be considered void. This is a major dissimilarity from the Model Law and the Turkish Arbitration Law, pursuant to which an arbitration clause that does not designate an institution is a perfectly valid ad hoc agreement.⁸⁰

Pursuant to *Article 18*, if the parties fail to select an institution, or if their appointment is unclear, the arbitration clause is invalid, unless a supplementary agreement is reached. Considering that it is often impossible to reach any kind of agreement once the dispute has actually arisen between the parties, any uncertainty in the designation of the arbitration commission could make the arbitration clause unenforceable. These provisions have attracted criticism. Articles 16 and 18 of the Arbitration Law of the PRC have been described as a *great wall*, which hinders the dissemination of international arbitration and the possibility for foreign institutions to administer arbitrations seated in Mainland China.⁸¹

⁸⁰ Born (2009) p: 148

⁸¹ Tao & Wunschheim (2007) p: 13

Although recent studies show a judicial attitude towards the enforcement of awards rendered in Mainland China but administered by foreign institutions, in particular the ICC, Articles 16 and 18 still remain controversial.⁸² The wording of Article 16, which specifically requires the appointment of an arbitration commission, can be considered a reference to Article 10. According to *Article 10*, arbitration commissions can be established, where needed, by the relevant departments and chambers of commerce, under the coordination of the People's Governments of the cities where the institution is to be set. The establishment of a commission must be registered with the local judicial administrative departments. Articles 11 to 15, moreover, set forth other requirements that institutions must meet, in order to be considered arbitration commissions pursuant to the Arbitration Law of the PRC.

These provisions show that the Turkish concept of arbitration commission is not entirely overlapping with the Chinese concept of arbitration commission. In fact, whilst Turkish institutions are independent, neutral and impartial; Chinese arbitration commissions are organized by the local Government and registered with the relevant judicial administrative department. Although there have been some important openings to foreign arbitration institutions, both from a political and a judicial point of view, Chinese commissions need to undergo the process of establishment and registration set forth in Article 10.

International Conventions:

In 1987, China acceded to the New York Convention, one of the most influential multilateral treaties. Since China joined the New York Convention, foreign parties have been able to seek recognition and enforcement of foreign arbitral awards in China. The recognition and enforcement of foreign awards is subject to two reservations; the reciprocity and the commercial reservation.⁸³ With 156 states party to the New York Convention, the *reciprocity* reservation finds little application nowadays, and is frequently withdrawn by States. Further, the lack of a harmonized definition of the term *commercial* has led to substantial divergences in the interpretation of the scope of the commercial reservation. In order to apply the New York Convention more uniformly, China may consider whether it would be timely and appropriate

⁸² Ibid.

⁸³ www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (Accessed on 9/11/2017)

to withdraw both reservations. Beside accession to the New York Convention, China also contributes its case law to the UNCITRAL Secretariat's New York Convention Guide.⁸⁴

1.3. Arbitration as an Alternative to Litigation

National laws generally recognize and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes. Some practitioners, therefore, refer to arbitration as a form of alternative dispute resolution.⁸⁵ However, the acronym of *alternative dispute resolution* is more often used to describe non-binding procedures, thereby distinguishing between litigation and arbitration on the one hand, and alternative dispute resolution on the other.

The reasons for choosing arbitration over litigation are neutrality, expertise, confidentiality, procedural flexibility, ability to choose the language and the seat of arbitration, the finality of the award and enforceability.⁸⁶

Having said that, arbitration parties are increasingly complaining about delays, particularly at the beginning and the end of the arbitration.⁸⁷ At the beginning, the complaint is that it takes too long to constitute an arbitral tribunal, and thus, to commence with the arbitration.⁸⁸ At the end of the arbitration, the complaint is that some arbitral tribunals take too much time to make their award.⁸⁹ For various reasons, international arbitration is no longer a relatively inexpensive method of dispute resolution. In litigation, the parties do have to pay court fees, but they are not specifically charged for the services of the judge or for the use of the facilities.

According to the Constitution of the Republic of Turkey, the judicial power is exercised by independent courts and judges.⁹⁰ Civil courts have authority to resolve all disputes of civil nature within their jurisdictions. In Turkey, arbitration is preferred for international disputes

⁸⁴ <http://newyorkconvention1958.org> (Accessed on 9/11/2017)

⁸⁵ Guide to International Arbitration, Latham & Watkins' International Arbitration Practice

⁸⁶ Buruma (2013) p: 11-13

⁸⁷ Ibid, p: 13

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See Article 9 of the Constitution of the Republic of Turkey

and less for domestic disputes.⁹¹ It is not an inexpensive solution and it is generally chosen by large companies that can afford that amount of fee. Unlike litigation, arbitration is preferred by international companies because it is a fast procedure and the arbitrators are specialized in the field activity of the companies involved. The parties can also choose the language they will use for the arbitration. Beside this, the parties may select the sole arbitrator or the arbitral tribunal according to the TIAL Act No. 4686.⁹²

The importance of arbitration in China can not be overstated. This dispute resolution mechanism is particularly attractive whenever a Chinese-foreign commercial relationship is involved and parties thus wish to avoid domestic litigation.⁹³ Since the promulgation of China's Civil Procedure Law, there has been an increasing number of judicial disputes since the 1990s.⁹⁴ The sheer volume of cases has placed significant stress on the judicial system and grassroots courts.⁹⁵ Moreover, its flexibility, efficiency and the cost saving make arbitration a tool that fits perfectly within Chinese culture.⁹⁶

1.4. Institutional Arbitration and Ad Hoc Arbitration in Turkey and China

1.4.1. Introduction

Any arbitration, wherever it is conducted, is subject to the mandatory rules of the *lex arbitri* – that is, the law of the seat of arbitration.⁹⁷ Here, the parties have a choice – ad hoc arbitration without the involvement of an arbitral institution or the rules of one of the established arbitral institutions.⁹⁸ Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution.⁹⁹ Instead, parties simply agree to arbitrate without

⁹¹ Akinci (2016) p: 3-15; Tuzcu & Bayar (2007) p: 188

⁹² See Article 7(A) of the TIAL Act No. 4686

⁹³ Chi (2008) p: 105

⁹⁴ Xie & Sun (2010) p: 45-55

⁹⁵ The number of cases in Beijing increases explosively: The percentage of unclosed cases increased by 76%, Xinhuanet, http://news.xinhuanet.com/legal/2005-04/27/content_2884636.htm (accessed on 17/9/17)

⁹⁶ de Vera (2004) p: 149

⁹⁷ Blackaby & Partasides QC (2015) p: 42-47 (1.140)

⁹⁸ Akinci (2016) p: 117-120

⁹⁹ Born (2015) p: 71-72

designating any institution to administer their arbitration. On the other hand, institutional arbitrations are conducted pursuant to institutional arbitration rules, almost always overseen by an appointing authority with responsibility for various aspects relating to constituting the arbitral tribunal, fixing the arbitrators' compensation and similar matters.¹⁰⁰ With this in mind, let's look at what kind of arbitrations exist under Turkey's and China's legislative regulations.

1.4.2. Institutional Arbitration Administered by the Local Arbitration Institutions in Turkey: ISTAC Model

Unfortunately, the efforts regarding arbitration legislation, which are mentioned above, failed to reach its intended success in Turkey.¹⁰¹ Although arbitration centers were established such as Istanbul Chamber of Commerce Arbitration Institute (hereinafter referred as "*ITOTAM*")¹⁰² and Turkish Union of Chambers and Commodity Exchanges Center of Arbitration (hereinafter referred as "*TOBB Arbitration*"),¹⁰³ they failed to become effective due to many reasons. In 2012, only 6 arbitration applications were made to ITOTAM. On the other hand, in the same year, 759 applications were made to ICC, 63 of which were from Turkey.¹⁰⁴

While these two essential institutions have been aiming to strengthen their presence in the arbitration community by taking various steps for a long time, recently, another promising development of establishment of Istanbul Arbitration Center (hereinafter referred as "*ISTAC*")¹⁰⁵ was recently put in place. I will give an outline of these three major arbitration institutions as you may see below.

Firstly, Istanbul Chamber of Commerce (hereinafter referred as "*ICOC*")¹⁰⁶ has been providing arbitration services for its members through its Arbitration Bureau since 1979. Upon replacement of the TCPL Act No. 1086 with the TCPL Act No. 6100 in 2011, ICOC revised

¹⁰⁰ Ibid, p: 69-70

¹⁰¹ Akinci (2011) p: 27

¹⁰² ITOTAM's official website is <https://www.itotam.com/en/InCooperation.aspx> (Accessed on 8/10/17)

¹⁰³ Its website is <http://www.tobb.org.tr/HukukMusavirligi/Sayfalar/Eng/Arbitration.html> (Accessed on 8/10/17)

¹⁰⁴ <http://hsfnotes.com/arbitration/> (Accessed on 11/10/17)

¹⁰⁵ ISTAC's website is <http://istac.org.tr> (Accessed on 8/10/17)

¹⁰⁶ ICOC's official website; <https://www.ito.org.tr/wps/portal/english/about-icoc> (Accessed on 8/10/17)

its Arbitration Rules in accordance.¹⁰⁷ Such revision fell short of meeting the requirements of a modern arbitration system which brought ICOC to set up its arbitration center (ITOTAM).

ICOC has played a key role in promoting arbitration over the years. In order to provide arbitration services parallel to international practice and aligned with modern arbitration rules, the ICOC as of 2014 completed its work on setting up its autonomous arbitration center and on drafting the new rules.¹⁰⁸ The current Rules are 2016 ITOTAM Arbitration Rules. In drafting the Rules, 2013 UNCITRAL Arbitration Rules and other modern arbitration rules such as ICC Arbitration Rules, Swiss Rules of Arbitration have been taken into consideration.¹⁰⁹

Despite all, popularity of ITOTAM could not reach a level whereby its name is associated with institutional arbitration in Turkey. It is highly possible that one of the reasons for latter can be found within the Article 1(2) of the ITOTAM Arbitration Rules. Indeed, it states that the Rules are applicable only if one of the parties is a member to Istanbul Chamber of Commerce.

Secondly, TOBB was founded by a law,¹¹⁰ and it is a separate legal entity that possess governmental powers. It has the highest level of representation of the private sector in Turkey. Its main purpose is to help maintaining the unity and synchronization between chambers and commodity exchanges and to support their development. TOBB has 365 members in the form of local chambers of commerce, industry, maritime commerce and commodity exchanges. It is also the representative of ICC in Turkey.

TOBB Arbitration Institution was founded in 1990 and consists of the Arbitration Council, Arbitration Board and the Secretariat. Its rules of arbitration are established under TOBB Arbitration Regulation.¹¹¹ Duties of the Arbitration Council, Arbitration Board and the Secretariat are set out in the Status of the Arbitration Council.¹¹² Despite its highest

¹⁰⁷ ITOTAM Rules is available at https://www.itotam.com/ITOTAM_ING.pdf (Accessed on 8/10/17)

¹⁰⁸ Tuzcu & Bayar (2007) p: 194

¹⁰⁹ Ibid.

¹¹⁰ The Law No. 5590 was published in the Official Gazette No. 7457, dated on 15/3/1950. Recently the Law No. 5174 replaced the Law No. 5590 which was published in the Official Gazette No. 25479, dated on 1/6/2004

¹¹¹ <http://www.tobb.org.tr/HukukMusavirligi/Documents/Arbitration/2.doc> (Accessed on 29/9/17)

¹¹² <http://www.tobb.org.tr/HukukMusavirligi/Documents/Arbitration/3.doc> (Accessed on 29/9/17)

representative position among the chambers of commerce and commodity exchanges in Turkey, the amount of requests for arbitration were made to the TOBB Arbitration Council are very limited.¹¹³

TOBB has prepared and implemented the Arbitration Rules for the rapid settlement of the disputes that may arise out of the commercial and industrial transactions among the Turkish businessmen or between them and their foreign counterparts or among the foreign businessmen. A party, who wishes to apply to the TOBB Arbitration, submits its request to the Chairmanship of the Arbitration Council of TOBB, and fees determined by the Council must be paid in advance in order to process the application.¹¹⁴ The disputes are settled by a sole arbitrator or three arbitrators.¹¹⁵ The Council has the authority not to approve the arbitrators nominated by the parties in accordance with the provisions of the Rules.¹¹⁶ The parties may nominate their arbitrators from the list of the TOBB Arbitrators or may choose any other person they trust, who has the qualifications specified within the Rules.¹¹⁷

Thirdly, concrete steps, including the drafting of legislation, have been taken for the establishment of an arbitration center in Istanbul. The purpose of the Law on the Istanbul Arbitration Center Act No. 6570 (hereinafter referred as the “*LIAC Act No. 6570*”),¹¹⁸ which was published in the Official Gazette dated on 29 November 2014 and came into effect on 1 January 2015, is to establish ISTAC and regulate the procedures and principles regarding the organization and operations of ISTAC.¹¹⁹

The LIAC Act No. 6570 regulates only the structural organization of ISTAC, it does not determine the arbitration rules. Pursuant to Article 1 of the LIAC, the purpose of this Law is stated as “... *to ensure the resolution of disputes including the ones with foreign elements through arbitration and other alternative dispute resolution methods...*” In other words,

¹¹³ Tuzcu & Bayar (2007) p:194

¹¹⁴ See Article 5 of the TOBB Arbitration Rules

¹¹⁵ Ibid, Article 15

¹¹⁶ Ibid, Article 16

¹¹⁷ Ibid, Article 17

¹¹⁸ <http://www.resmigazete.gov.tr/eskiler/2014/11/20141129-1.htm> (Accessed on 10/10/17)

¹¹⁹ Orak & Erbilin (2015) p: 144; Kinikoglu & Bilgi (2016) p: 6-25

ISTAC shall oversee the settlement of disputes, including those containing a foreign element, through arbitration or other alternative dispute resolution methods.¹²⁰

The LIAC Act No. 6570 regulates the structure of ISTAC which is to be founded in Istanbul and to operate in global scale.¹²¹ ISTAC is a subject to private law, and it has its own legal entity and it is designed to disseminate information and encourage arbitration and alternative dispute resolution methods by addressing the whole society and all relevant business organizations.¹²² It is also planned that ISTAC coordinates arbitration and especially plays an active role in establishing relationships with foreign arbitration center.¹²³

Pursuant to Article 4 of the LIAC Act No. 6570, the tasks of ISTAC are stated briefly as follows:

- to determine the Arbitration Rules of ISTAC and to ensure the conduct of services;
- to promote and issue publications regarding arbitration and other alternative dispute resolution methods and to incentivize, support and realize scientific works on this subject; and
- to cooperate with relevant individuals, institutions and organizations that are inside and outside Turkey.

The other articles of the LIAC Act No. 6570 regulate the structure of ISTAC. ISTAC has a legal entity consists of the (a) General Assembly, (b) Board of Directors, (c) Auditor, (d) Advisory Board, (e) National and International Arbitration Courts, and (f) Secretary General.¹²⁴

First, the *General Assembly* will consist of twenty-five members in total with ten years or more experience in their fields, be selected for four years with an option to be selected again. It is aimed to constitute an independent, impartial, functional and credible General Assembly by establishing a broader participation. The tasks and duties of the General Assembly are

¹²⁰ Akinci (2016) p: 431

¹²¹ Ibid, p: 34

¹²² Ibid, Article 2

¹²³ Ibid, Article 4(1)(b)

¹²⁴ Ibid, Article 5

determined in the LIAC Act No. 6570.¹²⁵ Second, *Board of Directors* shall be elected for four years and consists of five principals and four reserve members to be selected from the General Assembly and at least three of principal members and two of reserve members shall have a law degree. The President will be elected from members having a law degree and represent and manage ISTAC. The tasks and duties of Board Directors are determined in the LIAC Act No. 6570.¹²⁶ Third, one or more *Auditors* will be selected for four years by the General Assembly from its members or outside the General Assembly limited to three persons. The auditor is also entitled to audit annual activities of the Board of Directors and report them to the General Assembly.¹²⁷ Fourth, The *Advisory Board* is constituted in order to make ISTAC more efficient and to help it to achieve its goals. The Advisory Board will consist of fifteen members with at least five years of experience in arbitration or alternative dispute resolution methods. The members of the Advisory Board will be selected for a term of four years by the General Assembly from the list which will be prepared by the Board of Directors.¹²⁸ Fifth, the most important duty is given to *national and international arbitration courts* in terms of dispute resolution. Both courts shall consist of five members; the President of the Board of Directors, Secretary General and three other members with at least ten years of experience in the field of law. The term of office for the elected selected members by the Board of Directors is stated as five years.¹²⁹ Sixth, *Secretary General* is responsible for the operation of administrative affairs. As is known, the secretariat no doubt carries an important role in international arbitration. Even if the other wheels of the system run perfectly, the lack of secretary serviced would make it impossible for IAC to compete with the current international arbitration institutions. This is why it is crucial to establish a reliable and expert secretariat.¹³⁰

Article 14 and 15 respectively regulate *disqualification and confidentiality* and *incomes and expenses*. Article 16 which regulates the *applicable provisions* states that the relevant provisions of Civil Code and Law of Associations will be applied in case the LIAC remains silent regarding any matter.

¹²⁵ Ibid, Article 6, 7

¹²⁶ Ibid, Article 8, 9

¹²⁷ Ibid, Article 10

¹²⁸ Ibid, Article 11(1)

¹²⁹ Ibid, Article 12

¹³⁰ Ibid, Article 13

The only provisional article of the LIAC Act No. 6570 regulates the structure of ISTAC and more importantly states that the rules to be applied will be drafted and entered into force by the LIAC within *six months* after the election of Board of Directors and the budget of ISTAC will be financed by the Prime Ministry in first two years.¹³¹

There have been criticisms stating that the LIAC Act No. 6570 does not regulate the concept as detailed as it should and does not involve provisions regarding many important issues.¹³² Of course, it is possible to draft a law which regulates the subject thoroughly so that it could respond to questions raised in arbitration community. In order to do so, the legislator should start working on amending the LIAC and take into consideration all the constructive criticism and proposals which would show that opinions of a very few arbitration experts in Turkey are well appreciated by doing so it would be possible to reach the common goal to establish and function ISTAC in the best possible fashion and to create an arbitration spirit and culture.¹³³

As a final say, the General Assembly, Board of Directors, auditors and Advisory Board have been established as of May 2015, and the Arbitration and Mediation Rules of ISTAC went into effect on 26 October 2015.¹³⁴

1.4.3. Institutional Arbitration Administered by the Local Arbitration Institutions in China: CIETAC Model

In light of the Arbitration Rules of CIETAC, it is allowed to administer the arbitration proceedings as an arbitration institution under the UNCITRAL Arbitration Rules, as agreed by the parties in the arbitration agreement.¹³⁵ Thus, it demonstrates how CIETAC or other arbitration institutions in China are improving to respect the parties' agreement and *party autonomy* on one hand, and on the other hand to comply with the requirements for an arbitration law in China to not allow *ad hoc arbitration*.

¹³¹ Ibid, Article 1(3) (*provisional*)

¹³² Akinci (2016) p: 432-433; Orak & Erbilin (2015) p: 145

¹³³ Akinci (2016) p: 431; Kinikoglu & Bilgi (2016) p: 24-25

¹³⁴ <http://istac.org.tr/en/istanbul-arbitration-center-arbitration-and-mediation-rules-come-into-force/>

¹³⁵ See Article 4 of the CIETAC Arbitration Rules

CIETAC also called the Arbitration Court of China Chamber of International Commerce, was established in 1956 with its original name of Foreign Trade Arbitration Commission. In 1980 the Arbitration Commission was renamed as the Foreign Economic and Trade Arbitration Commission, and then adopted the name of the Arbitration Court of China Chamber of International Commerce while keeping the name of CIETAC in 2000.

CIETAC Arbitration Rules has an important role in guiding arbitration practice. Furthermore, as an observer organization, CIETAC attends and contributes actively to the sessions of the UNCITRAL Working Group on Arbitration and Conciliation.

CIETAC has continuously revised and released new rules to keep up with national legal developments and international practice. Since its first rules in 1956, CIETAC has revised its rules eight times.¹³⁶ The current CIETAC Rules came into force on 1 January 2015, replacing the 2012 Rules. While the 2015 Rules retain the same structure as the 2012 Rules, twenty changes have been made to the text and three changes have been made to the appendix. Noteworthy amendments include provisions providing for the joinder of additional parties;¹³⁷ the consolidation of multiple arbitrations without consent;¹³⁸ and emergency arbitrator procedures.¹³⁹

Although the CIETAC Rules were not made on the basis of UNCITRAL Arbitration Rules, they incorporate the same core principles: equal treatment of parties;¹⁴⁰ reasonable opportunity for parties to present their cases;¹⁴¹ independence of the arbitral tribunal;¹⁴² and overall streamlined proceedings to provide for fair and efficient resolution of disputes. Through these numerous reforms, arbitration in China has become more efficient and better aligned to international standards. Nevertheless, the CIETAC Rules exhibit specific key differences in the following: the basic structure of the rules; composition of the tribunal; communication of

¹³⁶ CIETAC Arbitration Rules were revised in 1988, 1994, 1995, 1998, 2000, 2005, 2012, and 2015.

¹³⁷ See Article 18 of the CIETAC Arbitration Rules

¹³⁸ Ibid, Article 19

¹³⁹ Ibid, Article 23

¹⁴⁰ Ibid, Article 24; Art 17(1) of the UNCITRAL Arbitration Rules

¹⁴¹ See Article 35 of the CIETAC Arbitration Rules; Art 17(1) of the UNCITRAL Arbitration Rules

¹⁴² See Article 24, 31(1), 32(2) of the CIETAC Arbitration Rules; Art 6(7), 11, 12(1) of the UNCITRAL Arbitration Rules

documents; interim measures; jurisdiction and validity of the arbitration agreement; the combination of arbitration with mediation; time limits for the tribunal to render the award; and the fee schedule.

Briefly stated, differing from the Turkish system, where the powers of the institution rely on the contractual relationships with the parties and the arbitrators, arbitration commissions in China are expressly regulated by the law.

1.4.4. Ad Hoc Arbitration

One of the choices parties must make when they decide to arbitrate is whether they want to arbitration to be administered by an arbitral institution, or whether they want the arbitration to be ad hoc.¹⁴³

Ad hoc arbitration is a proceeding that is not administered by others and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support.¹⁴⁴ In this context, the parties often choose an arbitrator (or arbitrators) who is (or are) to resolve the dispute without institutional supervision. The parties sometimes also select a preexisting set of procedural rules designed to govern ad hoc arbitrations. For international commercial disputes, UNCITRAL has published a commonly-used set of such rules which is named as UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (hereinafter referred as the “*UNCITRAL Arbitration Rules*”).¹⁴⁵

Properly structured, ad hoc arbitration should be less expensive than institutional arbitration, and thus, better suit smaller claims and less affluent parties.¹⁴⁶ Ad hoc arbitration places more of a burden on the arbitrator(s), and to a lesser extent upon the parties, to organize and administer the arbitration in an effective manner.¹⁴⁷ A primary advantage of the ad hoc

¹⁴³ *Ad hoc arbitration is not an option in China*. See Tao & Wunschheim (2007) p: 309-324

¹⁴⁴ See Article 3 of the UNCITRAL Arbitration Rules; similarly, See Art 2(3) of the ISTAC Arbitration Rules

¹⁴⁵ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules as revised in 2010, with new article 1, paragraph 4, as adopted in 2013. 68/109 on the report of the sixth committee.

¹⁴⁶ Moses (2012) p: 9-10

¹⁴⁷ Ibid.

process is its flexibility, enabling the parties to decide the dispute resolution procedure themselves.¹⁴⁸ However, this will of course require a greater degree of effort, cooperation and expertise from the parties to determine the arbitration rules. However, it seems reasonable to assume that the absence of administrative fees makes this arbitration type a popular choice. Beside this, the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an institutional arbitration proceeding.

In the international commercial arbitration cases, where Turkish parties are involved or the seat of arbitration is Turkey, international institutes and the parties often agree on the Arbitration Rules of ICC.¹⁴⁹ However, the UNCITRAL Arbitration Rules are the most popular known rules for ad hoc international arbitration. It is worth noting that, in practice, ad hoc arbitration is more often agreed for the domestic disputes in Turkey.¹⁵⁰

In China, it has long been clear that an agreement for ad hoc arbitration would be held invalid by the Chinese courts, pursuant to Article 16 of the Arbitration Law of the PRC. In a 2010 case, the arbitration agreement between a Thai company (“Tek Seng Rice”) and a Chinese company (“Yupinxuan Trade”) that provided for ad hoc arbitration without designating a seat of arbitration was held invalid by the SPC, pursuant to Article 16 of the PRC Arbitration Law.¹⁵¹

The current Chinese law does not recognize ad hoc arbitration. On the other hand, China is a party to the New York Convention, and is thus bound to recognize and enforce foreign arbitral awards, including those resulting from ad hoc proceedings.

China’s adoption of the Model Law would allow for ad hoc arbitrations, in accordance with international standards. If China is concerned about the fairness and quality of ad hoc tribunals, further procedural regulations can be promulgated for ad hoc arbitration, in conformity with the arbitrator qualifications and other requirements already contained in the

¹⁴⁸ See Article 17 of the UNCITRAL Arbitration Rules

¹⁴⁹ Acar (2016)

¹⁵⁰ Ibid.

¹⁵¹ See the Reply to the Request for Instructions on the Validity of an Arbitration Clause between *Tek Seng Rice Mill Co. Ltd. v. Guangzhou Yupinxuan Trade Co. Ltd.*, by SPC, dated on 13/6/2010

Arbitration Law of the PRC. In this regard, arbitral institutions may assist ad hoc arbitrations conducted under the UNCITRAL Arbitration Rules by acting as appointing authorities.

1.5. Interplay Between the Turkish Court System and International Arbitration

1.5.1. Introduction

In international arbitration, the process is conducted independently. The parties can create their own rules and the arbitral tribunal can fill the gaps.¹⁵² The arbitral tribunal has a power to decide on its own jurisdiction. That means issues are related to the validity of the arbitration agreement or the scope of power of the arbitral tribunal will be dealt with by the arbitral tribunal.¹⁵³ In this way, any early intervention of domestic courts is prevented.

Court assistance and court intervention in arbitration proceedings are major problems of international commercial arbitration. In international commercial arbitration, most of the time parties and arbitrators do not want interference from a court.¹⁵⁴ There are, however, times when the support of a court can prove essential. Parties tend to call on courts for assistance in very specific ways.¹⁵⁵ For instance, they may ask a court to enforce an agreement to arbitrate, sometimes by staying court proceedings while the arbitration goes forward, or in some jurisdictions by issuing an order compelling arbitration.

Beside this, the Court may be asked to rule on tribunal's decision that it has jurisdiction, or on a challenge to one of the arbitrators for conflict of interest. In an ad hoc arbitration, if parties cannot agree on an arbitrator, and have not named an appointing authority, they may ask a court to appoint the arbitrator. A party may ask for emergency relief, sometimes before the tribunal has even been formed.¹⁵⁶ Although the courts generally respect the parties' autonomy in an arbitration, their assistance is sometimes more and sometimes less than what the parties want. Thus, there is a wavering line between helpful assistance and unhelpful

¹⁵² Esin & Yesilirmak (2015) p: 144

¹⁵³ Ibid.

¹⁵⁴ Moses (2012) p:87

¹⁵⁵ Ibid, p:88

¹⁵⁶ Ibid

interference. I would like to consider some of the ways in which courts have an impact on arbitration proceedings and results under Turkish legal system.

1.5.2. “Court Intervention” Under the Model Law

The intervention of the court in international arbitration requires the connection of the matter in question with that country. In terms of the Model Law and followed by the TIAL Act No. 4686, first, such connection is established, as a rule, by location of the *seat of arbitration* in that country.¹⁵⁷

The provisions of the Model Law firmly state limitations imposed on court intervention by providing as follow; “*In matters governed by this Law, no court shall intervene except where so provided in this Law.*”¹⁵⁸ The main purpose of this provision is not to preclude court intervention altogether, but rather that the power to intervene is limited to certain circumstances. At times the intervention of the courts is a necessary and integral part of the arbitration system.

Two very important and related doctrines have been developed which impact on the integrity of the tribunal: *competence-competence* and *separability*. Article 16(1) of the Model Law adopts these principles. The doctrine of competence-competence promotes the inherent power of the arbitration panel to rule on its own jurisdiction. The arbitral tribunal’s competence to rule on its own jurisdiction is subject to court control.¹⁵⁹ Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, the Model Law provides for instant court control in order to avoid unnecessary waste of money and time.¹⁶⁰ Secondly, the doctrine of separability provides that an arbitration clause within a contract is distinct from the main contract, and therefore continues to be valid even if the main contract is void. The doctrine supports the intention of the parties and acts to keep the dispute within the tribunal by allowing it to rule on the validity of the main contract.¹⁶¹

¹⁵⁷ See Article 1(2) of the Model Law; See Article 1(2) of the TIAL Act No. 4686

¹⁵⁸ See Article 5 of the Model Law

¹⁵⁹ Esin & Yesilirmak (2015) p: 154

¹⁶⁰ See Article 16(3) of the Model Law

¹⁶¹ Esin & Yesilirmak (2015) p: 154

The Model Law does envision court involvement in certain circumstances. These can be divided into two groups. A first group comprises matters related to the arbitrators themselves as well as setting aside an award. These include the appointment, challenge and termination of the mandate of an arbitrator,¹⁶² jurisdiction of the arbitral tribunal,¹⁶³ and setting aside of the arbitral award.¹⁶⁴ A second group comprises matters related to discovery, security and enforcement. In these matters court assistance is sought in taking evidence,¹⁶⁵ recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection,¹⁶⁶ and recognition and enforcement of arbitral awards.¹⁶⁷

In order for a party to protect itself against local court intervention in an international arbitration, certain measures can be taken. First, significant recoverable assets must exist outside the host State. Second, the arbitrators must be protected against the impact of local court orders by sitting in a neutral location and residing in countries other than the host State.¹⁶⁸ It is therefore, preferable to select a country other than the host State as the seat of the arbitration, in order to limit the impact of a local court intervention and any decision annulling the final arbitration award when that award is to be enforced in the courts of the other countries.¹⁶⁹

1.5.3. Assistance of Turkish Courts in International Arbitration

The Turkish legal system encourages the autonomy of the parties. In the spirit of this principle, many of the provisions of the TIAL Act No. 4686 are caveated by the sentence *'unless otherwise agreed between the parties.'*¹⁷⁰ According to Article 7(H) of the TIAL Act No. 4686, the arbitrator or the arbitral tribunal has a mandate to decide its own jurisdiction. Although, Article 16 of the Model Law and Article 7(H) of the TIAL Act No. 4686 seem

¹⁶² See Article 11, 13 and 14 of the Model Law

¹⁶³ Ibid, Article 16

¹⁶⁴ Ibid, Article 34

¹⁶⁵ Ibid, Article 27

¹⁶⁶ Ibid, Article 8 and 9

¹⁶⁷ Ibid, Article 35 and 36

¹⁶⁸ Blackaby & Partasides QC (2016) p: 420-421

¹⁶⁹ Ibid.

¹⁷⁰ See Article 6, 7, 10, 12, 14 and 16 of the TIAL Act No. 4686

similar there is a crucial difference between them. According to Article 16(3) of the Model Law, against the decision of the arbitral tribunal, the aggrieved party can apply to the competent court within 30 days. By contrast, in the TIAL Act No. 4686, the aggrieved party must wait until the final award is made.

To give an illustration of what it means, let's look at a case¹⁷¹ where the Turkish Court of Appeals held that the parties cannot apply to domestic courts in the sense of the jurisdiction of the arbitral tribunal. If a party wants to object the jurisdiction of the arbitral tribunal, firstly he/she must apply to the arbitral tribunal. If the arbitral tribunal decides that it has the power, the aggrieved party cannot request to the court against that decision. The aggrieved party can recourse to the court after the final award is made under the Article 15(A)(1)(a) or 15(A)(1)(d) of the TIAL Act No. 4686. As it seen, the TIAL Act No. 4686 prevents any early intervention and thus, the parties cannot introduce any delaying tactics. Then again, the absence of the right to apply to the domestic courts against the decision of the arbitral tribunal might cause time-consuming and unreasonable expenses.¹⁷²

Courts may only intervene in the arbitral proceedings if they are entitled to do so in accordance with the TIAL Act No. 4686, which limits the intervention of the courts in arbitral proceedings to specific circumstances.¹⁷³ No one would be interested in choosing a venue of the country that the law permits the court to interfere with the arbitration or with the award.¹⁷⁴ It is undesirable for there to be excessive level of interference by the court in the arbitral process. However, court assistance in support of arbitration is desirable.¹⁷⁵ The court's intervention to the arbitration is possible when and only if permitted by law but in Turkish practice, this intervention should not be contrary to the arbitration agreement between the parties.¹⁷⁶ According to the TIAL Act No. 4686, if the arbitration takes place in Turkey, the competent Turkish court will assist and support to the arbitral proceeding. The competent court is the *Civil Court of First Instance* (Asliye Hukuk Mahkemesi) of the place of business or place of

¹⁷¹ Turkish Court of Appeals, 15th Civil Law Chamber, 27/6/2007, File No. 2007/2145, Decision No. 2007/4389

¹⁷² Esin & Yesilirmak (2015) p: 149

¹⁷³ See Article 3 of the TIAL Act No. 4686

¹⁷⁴ Moses (2012) p: 113

¹⁷⁵ Ibid.

¹⁷⁶ Esin & Yesilirmak (2015) p: 158-159

residence or the defendant in Turkey and if the defendant does not have the place of business or place of residence in Turkey, the Istanbul Civil Court of First Instance will have jurisdiction.¹⁷⁷ The court may only intervene in a dispute referred to arbitration to the extent permitted by the provisions of the TIAL Act No. 4686.

According to the Model law, domestic courts shall not interfere to the arbitration proceedings unless the Model Law allows intervention.¹⁷⁸ Under some certain circumstances, the intervention of the domestic courts may be needed. Firstly, domestic courts have roles in order to ensure the enforcement of the arbitration agreement under Article 5 of the TIAL Act No. 4686. Even though there is an arbitration agreement, if the claimant applies to a domestic court and the defendant objects to this application the domestic court must refer the parties to the arbitration proceeding. In a case, the Turkish Court of Appeals held that disputes are mainly resolved by the domestic court.¹⁷⁹ However, if there is an arbitration agreement between the parties it binds the parties. Hence, the parties must apply to the arbitration proceeding. Also, both Article II(3) of the New York Convention and Article 8 of the Model Law render the same power to the domestic courts.

Secondly, in arbitration proceedings the arbitrators are appointed by the parties. However, under Article 7(B)(2) and 7(B)(3) of the TIAL Act No. 4686, if the parties fail the arbitrators will be chosen by the competent domestic courts.¹⁸⁰ Additionally, if there is a vacancy in the arbitral tribunal the vacancy will be filled by the same appointment method.¹⁸¹ That means if the previous arbitrator has appointed by the domestic court a substitute arbitrator will also be appointed by the domestic court.

¹⁷⁷ See Article 3 of the TIAL Act No. 4686

¹⁷⁸ It is indicated that the Court should not intervene the arbitration proceeding. However, there are some exceptions such as “*the power of the Court to extend time for beginning arbitral proceedings*”, “*the power of the Court to remove arbitrator*”, “*the power of the support to the arbitral proceedings*”.

¹⁷⁹ Turkish Court of Appeals, 19th Civil Law Chamber, 11/3/2004, File No. 2003/2654, Decision No. 2004/2603

¹⁸⁰ See Article 11(3) and 11(4) of the Model Law. If the parties have applied to ad hoc arbitration the Court intervention is inevitable. However, if there is an institutional arbitration the arbitrator will be chosen by the institution. Similarly, Art. 8 of the ICC Arbitration Rules provides that *if the parties fail to nominate the arbitrator, will be nominated by the ICC Court*.

¹⁸¹ See Article 7(G) of the TIAL Act No. 4686, Article 15 of the Model Law

Thirdly, the arbitral tribunal does not have any coercive power upon the third parties. The arbitral tribunal cannot make any order or injunction in order to force the third parties to do something. The courts' intervention generally arises when any evidence is on the hand of a third party or when the witnesses are not reluctant to attend the hearings. In such cases, the support or assistance of the competent domestic courts is inevitable.¹⁸²

Fourthly, arbitral tribunal may have a power relating to the interim measures. This mandate stems from the law of the seat of arbitration. In both Model Law and the TIAL Act No. 4686, the arbitral tribunal has a mandate to grant interim measures.¹⁸³ However, there are certain differences between Article 17 of the Model Law and Article 6 of the TIAL Act No. 4686. Firstly, in Article 6 of the TIAL Act No. 4686, the arbitral tribunal is empowered to render any interim measures or attachments. On the other hand, in Article 17 of the Model Law does not include attachments; it just mentions interim measures. Secondly, in the TIAL Act No. 4686, the power of the arbitral tribunal is not restricted on the ground of the subject matter of the dispute. Notwithstanding, in the Model Law, the arbitral tribunal grants interim measures in respect of the subject matter of the dispute. The question is in the TIAL Act No. 4686, although, the arbitral tribunal has a power to grant interim measures or attachments, the decision of the arbitral tribunal cannot be enforced by the courts or official authority.¹⁸⁴ Most of interim measures and attachments cannot be enforced directly; hence domestic courts' assistance is required. Additionally, according to the Model Law and the TIAL Act No. 4686, the arbitral tribunal cannot grant interim measures upon the third parties. In this regard, although the power of the arbitral tribunal is recognized in the TIAL Act No. 4686 that power is limited.

Fifthly, the establishment of the arbitral tribunal may take a long time. In order to the preservation of evidence and property interim measures may be needed. In case of such urgent circumstances if the arbitral tribunal has not been established the parties can apply to competent domestic court. Article 6 of the TIAL Act No. 4686 provides that the parties can apply to a

¹⁸² See Article 12(B) of the TIAL Act No. 4686, Article 27 of the Model Law

¹⁸³ See Article 6 of the TIAL Act No. 4686; Art. 17 of the Model Law; Art. 23(1) of the ICC Arbitration Rules

¹⁸⁴ Ibid, p: 82. See Article 6 last sentence of the TIAL Act No. 4686

court before or during the arbitral proceedings. Applying a domestic court does not mean a waiver of the arbitration agreement.¹⁸⁵

Finally, at the end of the proceeding the aggrieved party may recourse to the court of the seat of arbitration in order to set aside the arbitral award. One of the objectives of the arbitration proceeding is to obtain a final and enforceable award. If the award is set aside in the seat of arbitration, it may not be recognized or enforced in any other states.¹⁸⁶ Article 15 of the TIAL Act No. 4686 indicates that in which circumstances the award may be set aside.¹⁸⁷ The aggrieved party can only challenge an arbitral award on the basis of this provision. The grounds for challenging are limited with this provision. According to this provision the competent court shall handle such applications primarily and expeditiously, the grounds for challenging an arbitral award are change from country to country. Thus, the parties need to make sure that they have checked to the procedural law of the seat of arbitration.

However, the local civil courts shall have jurisdiction in relation to the enforcement of foreign arbitration awards. Article 60(2) of the TPIPL Act No. 5718 stipulates that enforcement of foreign arbitration awards may be requested by a petition from the civil court of the location agreed upon in writing by the parties. In the event that there is no such agreement between the parties, the court at the location where the party against whom the award was made is resident in Turkey or if such party is not resident in Turkey, the court at the place where the goods against which the enforcement will be made are located shall be considered to have jurisdiction.

If a party requests that the court impose a preliminary injunction or provisional attachment prior to, or during the arbitral proceedings, this will not constitute a breach of the arbitration agreement; and if a party fails to enforce the preliminary injunction or provisional attachment rendered by the arbitrator or the arbitral tribunal, the other party may request that the competent court issue an order for the preliminary injunction or provisional attachment.¹⁸⁸

¹⁸⁵ Similarly, Article 9 of the Model Law, Article 23(2) of the ICC Arbitration Rules

¹⁸⁶ However, if the award is set aside on the ground of the public policy of the seat of arbitration, it might be recognized and enforced in any other state. Even if, the issue is against public policy of the seat of arbitration, it may not be against *public policy* of another state.

¹⁸⁷ Similarly, Article 34 of the Model Law

¹⁸⁸ See Article 6 of the TIAL Act No. 4686

In brief, it is important for arbitral systems to attempt to establish a harmonious balance between the independence of the arbitral process and the jurisdictions of national courts over the arbitral process. Despite the desire to achieve autonomy over the arbitral process, arbitrators are aware of the limitations of arbitral tribunals, more particularly, in that they have no coercive powers.

1.5.4. Assistance of Chinese Courts in International Arbitration

Courts play an important role in arbitration in China. This role can be complementary and also interventionist at different stages of the arbitration process. The courts can react either by request from any of the parties or upon the initiative of the arbitral tribunal.

Article 304 of the Interpretations of the SPC on Several Issues Concerning the Application of the Civil Procedure Law of the PRC (hereinafter referred as the “2015 Interpretations”)¹⁸⁹ states that a civil case is foreign-related where (1) either contracting party is a foreign citizen, enterprise or organization; (2) the facts that trigger, change, or terminate the civil relationship take place outside Mainland China; or (3) the subject-matter is located outside Mainland China.¹⁹⁰

Where the jurisdictional challenge is brought before the People’s Court, the Chinese judges used to apply universally the *lex fori* in determining the effect of the arbitration agreement.¹⁹¹ Hence, the Arbitration Law of the PRC fails to provide a conflict of laws rule in foreign-related arbitration agreements to which the Supreme People’s Court has tried to address. The Interpretation of the SPC on Certain Issues Relating to Application of the Arbitration Law of the PRC (hereinafter referred as the “2006 Interpretations”)¹⁹² provides that in determining the validity of the arbitration agreement, the People’s Court shall first look at the *applicable law* being agreed upon by the parties; if absent of that, the People’s Court may apply either *lex arbitri* or *lex fori* under the circumstances.¹⁹³ This clarification accords with the general

¹⁸⁹ Adopted on 18/12/2014 at 1636th Session of the Judicial Committee of the SPC, effective as of 4/2/2015.

¹⁹⁰ Ngo (2017) p: 283-306

¹⁹¹ Ibid.

¹⁹² Adopted on 23/8/2006 at the 1375th Session of the SPC

¹⁹³ Article 16 of the 2006 Interpretations

principle of *party autonomy* under Articles 19 and 28 of the Model Law that permit the parties to freely select and determine both the *substantial law* and *procedural law* in the arbitral proceedings.

In a 2012 case, the parties agreed that the arbitration shall take place at CIETAC and shall be settled according to the UNCITRAL Arbitration Rules.¹⁹⁴ The claimant argued that the arbitration clause was invalid for three reasons. Firstly, the arbitration clause did not specify a selected arbitration institution, as required under the Arbitration Law of the PRC.¹⁹⁵ Secondly, the adoption of the UNCITRAL Arbitration Rules suggested that the arbitration was an ad hoc arbitration, which was not allowed under the Chinese law.¹⁹⁶ Thirdly, the arbitration proceeding had been arranged in a manner similar to ad hoc arbitration. The People's Court initially upheld the claimant's challenge on the arbitration clause and declared the arbitration agreement invalid. The decision was then referred upwards to the High People's Court and the Supreme People's Court. Accordingly, on the basis of the SPC's guidance, the People's Court overturned its original decision and upheld the arbitration clause. While the agreement did not expressly specify the governing law of the arbitration clause, the parties had chosen to use Chinese law in the court proceedings in accordance with the Law of the PRC on Choice of Law for Foreign-related Civil Relationships.¹⁹⁷

¹⁹⁴ Invista Technologies S.a.r.l v. Zhejiang Yisheng Petrochemical Co. Ltd., 2012, Ningbo People's Court

¹⁹⁵ See Article 16 of the Arbitration Law of the PRC

¹⁹⁶ Ibid.

¹⁹⁷ See Article 18 of the Law of the PRC on Choice of Law for Foreign-related Civil Relationships

CHAPTER 2: AGREEMENT TO ARBITRATE:¹⁹⁸ FROM A COMPARATIVE PERSPECTIVE

2.1. Overview

In order for the parties of the dispute to submit their case to arbitration, the arbitration agreement is essential (*conditio sine qua non*).¹⁹⁹ In other words, arbitration stems from a contract. An international commercial arbitration agreement has two or more parties who agree to refer their disputes arising from a commercial issue to arbitration. Accordingly, the authority of the arbitral tribunal stems from an agreement which is concluded between the parties of dispute in concern.²⁰⁰ Such arbitration agreement has to be valid and enforceable for a proper functioning arbitration process. That is to say, the consent of the parties remains the essential basis of a voluntary system of international arbitration.²⁰¹

The arbitration agreement can be seen as either in the form of an *arbitration clause* or a *submission agreement*.²⁰² The arbitration clause, which is the most common form of arbitration agreement, is a contract under which the parties agree to submit their disputes, that may arise in the future, to arbitration.²⁰³ By an arbitration clause, the parties agree and undertake to submit the disputes that arises from the main agreement to arbitration. It generally contains simple, straightforward, standard language providing for the resolution of disputes through arbitration. By contrast, the submission agreement is drafted for the settlement of the disputes that has already been arisen between the parties.²⁰⁴ The parties of the dispute conclude a submission agreement when the arbitral tribunal has been constituted. To put in another way, an arbitration clause looks to the future, whereas a submission agreement looks to the past.²⁰⁵ To that end, Ergin briefly defines the meaning of the arbitration agreement as the agreement

¹⁹⁸ The name of Chapter 2 “*Agreement to Arbitrate*” is adapted from “*Chapter 2: Agreement to Arbitrate*” in “*Redfern and Hunter on International Arbitration*” by Blackaby & Partasides QC (2015)

¹⁹⁹ Akinci (2016) p: 80; Blackaby & Partasides QC (2015) p: 71

²⁰⁰ Ibid.

²⁰¹ Blackaby & Partasides QC (2015) p: 71

²⁰² Carbonneau & Butler (2013) p: 574; Moses (2012) p: 18

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Blackaby & Partasides QC (2015) p: 72 (2.02)

by which the parties submit the legal disputes that have been already arise (i.e. *compromise*) or that may arise in the future (i.e. *compromissary clause*) to a third party.²⁰⁶

As a matter of law, the arbitral clause, whether it is a stand-alone agreement or a provision within the larger contract, is always distinct from the main contract.²⁰⁷ The separability doctrine establishes that the arbitral clause has its own legal identity and it is an autonomous, self-contained agreement. Later, this chapter particularly deals with this doctrine.

2.2. Form and Validity of the Arbitration Agreement

The arbitration agreement is the underpinning for the regulatory framework governing the private dispute resolution process. In order for an arbitration agreement to be effective on the parties of the dispute and in turn grant jurisdiction to the arbitral tribunal, it should be *valid* and *binding* on the parties.²⁰⁸ By this means, if the arbitration agreement is not valid, then there is no legal basis for arbitration.

There are various laws, rules, guidelines governing the arbitral process are dealt with extensively in previous chapter. First of all, there are *arbitration rules*, which apply to the arbitration rules chosen by the parties.²⁰⁹ Frequently, a rule may contain a provision that says '*unless otherwise agreed in writing by the parties*'. This means that the rule is not mandatory, but rather is a default rule that will apply if the parties have not reached their own agreement on the particular topic. Then, both the arbitration law of the seat of arbitration and substantive laws come into play, and they are likely to be different *national laws*.²¹⁰ Today, many countries have adopted the Model Law as their arbitration law to further the progressive harmonization and unification of the law of international arbitration. The substantive law chosen by the parties is the national law that will be used to interpret the contract, to determine the merits of the dispute, and to decide any other substantive issues.²¹¹

²⁰⁶ Nomer (1999) p: 409

²⁰⁷ Carbonneau & Butler (2013) p: 574

²⁰⁸ Moses (2012) p: 5-9

²⁰⁹ Moses (2012) p: 6

²¹⁰ Ibid.

²¹¹ Born (2009) Vol.1; p: 535

Above the national laws, there are *international arbitration practices* which tend to be utilized in all arbitrations.²¹² This includes various practices that have developed in international arbitration, some of which have been codified as additional rules or guidelines. Finally, at the top, there are *international treaties*.²¹³ Significantly, the New York Convention is the most relevant treaty as so many countries are parties to it, and as well as it governs the enforcement of both arbitration agreements and awards. Furthermore, the European Convention is the another widely accepted source of international commercial arbitration which supplements the New York Convention in its contracting States.

Thus, as seen above, the regulatory of international commercial arbitration includes private agreements, agreed-upon rules, and international practice, as well as national laws and international conventions. Although parties have substantial autonomy to control the arbitration process, supplementation and reinforcement of the process by both the national and international laws help ensure that the process functions in a fair and effective manner.²¹⁴

In order for an arbitration agreement to be valid, the arbitration agreement has to be made in *writing*.²¹⁵ However, especially according to the rules of the New York Convention, changing communication conditions are taken into consideration. Whereas Article II(1) sets forth the writing requirement, Article II(2) defines '*in writing*' as follows: "*the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.*" The requirement for signature by parties has given rise to problems in the field, but the general view is that a signature is not necessary.

Likewise, the European Convention also contains a written form requirement.²¹⁶ The related provision improves modestly on Article II(2) of the New York Convention. It makes clear that parties' letters, telegrams and similar communications need not be signed, while expanding the category of telegrams to include '*communication by teleprinter*'. On the other

²¹² Moses (2012) p: 7

²¹³ Ibid, p: 8

²¹⁴ Born (2009) Vol.1; p: 567-574

²¹⁵ Blackaby & Partasides QC (2015) p: 75-80; Moses (2012) p: 21-30; Born (2009) Vol.1; p: 582-618

²¹⁶ See Article I(2) of the European Convention

hand, the Geneva Protocol and the Geneva Convention does not contain any written form requirement.²¹⁷

However, there has been a revolution in communication since the New York Convention was drawn up in 1958. Telegrams, which were frequent method of communication an urgent message in writing, were largely replaced first by telex, later by fax, and now by email. This change is reflected in the Model Law,²¹⁸ which goes much further than the New York Convention in its definition of writing, and has itself been the subject of important recommended interpretations and revisions.²¹⁹ In 2006, UNCITRAL adopted proposed revisions to the Model Law, and one of the principal changes was to Article 7's writing requirement which was substantially liberalized and modernized. In the Model Law, it is clearly provided that *"the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic email, telegram, telex or telecopy."*²²⁰

Under the Turkish law, it is clearly seen in the TIAL Act No. 4686 that the writing requirement with respect to the form of an arbitration agreement reflects the language of the Model Law.²²¹

Under the Chinese law, an arbitration agreement must include three elements to be valid: the expression of the parties' wishes to submit to arbitration; the scope of the matter to be arbitrated; and the selection of an arbitration commission to administer the arbitration.²²² The first paragraph of this provision explicitly requires an arbitration agreement to be in written form, including any contractual arbitration clause, or as a separate agreement to arbitrate, but does not provide such an explicit requirement on the form of an arbitration clause *provided in*

²¹⁷ Born (2015) p: 376

²¹⁸ See Para 19 of the Explanatory Note by the UNCITRAL Secretariat on the Model Law

²¹⁹ Blackaby & Partasides QC (2015) p: 76; Born (2009) Vol.1; p: 601-606

²²⁰ See Article 7(4) of the Model Law

²²¹ See Article 4 of the TIAL Act No. 4686

²²² See Article 16 of the Arbitration Law of the PRC

the contract. However, a brief examination of the background information shows that the writing requirement also applies to such an arbitration clause.

As for what constitutes a written form, the Arbitration Law does not provide direct answers but the Contract Law fills the gap. In accordance with the Contract Law of the PRC, written form includes any form capable of tangible representation of its content, such as written instruments, letters and electrically or electronically transmitted documents, including telegrams, telexes, facsimiles, electronic data interchange and email.²²³ A very similar provision is also contemplated by the CIETAC Arbitration Rules.²²⁴

An arbitration agreement may be invalidated for any of the following reasons: the subject matters agreed upon to be arbitrated is beyond the scope of arbitration prescribed by; the arbitration agreement was executed by a person without, or with limited, capacity for civil acts; and one party coerced the other party to sign the arbitration agreement by means of duress.²²⁵ Beside this, Article II(2) of the New York Convention provides that “... *signed by the parties*...”. The Model Law and the New York Convention further require the arbitration agreement to be signed *by the parties*.²²⁶

Beside the writing requirement, there is a variety of other form requirements for arbitration agreements which adopted by a number of national legal orders. Some of them are the *capital letters* requirement, the *signature of attorney* requirement, the *separate agreement* requirement, the *selection of arbitrators* in arbitration agreement requirement, the *institutional arbitration*²²⁷ requirement etc.²²⁸ Another key thing to remember is that the parties should bear the *legal capacity* in order for them to enter into an arbitration agreement.²²⁹ Otherwise, the invalidity of the arbitration agreement will be occurred. Therefore, existence of the legal

²²³ See Article 11 of the Contract Law of the PRC

²²⁴ See Article 5 of the CIETAC Arbitration Rules

²²⁵ See Article 17 of the Arbitration Law of the PRC

²²⁶ See Article 7(1) of the Model Law

²²⁷ Chinese arbitration legislation apparently requires that international arbitration agreements provide for arbitration under the auspices of an arbitral institution; *See Judgment of September 2004, Case No. 2004 XMECZ 154 (Wuxi Chinese People's Court)* The SPC has declared that this requirement applies only to arbitrations seated in China; *Letter of 25/10/2007, Chinese People's Supreme Court*

²²⁸ Born (2009) Vol.1; p: 622-624

²²⁹ *Ibid*, p: 625

capacity of the parties is a major requirement for the validity of the arbitration agreements. In order to determine whether the parties have the legal capacity or not to conclude an arbitration agreement, the *applicable law* to the parties will be taken into consideration.²³⁰

Neither the New York Convention, European Convention nor most national arbitration statutes prescribe detailed choice-of-law rules governing the capacity of parties to conclude arbitration agreements. In the absence of legislative guidance, national court decisions and commentary have adopted different approaches to the issue.²³¹

The another main requirement for the validity of an arbitration agreement is the *mutual consent* of the parties.²³² Therefore, in case of any ambiguity regarding the validity, existence or the scope of the arbitration agreement, the parties' intention should be determined and interpreted such ambiguities in favor of arbitration.²³³ To give an illustration of what it means, let's look at a decision, where the consistent approach of the Turkish Court of Appeals on the matter is clearly stipulated and rendered by the Turkish Court of Appeals General Legal Assembly on 22 February 2012, in which the arbitration agreement was found invalid due to the lack of special authority of the signatory of the agreement to execute an arbitration agreement.²³⁴

2.3. Arbitrability

Arbitrability²³⁵ establishes which disputes can be lawfully submitted to arbitration.²³⁶ A finding of inarbitrability can act as a defense to the enforcement of an arbitration agreement or arbitral awards.²³⁷ It is because arbitration is a private proceeding with public consequences;

²³⁰ Fouchard & Gaillard & Goldman (1999) p: 242

²³¹ Born (2009) Vol.1; 626-629

²³² See Article II(1) of the New York Convention; *the parties must undertake to submit their disputes to arbitration*

²³³ Born (2009) Vol.1; p: 661; "*consent to underlying contract constitutes consent to arbitration agreement*"

²³⁴ Turkish Court of Appeals, General Legal Assembly, 22/2/2012, File No. 2011/11-742, Decision No. 2012/82

²³⁵ In some jurisdictions, this defense is referred to as *objective arbitrability* while, in other jurisdictions, it is termed the *non-arbitrability* doctrine. Born (2009) Vol.1 p: 767; Kroll & Lew & Mistelis (2003) p: 185; Gaillard & Savage (1999) p: 59

²³⁶ Carbonneau & Butler (2013) p: 575; Kroll & Lew & Mistelis (2003) p: 187

²³⁷ Ibid.

for instance, in the recognition and enforcement of the award.²³⁸ Inarbitrability limits the parties' right to engage in arbitration and the arbitrators' authority to rule. Inarbitrability can arise as a result of the subject matter of the dispute or because of contractual flaws in the arbitration agreement.²³⁹

While the issue of what disputes are arbitrable has now become less of a problem, some basic misconceptions about the subject of arbitrability still persist.²⁴⁰ Under subject-matter inarbitrability, a dispute cannot be submitted to arbitration as a matter of law because it involves matters that are directly linked to the *public interest*, and only the domestic courts have the sole authority on such issues because they are public bodies and have a public mandate.²⁴¹ To some extent, subject-matter inarbitrability overlaps with the *public policy* exception to arbitration.²⁴² In this circumstances, public interest considerations prevent the recourse to arbitration.

Neither the Model Law of 1985 or its 2006 revision contains a provision dealing with particular category of disputes to be *non-arbitrable*.²⁴³ Notwithstanding with that, the Model Law is limited to disputes that are *capable of settlement by arbitration*.²⁴⁴ Addition to this, arbitrability was repeatedly included in the agenda for the Model Law's revision and as well as the UNCITRAL Arbitration Rules' revision.²⁴⁵ Annotated Provisional Agenda of the UNCITRAL Working Group on the revision of the UNCITRAL Arbitration Rules, dated on 9 July 2008, para 10;

“The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability

²³⁸ Blackaby & Partasides QC (2015) p: 110

²³⁹ Kroll & Lew & Nistelis (2003) p: 188

²⁴⁰ Born (2009) Vol.1; p: 769

²⁴¹ Ibid, 770

²⁴² Ibid, 770-772; Blackaby & Partasides QC (2015) p: 112-123

²⁴³ Born (2009) Vol.1; p: 776; Kroll & Lew & Mistelis (2003) p: 199-200

²⁴⁴ See Article 34(2)(b)(i) and 36(1)(b)(i) of the Model Law; Blackaby & Partasides QC (2015) p: 110 (2.124)

²⁴⁵ Born (2009) Vol.1; p: 772-775

should identify the topics that were not arbitrable. It was suggested that studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. It was cautioned however that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time."²⁴⁶

Under the New York Convention, the arbitrability of the subject matter of a dispute may be at issue when a domestic court is called upon to *recognize* an arbitration agreement and refer the parties to arbitration,²⁴⁷ or when the court is requested to *enforce* a foreign arbitral award.²⁴⁸ To put in another way, the New York Convention provides for the law of arbitrability only from the perspective of recognition and enforcement.²⁴⁹

For the purpose of Article II(1) of the New York Convention, the subject matter of the dispute is capable of settlement by arbitration unless the court seized of an action on the merits determines that it has mandatory jurisdiction over the dispute, to the exclusion of arbitration.²⁵⁰ For the purpose of Article V(2)(a) of the New York Convention, the non-arbitrability of the subject matter can not constitute a defense to the enforcement of an award. The recognition and enforcement of an award may be refused only if the subject matter of the dispute is expressly reserved to the mandatory jurisdiction of a domestic court or authority, to the exclusion of arbitration.²⁵¹

Like Article V of the New York Convention, Article VI(2) of the European Convention clearly distinguishes between the law applicable to the issue of arbitrability and law governing the validity of the arbitration agreement. While the latter is primarily submitted to the parties'

²⁴⁶ Croft & Kee & Waincymer (2013)

²⁴⁷ See Article II(1) of the New York Convention

²⁴⁸ Ibid, Article V(2)(a)

²⁴⁹ Kroll & Lew & Mistelis (2003) p: 189-191

²⁵⁰ Arfazadeh (2001) p: 80

²⁵¹ Ibid.

choice and in the absence of a choice to the law of the seat of arbitration, each national court determines the arbitrability of a dispute according to its own law.²⁵²

Although it is not defined under either the TIAL Act No. 4686 or TCPL Act No. 6100, and likewise in Model Law, the term arbitrability may be simply defined as the ability of a dispute being duly and finally resolved through arbitration under the applicable laws in Turkey. There is no special provision specifically regulating arbitrability under the arbitration legislation of Turkey.

However, Article 1(4) of the TIAL Act No. 4686 provides the following provision; *“this law shall not be applicable to disputes relating to real (in rem) rights concerning immovable property located in Turkey and to disputes that are not at the free will of the parties.”* It is also worth to mention that this article does not apply to immovable property located outside Turkey.²⁵³ In the Turkish law, the disputes that are subject to the parties’ will are arbitrable.²⁵⁴ Thus, commercial matters are arbitrable under the Turkish law.²⁵⁵ Family law disputes, administrative law disputes or criminal issues cannot be referred to arbitration.²⁵⁶ The Turkish Supreme Court held that bankruptcy disputes are also not arbitrable.²⁵⁷ Similarly, in order to protect employees, the Turkish Supreme Court held that labor law disputes are not arbitrable (except disputes arising from termination and consequences of the termination of the employment contract).²⁵⁸ The Turkish Court of Appeals held in its various decisions that such matters are deemed not arbitrable in order to protect employees²⁵⁹ and consumers²⁶⁰. The main reason behind this practice is the belief of the Turkish Court of Appeals that State courts will be able to protect the rights of weaker parties. Such rights could not properly be protected in the arbitration proceedings.

²⁵² Kroll & Lew & Mistelis (2003) p: 192

²⁵³ See Article 1(3) of the TIAL Act No. 4686; *“This Law shall not apply to disputes concerning in rem rights of immovable properties located in Turkey or to disputes that are not subject to the parties’ wills.”*

²⁵⁴ Esin & Yesilirmak (2015) p: 37-42

²⁵⁵ Ibid, p: 43

²⁵⁶ Ibid, p: 44-45

²⁵⁷ Akinci (2016) p: 51

²⁵⁸ Ibid.

²⁵⁹ Turkish Court of Appeals, 9th Civil Law Chamber, 20/1/2009, File No. 2008/44630, Decision No. 2009/537

²⁶⁰ Turkish Court of Appeals, 13th Civil Law Chamber, 20/10/2008, File No.2008/6195, Decision No. 2008/12026

Under the Chinese law, two categories of disputes are excluded from arbitration: disputes concerning marriage, adoption, guardianship, child maintenance, inheritance; and administrative disputes falling within the jurisdiction of relevant administrative organs according to law.²⁶¹ In a jurisdictional context, any subject matter of the dispute that is not arbitrable under the law of the country, an arbitral tribunal has no jurisdiction on that matter and the arbitration agreement is considered void.²⁶² In addition, Article 17(2) of the Arbitration Law of the PRC provides for the conditions where the party to an arbitration agreement has no civil capacity or lack of it, it is no valid arbitration agreement also. Adherent to the international arbitral principles, any subject matter of the dispute involving coercion and fraud in an arbitration agreement shall be excluded from the arbitrability in the Arbitration Law of the PRC.²⁶³ The Arbitration Rules of CIETAC provides that generally commercial matters in relation to economic, trade and other disputes of a contractual or non-contractual nature based on an agreement of the parties are capable of being resolved by arbitration.²⁶⁴

Whether or not a particular type of dispute is arbitrable under a given law is, in essence, a matter of public policy for that law to determine.²⁶⁵ If the issue of arbitrability arises, it is necessary to have regard to the relevant laws of the different states that are concerned such as the law governing the party involved; the law governing the arbitration agreement; the law of the seat of arbitration; the law of the ultimate place of enforcement of the award.²⁶⁶ In conclusion, the significance of arbitrability should not be underestimated. It is important to be aware that it may be an issue.

2.4. Drafting the Arbitration Agreement

2.4.1. Arbitration Agreement and Its Content

²⁶¹ See Article 3 of the Arbitration Law of the PRC

²⁶² Ibid, Article 17(1)

²⁶³ Ibid, Article 17(3)

²⁶⁴ See Article 3(1) of the CIETAC Arbitration Rules

²⁶⁵ Blackaby & Partasides QC (2015) p: 111

²⁶⁶ Ibid, p: 124

The arbitration agreement serves the critical function of creating a framework for the parties' own private dispute resolution system outside of domestic courts.²⁶⁷ To ensure proper functioning of the system, the agreement should be drafted well. A well-drafted arbitration clause has a significant impact on how well the parties resolve the dispute. Unfortunately, in negotiating and drafting a contract, attorneys and parties too often do not focus on drafting the arbitration clause. This may be defective that it invalidates the arbitration agreement.

The arbitration contract must have basic legal and substantive content. It, must first of all, state that the parties agree to arbitrate and that they understand that the arbitration represents a surrender of the right to judicial remedies.²⁶⁸ A fair amount of conventional wisdom holds that whilst some arbitrators draft lengthy special form arbitration provisions, this is not generally necessary, thus, short and simple arbitration clauses are more sufficient.²⁶⁹ The arbitration clause shall be definite, clear and shall not let any ambiguities at all. In drafting an arbitration agreement before any dispute has been arisen, it is important to determine the *key issues* and then well incorporate such into the *language* of the arbitration agreement.²⁷⁰ The parties should explicitly state the matters that they want the arbitration agreement to cover.²⁷¹ It should be clearly seen that the parties have chosen to go to arbitration instead of other dispute resolution mechanisms. The *scope* of the arbitration agreement is another important issue that should be taken into consideration while drafting an arbitration agreement. Otherwise, the agreement may be considered as void or uncertain.

On the other hand, before drafting an arbitration agreement, the type of the arbitration should be determined (namely '*ad hoc*'²⁷² or '*institutionalized arbitration*').²⁷³ If there is no administering institution, and the parties do not agree on how to proceed, they may have to

²⁶⁷ Moses (2012) p:43-58

²⁶⁸ Carbonneau & Butler (2013) p: 667

²⁶⁹ Kroll & Lew & Mistelis (2003) p: 166

²⁷⁰ Carbonneau & Butler (2013) p: 668; Moses (2012) p:44; Kroll & Lew & Mistelis (2003) p: 166

²⁷¹ Ibid.

²⁷² See Article 2(3) of the ISTAC Arbitration Rules; "*In an ad hoc arbitration, the parties may agree for the appointment of the arbitrators by the Board. In this case, the fee shall be paid on the date of the application in accordance with the Istanbul Arbitration Center Rules on Costs and Fees Scales.*" In contrast, there is no any provision on this in the CIETAC Arbitration Rules as ad hoc arbitration is not an option under the Chinese law.

²⁷³ Carbonneau & Butler (2013) p: 670; Moses (2012) p: 46

resort to the Court. Whether the arbitration agreement is for an ad hoc arbitration or institutional arbitration, it is important for the agreement to be in *writing*.²⁷⁴ As noted earlier, a writing form is generally required for enforcement purposes under the New York Convention, and the Model Law, and it is also required by many national laws.

2.4.2. Choice of the Arbitrators

There are several different methods of appointing the solo arbitrator or the arbitral tribunals. The most common ones are by agreement of the parties, by an arbitral institution, by means of a list system and by a national court.²⁷⁵

One of the most attractive point of arbitration is that it allows the parties to submit their dispute to the judges that they choose. In the arbitration agreement, it is better for the parties to establish the core features of the sole arbitrator or the arbitral tribunal such as the *number* of the arbitrators and their *qualifications*. According to the Model Law and UNCITRAL Arbitration Rules in the case of failing its determination, the number of arbitrators shall be three.²⁷⁶ The cost, speed and expertise are the main factors for the parties in deciding the number of the arbitrators. If more than one arbitrator, it is usual for each party to nominate one arbitrator, leaving the third arbitrator to be appointed by the other two arbitrators by consensus.²⁷⁷ Not only the number of the arbitrators, but there also may be other essential aspects to set forth specific qualifications such as expertise in a particular field, or the ability to speak a particular language.²⁷⁸ However, it should be noted that specifying so many qualifications could make impossible to find arbitrators and it could possibly result in invalidating of the arbitration clause.

Many of these topics are invariably regulated by arbitral institutional rules. For example, in the text of the ICC Arbitration Rules, Articles 11-15 give more detailed explanation on appointment and confirmation of the arbitrators. It provides that where there is to be a sole

²⁷⁴ Ibid.

²⁷⁵ Blackaby & Partasides QC (2015) p: 240-245

²⁷⁶ See Article 10 of the Model Law; See Art. 7(1) of the UNCITRAL Arbitration Rules

²⁷⁷ Blackaby & Partasides QC (2015) p: 240

²⁷⁸ Carbonneau & Butler (2013) p: 671; Moses (2012) p: 47

arbitrator and the parties fail to reach an agreed nomination within thirty days from the communication of the request for arbitration to the other party, the arbitrator will be appointed by the ICC Arbitration Rules. The Rules also provide that, where there is to be an arbitral tribunal of three arbitrators, the third arbitrator will be appointed by ICC Court, unless the parties have agreed upon another procedure, in which case the agreed appointment must be made within a limited time.²⁷⁹

However, the ISTAC Arbitration Rules contain similar provisions with the ICC Arbitration Rules.²⁸⁰ The Arbitration Rules of ISTAC provides that, where the dispute shall be resolved by a sole arbitrator, the parties shall choose the sole arbitrator together; if the parties fail to choose the sole arbitrator within 30 days from the notification of the claimant's request for arbitration to the other party or within the additional time granted by the Secretariat, the Board shall appoint the sole arbitrator.²⁸¹ It also provides that, where the dispute shall be resolved by an arbitral tribunal, each of the parties shall choose one arbitrator in the request for arbitration and the answer to request for arbitration respectively; if one of the parties fails to choose an arbitrator, the Board shall appoint the arbitrator.²⁸²

In China, generally three arbitrators are appointed to form an arbitral tribunal. The parties' freedom of choice is limited when it comes to choosing arbitrators. The Arbitration Law of the PRC requires each arbitration institution to draw up a panel of arbitrators by profession.²⁸³ This requirement is generally seen as creating a compulsory panel system in China. According to the Arbitration Law of the PRC, where the parties concerned fail to decide upon the composition of the arbitration tribunal or fail to choose the arbitrator within the time limit prescribed by the arbitration rules, the chairperson of the arbitration commission shall make the decision.²⁸⁴

Article 13 of the Arbitration Law of the PRC specifies that an arbitrator must meet one of the following conditions: the arbitrator

²⁷⁹ See Article 12(4) and (5) of the ICC Arbitration Rules

²⁸⁰ See Article 12-17 of the ISTAC Arbitration Rules

²⁸¹ Ibid, Article 14(1)

²⁸² Ibid, Article 14(2)

²⁸³ See Article 13 of the Arbitration Law of the PRC

²⁸⁴ Ibid, Article 32

- (1) has been in arbitration work for eight years;
- (2) has worked as a lawyer for eight years;
- (3) has served as a judge for eight years;
- (4) has been engaged in legal research work and has a senior title; or
- (5) has acquired legal knowledge, worked in the fields of economics and trade, and possesses a senior title or has attained an equivalent professional level.

Similarly, the Arbitration Rules of CIETAC require the parties to nominate their respective arbitrators from CIETAC's designated arbitrators.²⁸⁵ Alternatively, if they agree to nominate from outside the panel, then that nomination is subject to confirmation by the Chairman of CIETAC.²⁸⁶

2.4.3. Seat of the Arbitration: The Law Governing the Arbitral Proceedings

The seat of arbitration is the jurisdiction in which an arbitration takes place legally. This must be distinguished from the location of any physical hearings or meetings that are held as part of the arbitration proceedings. The hearings or meetings do not necessarily have to be held at the seat of arbitration. It is essential to appreciate the connection between arbitration proceedings and the laws of the seat of arbitration.

The seat of the arbitration, in essence, is the legal jurisdiction to which the arbitration is tied. This tie to a certain location is significant as it will determine the procedure or rules which govern the arbitration (*the lex arbitri*).²⁸⁷ It will also determine which domestic court may intervene during the arbitration and ultimately the extent of this intervention. In other words, if any court intervention is needed or occurs during or after the arbitration, the domestic

²⁸⁵ Ibid, Article 26(1) of the CIETAC Arbitration Rules

²⁸⁶ Ibid, Article 26(2)

²⁸⁷ Blackaby & Partasides (2015) p: 167; "What then is the law governing the arbitration? It is, as the present authors trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures, the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations." *Smith Ltd v. H International* (1991) by English Judge; Moses (2012) p: 47

law governing arbitrations will have an impact on the proceeding.²⁸⁸ Thus that country's domestic laws are also then applicable to the arbitration. Given that there may be wide divergences between the extent of court intervention in the arbitral process and between mandatory laws that can apply, a party should consider their choice of seat carefully. Failure to do so can result in difficulties at an advanced stage in the arbitral process.

The seat of arbitration has a vital role in international arbitration proceedings. If the parties want to apply arbitration proceeding, they should determine the seat of arbitration by taking into account both legal and practical issues. It seems to me that, supportive legal system towards recognition of arbitral award is a huge advantage for the country to be promoted as an arbitration venue. Choosing the wrong seat can severely delay the arbitration, increase the risk of parallel court proceedings and allow the award to be challenged on broad grounds in local courts, which may not be reliable or may be in a jurisdiction where the counterparty is very well-connected, posing evident risks.

The New York Convention maintains the reference to the law of the country where the arbitration took place, and synonymously, to the law of the country where the award is made.²⁸⁹ This brings the clear territorial link between the seat of arbitration and the law governing that arbitration. This link is also maintained under the Model Law; *"the provisions of this Law, except Article 8, 9, 35 and 36, apply only if the seat of arbitration is the territory of this State"*.²⁹⁰ Furthermore, according to the Model Law, the parties are free to agree on the seat of arbitration, and failing such agreement, the seat of arbitration shall be determined by the arbitral tribunal.²⁹¹

As Article 18(1) of the UNCITRAL Arbitration Rules states that unless the parties have not previously agreed on the seat of arbitration, the seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. On the same issue, pursuant

²⁸⁸ Ibid, p: 166-176

²⁸⁹ See Article V(1)(a), (d) and (e) of the New York Convention

²⁹⁰ See Article 1(2) of the Model Law

²⁹¹ Ibid, Article 20(1)

to the ICC Arbitration Rules, the seat of the arbitration shall be fixed by the Court, unless agreed upon by the parties.²⁹²

In the arbitration legislation of Turkey, the TIAL Act No. 4686 provides that *“the seat of arbitration may be freely determined by the parties or an arbitral institution selected by the parties. In the event the parties have agreed upon an institutional arbitration, the seat of arbitration may be determined by the institution in accordance with its rules of arbitration. Where the parties have not agreed upon the seat of arbitration, the seat of arbitration is to be determined by the arbitral tribunal having regard to the specifics of the case.”*²⁹³ Beside this, a similar approach finds a place in the Arbitration Rules of ISTAC as well; *“unless otherwise agreed by the parties, the sole arbitrator or the arbitral tribunal may, after consulting with the parties, conduct hearings and meetings at any location, other than the seat of the arbitration deemed to be appropriate.”*²⁹⁴

In the same way, China’s arbitration law does not prohibit parties to a foreign-related arbitration with the seat in China from agreeing to conduct hearings or meetings outside China.²⁹⁵ The arbitration rules of the selected arbitration commissions will normally provide some guidelines as to where parties can choose to hold hearings and procedural meetings. For example, the Arbitration Rules of CIETAC provides that if both parties agree, and the tribunal considers it necessary, the case may be heard in other places with the approval of the secretary general of CIETAC.²⁹⁶

For countries trying to set up an arbitration venue, I believe they need to find a good model on their experience of designing attractive arbitration venue. There is no uniform standard of example. However, the most important task is to create a unique venue that could best attract businessman to choose as a venue.

²⁹² See Article 18(1) of the ICC Arbitration Rules

²⁹³ See Article 9(1) of the TIAL Act No. 4686

²⁹⁴ See Article 23(2) of the ISTAC Arbitration Rules; similarly, See Art. 9 of the TIAL No. 4686

²⁹⁵ Tao & Wunschheim (2007) p: 315

²⁹⁶ See Article 7(2) of the CIETAC Arbitration Rules

Finally, it is presently accepted that the seat of arbitration is a legal concept and not a geographical concept. In other words, the seat of arbitration creates a connection between the arbitration and legal systems.²⁹⁷ Even though they are two separate concepts, in principle the seat of arbitration is mostly considered as the applicable procedural law. That is why, determining the seat of arbitration has significant importance.

2.4.4. Language of the Arbitration

The very nature of international commercial arbitration entails parties, arbitrators and any other participant in the arbitral proceedings generally being of different nationalities and speaking different languages. Therefore, the language in which the proceedings will be held becomes of great importance for the characteristic purpose of arbitration itself. As also in the other elements of the arbitration agreement in case of no choice made by the parties regarding the language, the arbitral tribunal will decide on the applicable language as it is mentioned in the Model Law, UNCITRAL Arbitration Rules and as well as ICC Arbitration Rules.²⁹⁸

In Turkish law, Article 10(C)(1) of the TIAL Act No. 4686 provides that the arbitral proceedings may be conducted in Turkish or in the official language of a foreign state that is recognized by the Republic of Turkey. Therefore, it is possible for the language of arbitration to be a language other than Turkish. This provision therefore permits the selection of a language that is most appropriate in light of the specifics of the case at hand. The only restriction imposed by the TIAL Act No. 468 is that the language of arbitration must be the official language of a state that is recognized by the Republic of Turkey. Same provision also determines that the arbitration may have more than one language, and in the absence of an agreement between the parties as to the language of arbitration, the language of arbitration shall be determined by the sole arbitrator or the arbitral tribunal.

However, under the ISTAC Arbitration Rules, the parties freely determine the language of the arbitration. In the absence of such agreement between the parties, the sole arbitrator or the arbitral tribunal shall determine the language of the arbitration considering all

²⁹⁷ Esin & Yesilirmak (2015) p: 93

²⁹⁸ See Article 22(1) of the Model Law; See Art. 19(1) of the UNCITRAL Arbitration Rules; See Art. 20 of the ICC Arbitration Rules

circumstances and conditions.²⁹⁹ The language of the arbitration may be one or more languages.³⁰⁰ In the absence of such agreement between the parties, the sole arbitrator or the arbitral tribunal shall determine the language of the arbitration considering all circumstances and conditions. The language of the arbitration may be one or more languages.

Under the CIETAC Arbitration Rules, there is a statement that the arbitration will be conducted in Chinese language unless the parties agree otherwise.³⁰¹ It is also mentioned that CIETAC may designate another language as the language of arbitration having regard to the circumstances of the case.³⁰²

To conclude, in a mechanism of consensual resolution of international disputes, as international commercial arbitration is, language should not be looked at as a secondary matter. As it has been demonstrated, language can potentially affect the proceedings in many circumstances, leading in most cases to an inefficient arbitration.

2.5. Applicable Law to the Arbitration Agreement

Although the *lex arbitri*, which governs the arbitral proceedings that is almost always the law of the seat of arbitration, usually deals with the formal validity of the arbitration agreement, the law governing the arbitration agreement's substantive validity could be any of a number of laws.³⁰³ Thus, a contract may relate to several places. In such cases, several legal legislations exist applicable to the contract, emphasizing all necessary requirements to decide what system of law will govern.³⁰⁴ It is worth to mention that a good choice of governing law can act as a defense to the enforcement of an arbitration agreement or arbitral award.³⁰⁵

International commercial contracts, as a legal relationship between the parties, bring consequences to the legal world in case a dispute arises. The risk of an inefficient beginning of

²⁹⁹ See Article 24(1) of the ISTAC Arbitration Rules

³⁰⁰ Ibid.

³⁰¹ See Article 81(1) of the CIETAC Arbitration Rules

³⁰² Ibid.

³⁰³ Moses (2012) p:69

³⁰⁴ Blackaby & Partasides (2015) p: 185-224

³⁰⁵ Ibid.

what law should be used, which law should infer the parties' obligations are decisions that can be easily resolved with the specification of choice of law in the arbitration agreement.³⁰⁶

Analysis of the choice of the law governing an international arbitration agreement begins with the *separability* presumption.³⁰⁷ An international arbitration agreement is presumptively separable from the underlying contract with which it is associated. The applicable laws are separated from the law governing the agreement to arbitrate, the law governing the arbitration, and law applicable to the substance.³⁰⁸ The law of the seat of arbitration is the law that leading recognition and enforcement of the arbitration award. As a consequence, it is theoretically possible for the parties' arbitration agreement to be governed by a different law than the one governing their underlying contract.³⁰⁹

The independence of arbitration proceeding, in contrast to the concept of the *lex arbitri*, argues for the continued vitality of national law in the regulation of international commercial arbitration.³¹⁰ The choice of law, governing an international commercial arbitration agreement, is a chronic and important issue in the arbitral process. Choice of law subject arises in most disputes over the existence, validity, and interpretation of international commercial arbitration agreements, and remains to produce unfortunate uncertainty.

When the parties designate a particular country as the seat of arbitration, they enter that State's territory and subject themselves and the arbitration to the State's sovereign authority.³¹¹ The local regulation of arbitration cannot be ignored or suspended for purposes of international arbitral proceedings. Thus, the local courts can assist the arbitration (if they are authorized to do so under national law), but they also must apply the restrictions of the local law to the arbitration if the national legislation requires them to do so.³¹² The arbitral proceedings should not call into question domestic legality or its core objectives.

³⁰⁶ Moses (2012) p:72

³⁰⁷ Born (2009) Vol.1; p: 473. For more details on separability doctrine, see Chapter 2.6

³⁰⁸ Ibid, p: 476

³⁰⁹ Ibid, p: 474-486

³¹⁰ Ibid, p: 518

³¹¹ Moses (2012) p: 73

³¹² Ibid.

Early international arbitration conventions, such as the Geneva Protocol and Geneva Convention, do not address the question of what law governs the international arbitration agreement in detail. The Geneva Protocol provides that “*each of the contracting states recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction one of the parties is subject.*”³¹³ As may be seen, the Geneva Protocol does not refer to the possibility of choosing the law governing arbitration agreements, and did not provide that such law might differ from the one governing the underlying contract.³¹⁴ In comparison, the Geneva Convention indirectly addresses the law governing the arbitration agreement, provided that “*the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto.*”³¹⁵ However, the Geneva Convention does not prescribe the *choice of law* rule either.³¹⁶

By the year of 1958, the New York Convention addresses the choice of the law governing an international arbitration agreement more explicitly. The New York Convention discloses that the arbitration agreement is a separable agreement, subject to specialized international rules of both substantive and formal validity.³¹⁷ Structurally similar to the Geneva Protocol, the New York Convention does not prescribe the *choice of law* rule either. Instead, the New York Convention sets forth substantive international rules of presumptive substantive validity, directly applicable to international arbitration agreements.³¹⁸

The European Convention is even more relevant to the law applicable to the arbitration agreement. The European Convention provides a specialized set of choice-of-law rules, applicable only to *the validity of an arbitration agreement*.³¹⁹ At the same time, Article VII of

³¹³ See Article I of the Geneva Protocol

³¹⁴ Born (2009) Vol.1; p: 477

³¹⁵ See Article I(a) of the Geneva Convention

³¹⁶ Born (2009) Vol.1; p: 477

³¹⁷ See Article II(1), (2) and (3) of the New York Convention

³¹⁸ Born (2009) Vol.1; p: 477-478

³¹⁹ See Article VI(2) of the European Convention

the European Convention provides a separate regime for determination of the law governing the *substance of the dispute* between the parties, including particularly the law applicable to the parties' underlying contract.

Like the New York Convention, the Model Law does not address choice-of-law issues. However, also like Article II of the New York Convention, Article 8 of the Model Law sets forth a substantive rule that international arbitration agreements are valid and enforceable. Addition to this, the Model Law in parallel with the New York Convention, prescribes a specialized form requirement for international arbitration agreements,³²⁰ and permits annulment or non-recognition of an arbitral award if “*a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.*”³²¹

The ICC Arbitration Rules provides that “*the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*”³²² Again, there is no any provision prescribes the *choice of law* rule under the ICC Arbitration Rules.

In Turkish law, the principle of party autonomy entitles the parties to choose the applicable law.³²³ The arbitrators are bound by the choice of the parties under the principle of party autonomy in that once the parties have chosen the applicable law; the arbitrators are obliged to apply it.³²⁴ In fact, the TIAL Act No. 4686 provides that, *unless otherwise agreed*, where a state's laws have been agreed upon as the applicable law, it shall be deemed that the parties have agreed upon the applicability of the substantive laws of that state to the agreement, and not the provisions relating to the conflict of laws or procedural rules.³²⁵ In this respect, the Turkish Court of Appeals General Legal Assembly's decision, whereby it was held that the

³²⁰ See Article 7 of the Model Law

³²¹ Ibid, Article 34(2)(a)(i) and 36(1)(a)(i)

³²² See Article 21(1) of the ICC Arbitration Rules

³²³ Esin & Yesilirmak (2015) p: 77; Aygul (2014) p: 73-140

³²⁴ Ibid.

³²⁵ See Article 12(C) of the TIAL Act No. 4686

phrase *Turkish laws in force* covered Turkish procedural laws, has lost its validity in light of this provision contained in the TIAL Act No. 4686.³²⁶ It also provides that, in the absence of the choice of law to be applied to the substance of the dispute, the sole arbitrator or the arbitral tribunal decides according to the law with which they consider the dispute to be most closely connected.³²⁷ All thing considered, the arbitrators have great freedom over the method used to determine the law most closely connected to the dispute.

According to the General Principles of the Civil Law of the PRC, dated on 12 April 1986, and the Contract Law of the PRC, dated on 5 June 1999, the parties to a foreign-related contract have the right to freely choose the governing substantive law for any controversy arising under their contract.³²⁸ The parties are not obligated to choose the Chinese law as the law governing their contract. If the parties to a foreign-related civil relationship fail to choose or specify the governing law in their agreement, the Law of the Application of Law for Foreign-Related Civil Relations of the PRC, dated on 28 October 2010, provides as a general rule, that the applicable law is either the law of country of the party whose performance of the contract best reflects the characteristics and nature of the contract in question, or the law of the country that has the closest relation with the contract.³²⁹

2.6. Separability Doctrine

2.6.1. Definition and Sources

As a matter of law, the arbitral clause, whether it is a stand-alone agreement or a provision within the contract, is always distinct from the main contract. The *separability* doctrine establishes that the arbitral clause is a distinct entity, governed by its own legal rules and it is juridically separable and autonomous.³³⁰ Separability means that the arbitration clause in a contract is considered *to be separate from the main contract*. Thus, separability doctrine

³²⁶ Turkish Court of Appeals General Legal Assembly, 5/5/1999, File No. 1999/15-235, Decision No. 1999/273

³²⁷ See Article 12 of the TIAL Act No. 4686

³²⁸ See Article 145(1) of the General Principles of the Civil Law of the PRC; See Article 126(1) of the Contract Law of the PRC; “Parties to a foreign-related contract may select the applicable law for resolution of a contractual dispute, except otherwise provided by law.”

³²⁹ See Article 41 of the Law of the Application of Law for Foreign-Related Civil Relations of the PRC

³³⁰ Blackaby & Partasides QC (2015) p: 104

ensures that if one party claims that there has been a total breach of the contract by the other, the contract is not destroyed for all purposes. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration agreement survives for determining the mode of their settlement.

The arbitration agreement, as a rule is a procedural law contract. In contrast, the main contract is a substantive law contract.³³¹ These two contracts are different from each other. Therefore, the fate of an arbitration agreement is not tied to the fate of main contract. At the same time, the fate of main contract does not depend on the fate of the arbitration agreement. For this reason, the validity of both agreements should be examined separately.

We can describe separability as two fairly rules. Firstly, the arbitration clause may be governed by a different law than the main contract. Secondly, the invalidity of the main contract has no impact in and of itself on the validity of the agreement to arbitrate contained in it.³³²

One of the direct consequences that separability doctrine can have is the possibility of laws applicable to the parties' main contract be different from the one that is applicable to the arbitration agreement.³³³ An arbitration clause in an international contract may perfectly well be governed by a law different from that applicable to the underlying contract. Beside this, I would also like to point out that the doctrine of separability does not mean that the law that governs the arbitration agreement or clause should always be separate. It simply states that it is a *possibility* for another law to be applicable to the arbitration agreement or to main contract. As a matter of fact, in practice, the applicable law to the arbitration agreement and the main contract are often same.³³⁴

The doctrine of separability is endorsed by institutional and international rules of arbitration and as well as by national legislations. At this point, I would like to focus on the interpretation and practice of this doctrine and explore its implications in contract, private international, civil procedure and public law as well.

³³¹ Moses (2012) p: 19

³³² Ibid.

³³³ Savage & Gaillard (1999) p: 221

³³⁴ Blackaby & Partasides QC (2015) p: 104

Separability has been a widely accepted concept in most of jurisdictions, including the continental Europe, the USA, Turkey and China. As a widely accepted doctrine among most of jurisdictions, separability means that an arbitration agreement between the parties is independent from the main contract. This doctrine thus permits courts to entertain challenges specifically applicable to the arbitration agreement, and not to the contract as a whole.

The doctrine of separability is identified in the certain international commercial arbitration laws and arbitration rules. Even though, the New York Convention has no clear and direct statement on the principle of separability,³³⁵ the New York Convention states that recognition and enforcement may be refused if the party against whom such measures are sought can establish that “*the arbitration agreement is not valid under the law which the parties have subjected to it*” is the only possible way to refer this doctrine.³³⁶ Moreover, the New York Convention provides that the court should refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.³³⁷ This provision sets grounds to come to decision that the process of verifying an arbitration agreement is separate from the main contract. Thus, invalidity of the main contract would not prevent from referring the parties to arbitration as the court accept the principle of separability.³³⁸

Under the Model Law, it is provided that “*the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the main contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*”³³⁹ As may be seen, an arbitration clause shall be treated as an agreement independent of the other terms of the contract.

³³⁵ Gaillard (2005) p: 7-10

³³⁶ See Article V(1)(a) of the New York Convention

³³⁷ Ibid, Article II(3)

³³⁸ See the ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges. Published by the International Council for Commercial Arbitration (2011) available at http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf (Accessed on 27/8/17)

³³⁹ See Article 16(1) of the Model Law

Along the same line with the Model Law, the UNCITRAL Arbitration Rules include a provision that *“the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.”*³⁴⁰ For this purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

Also under the ICC Arbitration Rules, it is embodied that *“unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties’ respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.”*³⁴¹

In the Turkish arbitration legislation, the choice of both domestic arbitration (under the provisions of the TCPL Act No. 6100) and international arbitration (under the provisions of the TPIPL Act No. 5718) have been available in many circumstances in the past. Currently, the TIAL Act No. 4686 does not recognize arbitration held in Turkey as being purely local arbitration and it provides for an alternative to the application of the Turkish procedural laws in arbitration proceedings in Turkey.³⁴²

According to the TIAL Act No. 4686, *“no objection could be made against the arbitration agreement by arguing that the underlying contract is invalid or that the arbitration agreement is related to a dispute, which has not yet arisen.”*³⁴³

³⁴⁰ See Article 23(1) of the UNCITRAL Arbitration Rules

³⁴¹ See Article 6(9) of the ICC Arbitration Rules

³⁴² Esin & Yesilirmak (2015) p: 365

³⁴³ See Article 4 (*last paragraph*) of the TIAL Act No. 4686

The contract and the arbitration agreement are separate entities under the Turkish legal basis even if the arbitration agreement has been incorporated as a section of the contract itself.³⁴⁴ As such, the invalidity of the contract is different to the invalidity of the arbitration agreement. An arbitration clause that forms part of a contract can be treated as an agreement independent of the other terms of the contract and separable from the other parts of the contract. A decision by the arbitral tribunal that the contract is null and void does not extend ipso jure to a decision that the arbitration agreement is invalid. A null and void contract may contain a perfectly valid arbitration agreement.

The TCPL Act No. 1086 provides that “...both party could deputize a sole arbitrator or an arbitral tribunal for the controversy between them. An arbitration could be practiced on a special agreement as well as it may comprise of a circumstanced concerning condition that would possibly be manifested as a clause of the main agreement between the parties...”³⁴⁵ On the other hand, the new procedural law the TCPL Act No. 6100 provides that “...an arbitration agreement could be made either as a clause of the main agreement or as a completely separate agreement...”³⁴⁶

As far as the principle of separability is concerned, it is recognized by the Arbitration Law of the PRC and CIETAC Arbitration Rules.³⁴⁷ Under the Arbitration Law of the PRC, any amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement while the provision is similar under the CIETAC Arbitration Rules as to treat an arbitration agreement as independent and separate from all other clauses of the contract.³⁴⁸

Article 19 of the Arbitration Law of the PRC provides that “an arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement. The arbitration tribunal shall have the power to affirm the validity of a contract.” Article 57 of the Contract Law of the PRC also

³⁴⁴ Akinci (2011) p: 56

³⁴⁵ See Article 516 of the TCPL Act No. 1086

³⁴⁶ See Article 412(2) of the TCPL Act. No. 6100

³⁴⁷ See Article 19 of the Arbitration Law of the PRC; See Article 5(4) of the CIETAC Arbitration Rules

³⁴⁸ Tao & Wunschheim (2007) p: 304

provides that “*the invalidation, cancellation or discharge of a contract does not impair the validity of the contract provision concerning the method of dispute resolution, which exists independently in the contract.*”

In parallel with the Chinese national legislation regarding the doctrine of separability, the CIETAC Arbitration Rules provide that “*an arbitration clause contained in a contract shall be treated as a clause independent and separate from all other clauses of the contract, and an arbitration agreement attached to a contract shall also be treated as independent and separate from all other clauses of the contract. The validity of an arbitration clause or an arbitration agreement shall not be affected by any modification, cancellation, termination, transfer, expiry, invalidity, ineffectiveness, rescission or non- existence of the contract.*”³⁴⁹

2.6.2. Differences Between Separability and Competence-Competence

The doctrine of *competence-competence*, which is followed in most jurisdictions, provides that arbitrators are competent to determine their own competence – that is, they are empowered to decide their own jurisdiction to hear and determine the dispute before them.³⁵⁰

It is a general principle of international commercial arbitration that a tribunal is empowered to make a determination as to its own jurisdiction to deal with the substantive claims in dispute.³⁵¹ This permits arbitrators to determine their own jurisdiction as an initial matter. However, the fact that a tribunal can determine its own jurisdiction does not give it exclusive power to do so and certainly does not prevent an enforcing court that is not at the seat of the arbitration from re-examining the tribunal's jurisdiction.³⁵²

There have been many problems arising out of the decisions of an arbitrator on his own jurisdiction.³⁵³ When arbitral tribunal decides that a valid arbitration agreement does not exist between the parties, this decision brings the question that then how does the arbitral tribunal

³⁴⁹ See Article 5(4) of the CIETAC Arbitration Rules

³⁵⁰ See Article 16(1) of the Model Law; See Article 6(3) of the ICC Arbitration Rules

³⁵¹ Born (2009) Vol.1; p: 1048

³⁵² Ibid.

³⁵³ Carbonneau & Butler (2013) p: 576

decide that since it lacked jurisdiction to decide on its own jurisdiction. This question arises because there is not a basis for this jurisdiction.³⁵⁴

As leading conventions, the Model Law and the New York Convention provide multinational parties with a dispute resolution mechanism that enables them to have their disputes resolved by a neutral adjudication in order not to be affected by diminutions of national courts and to have easily enforceable judgments.³⁵⁵ To understand the authorization of arbitrators, the competence-competence doctrine must be scrutinized. Whereas the *positive effect* of the doctrine is widely recognized, the Model Law and the New York Convention are not clear on the *negative effect*, and different countries adopt different approaches regarding the negative effect of the competence-competence doctrine, which is concerned with who decides the arbitrator's jurisdiction when a party objects to the validity or scope of the arbitration agreement.³⁵⁶ Some apply the *prima facie approach*, which places greater value on the parties' interest for the purpose of preventing dilatory tactics and providing cost-efficiency. Others take a more *interventionist and presumptive approach*, which seeks to affirm the parties' intention at all stages in order to minimize the risk that parties who never agreed to arbitration are forced to participate.

The positive effect is to authorize arbitrators to determine their own competence at the outset.³⁵⁷ By ruling on the jurisdiction of the tribunal, this positive effect sets out a framework of concurrent jurisdiction of courts and arbitral tribunals. The negative effect is more controversial and barring courts from determining the competence of arbitrators at outset.³⁵⁸ The negative effect thereby restricts the function of the courts in order to provide the tribunal with the first opportunity to determine its own jurisdiction and the validity of the arbitration

³⁵⁴ Ibid.

³⁵⁵ Born (2009) Vol.1; p: 317-335

³⁵⁶ “The principle of competence-competence, in both its positive and negative effects, is at the heart of the self-contained character of international arbitration” Gaillard & Banifatemi; “Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice - Chapter 8: Negative Effect of Competence-Competence; The Rule of Priority in Favor of the Arbitrators” (2002) p: 269

³⁵⁷ Ibid, p: 259

³⁵⁸ This terminology was originally suggested by Emmanuel Gaillard in 1994: Goldman on International Commercial Arbitration (1999)

agreement.³⁵⁹ In this manner, the negative effect bars a court from reviewing the merits of the dispute when deciding on the existence or validity of the arbitration agreement prior to the arbitral tribunal. According to the negative effect, a state court may review the jurisdiction of a tribunal only at the enforcement stage. Such prioritization of tribunals over state courts concerning the review of validity is an essential feature of the negative effect.³⁶⁰

The principle of competence-competence is an important and widely accepted feature of modern arbitration law. This rule signifies the power of the arbitral tribunal to determine its own jurisdiction, which includes the jurisdiction to evaluate any objections with respect to the existence or validity of the arbitration agreement.³⁶¹ For justification, first reference was made in the Statute of International Court of Justice in which International Court of Justice can rule on its own jurisdiction.³⁶² Since then the doctrine was put in the International Centre for Settlement of Investment Disputes Convention (hereinafter referred as the “*ICSID Convention*”) and then most importantly, in the Model Law sets forth the principle of competence-competence.³⁶³

“the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

The doctrine of competence-competence, which holds that an arbitral tribunal may determine questions as to its own jurisdiction, is accepted in Turkish legislative regulations.³⁶⁴ Observing this principle as codified in the Model Law, the TIAL Act No. 4686 governs the procedure for jurisdictional challenges to be brought before the arbitral tribunal.³⁶⁵ Since a

³⁵⁹ Ibid, p: 262-266

³⁶⁰ Bermann (2012)

³⁶¹ Sklenyte (2003) p: 44

³⁶² See Article 36(6) of the Statute of ICJ: “*In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.*”

³⁶³ See Article 4(1) of the ICSID Convention; See Article 16(1) of the Model Law

³⁶⁴ Esin & Yesilirmak (2015) p: 172

³⁶⁵ See Article 7(H) of the TIAL Act No. 4686

jurisdictional objection is decided by the tribunal as a preliminary matter, any objection should be made with the first reply brief at the latest. A party is required to submit an objection as soon as they believe that the arbitral tribunal has exceeded its powers, or else the objection will not be entertained. However, if the arbitral tribunal concludes that the delay in filing an objection is justified, it may admit in objections at a later stage. Finally, in case the arbitral tribunal decides that it has jurisdiction, it will continue the arbitral proceedings and render an award.

Article 7(H) goes on to provide further parameters for jurisdictional challenges. When ruling on the tribunal's jurisdiction, an arbitration clause shall be treated as independent from the other terms of the contract. Therefore, even if the main contract is decided by the tribunal to be null and void, the arbitration clause is not invalidated.³⁶⁶ Furthermore, the fact that a party chose an arbitrator or participated in the formation of a tribunal does not invalidate its right to raise a jurisdictional objection.³⁶⁷

The TIAL Act No. 4686 limits the arbitral tribunal's authority to order a preliminary injunction or attachment by prohibiting it from issuing preliminary injunctions or attachments that are solely enforceable by governmental authorities.³⁶⁸ For example, real property owned by the respondent may not be seized based on a preliminary attachment ordered by an arbitral tribunal because the seizure of real property requires the involvement of execution officers. Similarly, the arbitral tribunal may not order the customs authority to prevent the respondent from taking its assets out of the country. Though Article 6 of the TIAL Act No. 4686 empowers arbitrators to grant interim measures, it was highly criticized by the Turkish scholar that such provision becomes meaningless where it is not enforceable in the Turkish courts.³⁶⁹ The inherent result of interim measures fails to find the meaning in the practice. As it is embodied within TIAL Act No. 4686, the arbitral tribunal may rule on its own jurisdiction.³⁷⁰

³⁶⁶ Akinci (2011) p: 133

³⁶⁷ Ibid.

³⁶⁸ Ibid, p: 135

³⁶⁹ Ibid.

³⁷⁰ See Article 7(H) of the TIAL Act No. 4686

However, in Turkish legal system, under the new TCPL Act No. 6100, the jurisdiction of the arbitrator to decide on their own jurisdiction.³⁷¹ Unlike the former TCPL Act No. 1086, the new TCPL Act No. 6100 allows an arbitrator to decide on its own jurisdiction. According to this former civil procedural code, arbitrators who resolve a dispute between the parties, have not been given the authority to decide on their jurisdiction.³⁷² In contrast, the TIAL Act No. 4686 provides that arbitrators have the power to decide on their own jurisdiction.³⁷³ In compliance with the TIAL Act No. 4686 and Model Law, the new TCPL Act No. 6100 recognizes the power of an arbitrator to decide on its jurisdiction.³⁷⁴

According to one approach, the authority to adjudicate a dispute is granted to state courts and therefore this power cannot be altered by freedom of contract. Arbitrators can not be given to render a final decision on a dispute since, this would be contrary to public policy. In this way, the legal protection duty of the courts has been considered as an exception. Therefore, the provision of the law, while recognizing this exception, provides some important limitations.³⁷⁵

According to another approach, arbitration held in accordance with the provisions of the former TCPL Act No. 1086, was significantly narrowed by the enactment of the TIAL Act No. 4686.³⁷⁶ During the period of application of the former TCPL Act No. 1086 of 1927, serious and significant differences between international arbitration and domestic arbitration provisions were present.³⁷⁷ However, the TCPL Act No. 6100 of 2011 contains provisions based on the TIAL Act No. 4686.³⁷⁸ Thus, the difference between the two laws relating to arbitration is resolved.

³⁷¹ See Article 422 of the TCPL Act No. 6100

³⁷² See Article 519 of the TCPL Act No. 1086

³⁷³ See Article 6 of the TIAL Act No. 4686

³⁷⁴ Akinci (2011) p: 133

³⁷⁵ Ibid, p: 134

³⁷⁶ Ibid, p: 135

³⁷⁷ Ibid, p: 137

³⁷⁸ See Article 407-444 of the TCPL Act No. 6100

In this new civil procedural code, the arbitral tribunal may also decide whether a valid arbitration agreement exists.³⁷⁹ Thus, in the TCPL Act No. 6100, the courts authority to decide on this matter is limited. Therefore, an arbitration clause contained in a contract shall be evaluated independently of any other provision. Even if an arbitral tribunal decides that the original contract is null and void, the validity of the arbitration agreement would not automatically be also deemed to null and void.³⁸⁰

The Defendant can make an objection to the jurisdiction of the arbitral tribunal in the reply submission at the latest. If this objection can not be made in the reply petition and arbitral tribunal concludes that the delay is justified, the objections not raised in timely manner may be accepted by the arbitral tribunal.³⁸¹ Parties might have personally chosen the arbitrators or might have been involved in the selection of arbitrators prior to making an objection. Even in this case, the jurisdiction of the sole arbitrator or the arbitral tribunal can be objected to.³⁸² If the arbitral tribunal has exceeded its authority during the process of arbitration, an objection must be made immediately.³⁸³ If this objection cannot be made in timely manner and if the arbitral tribunal concludes that the delay is justified the tribunal may accept the objection.³⁸⁴

The TIAL Act No. 4686 presents the issue of jurisdictional objections as one to be contested within the confines of arbitral proceedings. To give an illustration of what it means, let's look at a case³⁸⁵ where the validity of an arbitration agreement was contested before a court, the Turkish Court of Appeals ruled that, under the TIAL Act No. 4686, challenges of this sort should first be brought before the sole arbitrator or the arbitral tribunal. The Turkish Court of Appeals also stated that the decision of the sole arbitrator or the arbitral tribunal on jurisdiction would be subject to review in an annulment action brought against the final award.

³⁷⁹ Ibid, Article 422(1)

³⁸⁰ Akinci (2011) p: 135

³⁸¹ See Article 422(4) of the TCPL Act No. 6100

³⁸² Ibid, Article 422(2)

³⁸³ Ibid, Article 422(3)

³⁸⁴ Ibid, Article 422(4)

³⁸⁵ Turkish Court of Appeals Plenary Session of Civil Law Chambers, 18/7/2007, File No. 2007/15-444, Decision No. 2007/ 554

One such review was undertaken after an annulment action was brought before the Turkish courts. In this instance, the Turkish Court of Appeals annulled an award in which the arbitral tribunal denied that it had jurisdiction despite the existence of an arbitration agreement.³⁸⁶ The Court noted that the dispute between the parties was within the scope of the contract and that the procedure outlined by the arbitration agreement had been properly followed. As a result, the tribunal's award denying its jurisdiction was found to be invalid, and consequently, set aside.

In another decision on the issue of the arbitral tribunal's jurisdiction, the Turkish Court of Appeals found that arbitrators are bound by the requests of the parties and they cannot render a decision exceeding those requests.³⁸⁷ In this dispute, the defendant requested in its defense for an amount to be deducted from the claimed receivables and stated that it reserved its right to file a counterclaim regarding this deductible; however, the defendant did not file such a counterclaim. The arbitrators ruled for the collection of the deductible amount in favor of the defendant as if a counterclaim had been made, instead of deducting this amount from the plaintiff's receivable. The Turkish Court of Appeals determined that the award may be annulled because the arbitrators exceeded their authority.

The competence-competence doctrine does not exist in Chinese arbitration legislation and practice.³⁸⁸ Jurisdiction to rule on interim measures is within the competence of Chinese courts. The power to decide on jurisdiction lies not with the arbitral tribunals but with the courts and the arbitration institutions. Although China's Arbitration Law provides that arbitration tribunals have the authority to determine their own jurisdiction and competence, this right, generally speaking, is subject to the supervision and review of the courts.³⁸⁹ The Arbitration Law of PRC provides that if any party objects to the validity of an arbitration agreement – and thus, to the jurisdiction of the arbitrators – such objecting party may apply to either the arbitration tribunal or a People's Court for a ruling.³⁹⁰

³⁸⁶ Turkish Court of Appeals Plenary Session of Civil Law Chambers, 18/10/2006, File No.2006/15-609, Decision No. 2006/656

³⁸⁷ Turkish Court of Appeals Plenary Session of Civil Law Chambers, 18/7/2007, File No. 2007/15-444, Decision No. 2007/554

³⁸⁸ Tao & Wunschheim (2007) p: 309-312

³⁸⁹ Ibid.

³⁹⁰ See Article 20 of the Arbitration Law of the PRC

Under Article 5 of the PRC Arbitration Law, party autonomy is provided where the People's Court will not intervene in the arbitration process unless the arbitration agreement is null and invalid. It appears on the outset that such a provision accords with Article 8(1) of the Model Law.

In addition, Article 20 of the Arbitration Law of the PRC that seems to contradict the underlying ideology of Article 5 which provides that the jurisdiction of the People's Court takes precedence over that of the arbitration institution when one party asks the People's Court to rule on the validity of their arbitration agreement. The provision follows that the power of the people's court in reviewing the enforceability of arbitration agreements prevails.

Article 26 of the PRC Arbitration Law also addresses the jurisdictional challenge when a party fails to submit the arbitration agreement or to raise an objection before the first hearing, it will be treated as a waiver of the arbitration agreement and the People's Court will continue to try the case.

However, the Reply to Several Problems Concerning the Validity of the Arbitration Agreement promulgated by the SPC (hereinafter referred as the "*SPC Reply*") dated on 5 November 1998, provides that if one party submits the question of validity of an arbitration agreement to an arbitration tribunal while the other party submits the question to the People's Court, the People's Court should inform the arbitration tribunal to stop all work on the case pending the court's decision.³⁹¹ According to the 2006 Interpretation, an objecting party will lose the right to apply to the People's Court for a ruling on the validity of an arbitration agreement or the jurisdiction of the arbitration tribunal in two scenarios:³⁹² if the objecting party fails to object to the jurisdiction of the tribunal before the tribunal's first hearing; or if the objecting party fails to apply to the court before the arbitration tribunal has rendered a decision on validity of the arbitration agreement and its own jurisdiction.³⁹³ These objective-oriented measures certainly show more respect to parties' autonomy in drafting arbitration agreement that is in line with international arbitration norms.

³⁹¹ Tao (2012)

³⁹² See Article 13 of the 2006 Interpretation

³⁹³ Xia (2011) Int. Com. Arb. Vol.1.

Pursuant to the SPC Reply, the arbitral tribunal can only resume the arbitral proceeding if the court instructs it to do so. As such, the rule may provide the chance for the opposing party to use dilatory tactics by requesting judicial review, and eventually counteract the efficiency of arbitration. The SPC Reply further confirms the supremacy of judicial power in determining the arbitral jurisdiction vis-à-vis the arbitration commission, where the court is equipped with greater authority in reviewing the arbitration agreement.³⁹⁴

More significantly, prior to 2012, arbitration institutions in China, CIETAC in particular, were authorized to rule on jurisdiction. During that period, CIETAC would issue a preliminary ruling on jurisdiction based on a prima facie assessment. If the ruling of the tribunal and the arbitral institution was inconsistent, the arbitrator would have to follow the decision of the institution. Even though the revised CIETAC Arbitration Rules provide that CIETAC can delegate its power over jurisdiction to the arbitral tribunal, it still remains unclear as to when and in what circumstances CIETAC will do so.³⁹⁵

The separability and competence-competence principles are generally considered as the complementary of each other, while at the same time these two concepts overlap just partially.

As discussed above, the concept of separability means that the validity of the arbitration clause does not depend on the validity of the other parts of the contract in which it is contained. As long as the arbitration clause itself is validly entered into by the parties and worded sufficiently broad to cover non-contractual disputes, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity. Separability rescues many arbitration agreements from failing simply because they are contained in contracts of which the validity is questioned.³⁹⁶ The doctrine of competence-competence picks up where the doctrine of separability ends. This principle has two aspects.³⁹⁷ First, it means that arbitrators are the judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of the arbitration agreement itself, and thus the competence of the arbitrator is impugned, arbitrator does not have to stop proceedings but can continue the arbitration and consider whether he has jurisdiction. Second, an arbitration

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³⁹⁶ Moses (2012) p: 91-95; Born (2009) Vol.1; p: 1046-1050

³⁹⁷ Ibid.

agreement limits the jurisdiction of state courts. If the *prima facie* existence of the arbitration agreement is objected to, a court must refer the dispute to arbitration.³⁹⁸

Competence-competence principle allows arbitrators to examine their own jurisdiction. If the main contract would be void, with only competence-competence principle they would have no opinion other than just to decline jurisdiction.³⁹⁹ While the principle of separability gives right to arbitrators to declare that main contract ineffective, without necessarily concluding that the arbitration agreement likewise ineffective and therefore declining jurisdiction.⁴⁰⁰ In other words, the decision of arbitration of an arbitrator to retain jurisdiction and then declare a dispute contract ineffective must be founded on the principle of separability and not solely on the competence-competence. However, the doctrine of competence-competence goes further than the doctrine of separability and it gives the tribunal the right to determine challenges to its jurisdiction that go beyond the arbitration agreement itself.⁴⁰¹

In sum, the competence of the arbitral tribunal to rule on jurisdictional challenges is a corollary to the separability doctrine establishing the autonomous nature of the agreement.⁴⁰² In other words, the advantages of the doctrine of competence-competence comes very clear in the case when the doctrine of separability cannot serve as the basis for the arbitrator's jurisdiction over any direct challenge of the arbitration agreement rather than the main contract. It is conceivable that the doctrine of competence-competence and the doctrine of separability must be very carefully separated.

³⁹⁸ Ibid.

³⁹⁹ Born (2009) Vol.1; p: 1049

⁴⁰⁰ Ibid

⁴⁰¹ Ibid, p: 1064

⁴⁰² Ibid.

CHAPTER 3: RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: FROM A COMPARATIVE PERSPECTIVE

3.1. Applicable Rules on the Recognition and Enforcement of Foreign Arbitral Awards

The rules for the recognition and enforcement of foreign arbitral awards often differ from the rules for the recognition and enforcement of domestic arbitral awards.⁴⁰³ In many countries, foreign or international commercial arbitration agreements are subject to different legislative rules other than domestic arbitration agreements.⁴⁰⁴ Therefore, it is crucial to categorize an arbitration as to whether it is a domestic or foreign. In Turkish law, there are three different laws concerning arbitration. These are the TPIPL Act No. 5718, the TIAL Act No. 4686, and the TCPL Act No. 6100. Some of them have definitions regarding the international commercial arbitration law. The most important criteria are given under the TIAL Act No. 4686 as follow;⁴⁰⁵

“1. where the parties to the arbitration agreement have their domiciles or habitual residences or places of business in different States;

2. where one of the following is situated outside the State in which the parties have their domiciles or habitual residences or places of business; the seat of arbitration, which is determined in, or pursuant to, the arbitration agreement; [or] a place where a substantial part of the obligations arising from the underlying contract are performed or a place where the dispute has the closest connection;

3. where a shareholder of the company which is a party to the underlying contract that constitutes the basis for the arbitration agreement has brought foreign capital (into Turkey) in accordance with the laws concerning the encouragement of foreign capital or where a loan and/or guarantee agreement needs to be signed for the execution of the underlying contract;

⁴⁰³ Blackaby & Partasides QC (2015) p: 605-617; Moses (2012) p: 212

⁴⁰⁴ Ibid.

⁴⁰⁵ See Article 2 of the TIAL Act No. 4686

4. *where, in accordance with the underlying contract or with the underlying legal relationship, the movement of capital or of goods shall be made from one country to another.*”

However, it is necessary to emphasize the importance of the rules of international treaties which have come to assume major importance for the enforcement of foreign arbitral awards. International treaties *therefore* have priority over provisions of national laws.⁴⁰⁶ This mainly concerns three conventions, namely the Geneva Convention of 1927; New York Convention of 1958; and European Convention of 1961.⁴⁰⁷

The most important enforcement convention is the New York Convention. As of September 2017, the New York Convention has 157 State parties which includes 154 of the 193 United Nations Member States, each of which broadly agrees to enforce arbitral awards made in the other *contracting States* subject only to limited grounds for objection.⁴⁰⁸ Today, there is no such wide-ranging convention providing for the enforcement of court judgments.

In the Turkish legal system, the recognition and enforcement of foreign arbitral awards is mainly regulated by the TPIPL Act No. 5718, between articles 60 and 64.⁴⁰⁹ The New York Convention is also another main source of international commercial arbitration law of Turkey.⁴¹⁰ According to the Constitution of the Republic of Turkey,⁴¹¹ international conventions and treaties duly signed and ratified by the Turkish Republic have the same effect of statutory provisions in the hierarchy of norms. Turkey has been a party to the New York Convention that was ratified by the Turkish Parliament in 1992. In this context, the New York Convention is another legal basis regarding the recognition and enforcement of foreign arbitral awards provided that the foreign arbitral award is covered by the New York Convention’s field of application.

In the Chinese legal system, the Civil Procedure Law of the PRC, dated on 9 April 1991, contains some fundamental provisions that support international commercial arbitration.

⁴⁰⁶ Ibid.

⁴⁰⁷ Akinci (2011) p: 12-19

⁴⁰⁸ See <http://newyorkconvention1958.org> ; <http://www.newyorkconvention.org> (Accessed on 1/9/2017)

⁴⁰⁹ Akinci (2011) p: 18

⁴¹⁰ Ibid.

⁴¹¹ See Article 90 of the Constitution of the Republic of Turkey

Specifically, Chinese courts respect foreign-related arbitration agreements⁴¹² and allow the party of a foreign arbitral award to apply directly to the competent Chinese court for the recognition and enforcement of that award.⁴¹³ On the other hand, the Arbitration Law of the PRC does not mention the recognition and enforcement of foreign arbitral awards directly, but its provisions regarding respect and validity of arbitration agreements⁴¹⁴ mirror those of the New York Convention.

Substantially, the Model Law, the New York Convention and the TPIPL Act No. 5718 will be analyzed under this chapter. Besides this, I will provide a general overview of the Geneva Convention and the European Convention for a comparative evaluation as Turkey is a party to these treaties as well.⁴¹⁵

3.2. Recognition and Enforcement of Foreign Arbitral Awards Under the New York Convention and Model Law

Although arbitration is considered as a reasonable form of alternative dispute resolution, foreign arbitral awards are also subject to an enforcement procedure.⁴¹⁶ In this sense, the New York Convention provides a simplified procedure for the recognition and enforcement in the *contracting States*.⁴¹⁷

In Turkey, Turkish courts are legally required to enforce valid arbitration agreements regarding an arbitrable dispute and traditionally tend to be arbitration-friendly.⁴¹⁸ As being a party to the New York Convention, Turkey ensures that *foreign* and *non-domestic* arbitral awards will not be discriminated against and such awards will be recognized in Turkey, unless specific conditions stipulated in the New York Convention.⁴¹⁹

⁴¹² See Article 269 of the Civil Procedure Law of the PRC

⁴¹³ Ibid, Article 257

⁴¹⁴ See Article 9 of the Arbitration Law of the PRC

⁴¹⁵ For more details on the sources of Turkish international commercial arbitration, see Chapter 1.2.1

⁴¹⁶ Gaillard & Banifatemi (2008) p: 210-214; van den Berg (2009) p: 36

⁴¹⁷ Including Turkey as it became a party to the New York Convention in 1992

⁴¹⁸ Akinci (2011) p: 6

⁴¹⁹ Nomer & Eksi & Gelgel (2016) p: 16

However, only *foreign* arbitral awards can be enforced in Turkey under the New York Convention, and contains two definitions for this condition.⁴²⁰ On the one hand, the awards made in a *country other than Turkey* are considered as foreign awards, regardless of the nationality of the parties or the law applied to the arbitration procedure.⁴²¹ On the other hand, in principle, the arbitration procedures with foreign elements conducted in Turkey fall within the scope of TIAL Act No. 4686.⁴²² However, if the parties explicitly agree that the arbitration procedure is not conducted in accordance with the TIAL Act No. 4686, such arbitral award with a foreign element made in Turkey is considered as foreign and therefore can be enforced under the New York Convention.⁴²³

However, Article I(1) of the New York Convention sets out its scope:

“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

In China, the New York Convention is now being strictly implemented. On one hand, in judicial practice, the courts have made great achievements in interpreting and applying the New York Convention properly to favor international commercial arbitration.⁴²⁴ However, there are still some unsettled problems because the courts practices are limited by outdated legislation.⁴²⁵ Additionally, the Arbitration Law of the PRC differs with that of the countries where international commercial arbitration is highly developed.⁴²⁶ With respect to foreign arbitral awards made outside of Mainland China, the Civil Procedure Law of the PRC provides

⁴²⁰ See Article I(1) of the New York Convention

⁴²¹ Akinci (2011) p: 9

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Xia & Sun (2011) p: 162

⁴²⁵ Ibid.

⁴²⁶ For instance, Article 267 of the Civil Procedure Law of the PRC adopts criteria of “*foreign arbitral body*” to decide whether an arbitral award is *foreign* or not, and the Arbitration Law of the PRC only recognizes *institutional* arbitration.

that the recognition and enforcement of such foreign arbitral awards in China will be determined in accordance with the New York Convention which became effective in China on 22 April 1987. In other words, international treaties, which China is a party to, take priority over the Civil Procedure Law of the PRC.⁴²⁷

However, five grounds listed in Article V of the New York Convention are the exhaustive grounds for refusal.⁴²⁸ It should be noted that the defendant has the *burden of proof*⁴²⁹ and can only resist the enforcement of the award on the basis of the grounds set forth in Article V(1).⁴³⁰ The court can refuse the enforcement on its own motion on the grounds identified in Article V(2).⁴³¹

First of all, there should be a valid arbitration agreement between the parties. In this regard, the defendant may argue the *incapacity* of the parties or *invalidity* of the arbitration agreement.⁴³² The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. However, it is noted that the governing law of incapacity is not clearly indicated in the New York Convention.⁴³³ In this case, the Court will examine the incapacity argument after determining the *applicable law* in accordance with Turkish law.⁴³⁴ As for invalidity, the defendants frequently argue that the arbitration agreement is not valid because it is not in writing as required in Article II.⁴³⁵ Illegality, duress or fraud are the other common examples of this ground.⁴³⁶ The court will examine this argument in accordance with the law chosen by the parties in the agreement.⁴³⁷ If there is no such choice, the applicable law is the law of the country where the award was made.⁴³⁸

⁴²⁷ Chen & Howes & McDermott & Will & Emery (2009)

⁴²⁸ Bermann (2014) p: 48-74

⁴²⁹ Ibid.

⁴³⁰ Ibid, p: 48-64

⁴³¹ Ibid, p: 65-74

⁴³² See Article V(1)(a) of the New York Convention

⁴³³ Blackaby & Partasides QC (2015) p: 617-622; van den Berg (2009) p: 83-104

⁴³⁴ See Article 9 of the TPIPL Act No. 5718

⁴³⁵ Blackaby & Partasides QC (2015) p: 617; van den Berg (2009) p: 83-104

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

The defendant's *right to fair hearing*⁴³⁹ should not be violated in the arbitration procedure. In this respect, the defendant should be given proper notice of the appointment of the sole arbitrator or of the arbitration proceedings. In *institutional arbitration*, the notification procedure must be carried out in compliance with the relevant institution's regulations. In *ad hoc arbitration*, it must be gradually performed considering the arbitration agreement and the rules designated by the arbitration court, in order.⁴⁴⁰ What's more, the defendant should be able to present his case during the arbitration procedure. For instance, the defendants frequently argue that they were not granted sufficient time to submit their defense petition and evidence.⁴⁴¹

The arbitral award should be issued within the scope of the arbitration agreement and the parties' submissions.⁴⁴² In this regard, the arbitral tribunal's jurisdiction is limited to deciding the issues that the parties have agreed to submit to it for determination.⁴⁴³ The enforcement of the award may be refused if the composition of the arbitral tribunal and the arbitration procedure was not in compliance with the arbitration agreement, or in the absence of an agreement on these matters, was not in accordance with the law of the country where the arbitration took place.⁴⁴⁴ The enforcement of the award may be refused, if the arbitral award has not become *binding* on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.⁴⁴⁵ At this point, I would like to underline that *bindingness*⁴⁴⁶ is indicated in the New York Convention is different than the *finalization* of the foreign judgments or arbitral awards. Born claims that "*one of the principal innovations of the New York Convention was its abandonment of the double exequatur procedure, in addition, the New York Convention specifically abandoned the finality requirement.*"⁴⁴⁷

⁴³⁹ See Article V(1)(b) of the New York Convention

⁴⁴⁰ Bermann (2014) p: 52

⁴⁴¹ Ibid, p: 53

⁴⁴² See Article V(1)(c) of the New York Convention

⁴⁴³ Bermann (2014) p: 56

⁴⁴⁴ See Article V(1)(d) of the New York Convention

⁴⁴⁵ Ibid, Article V(1)(e)

⁴⁴⁶ While the Geneva Convention requires that the award should become final in the country where it was made, however, there is no definition of the meaning of the binding is given in the New York Convention.

⁴⁴⁷ Born (2009) p: 1008

The court can refuse enforcement of an award on its own motion if subject matter of the difference is not capable of settlement by arbitration under Turkish law.⁴⁴⁸ For instance, the TCPL Act No. 6100 provides that disputes arising from in rem rights on immovable property and disputes that are not governed by the parties' mutual agreement are not arbitrable.⁴⁴⁹ It is also specified in the TIAL Act No. 4686.⁴⁵⁰ The Court also examines whether the arbitral award is contrary the public policy⁴⁵¹ of Turkey.⁴⁵² Transactions against Turkish tax, customs or foreign exchange regime, obligations arising from contracts based on drug trafficking or gambling are among examples to Turkish public policy.⁴⁵³

On the other hand, under the Chinese practice, the grounds are mainly divided into two groups which must be raised *by the party* resisting in recognition and enforcement and which can be raised *by the Court*. While first group is tuned with Article V of the New York Convention, second group lays down different orders.⁴⁵⁴ According to the Arbitration Law of the PRC, contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated;⁴⁵⁵ and marital, adoption, guardianship, support and succession disputes and administrative disputes may not be arbitrated.⁴⁵⁶ Beside this, violation of mandatory provisions or regulations; unfair and unjustifiable outcome of the arbitral awards; low-price dumping by foreign enterprises to the Chinese market, and violation of fairness and justice principle in the Chinese law; and violation of Chinese judicial sovereignty and jurisdiction of the Chinese Court are contrary to the Chinese public policy. This means that the application of public policy as a ground for refusing the enforcement of international arbitral awards in China is a major concern to foreign traders and investors.⁴⁵⁷

⁴⁴⁸ See Article V(2)(a) of the New York Convention

⁴⁴⁹ See Article 408 of the TCPL Act No. 6100

⁴⁵⁰ See Article 1 of the TIAL Act No. 4686

⁴⁵¹ See the last sub-title of this Chapter "*Comparative Evaluation*" where the public policy will be analyzed in more detail by indicating a decision made by the Turkish Court of Appeals.

⁴⁵² See Article V(2)(b) of the New York Convention

⁴⁵³ Soylu (2016) p: 86

⁴⁵⁴ Zhang (2015) p: 43-51

⁴⁵⁵ See Article 2 of the Arbitration Law of the PRC

⁴⁵⁶ Ibid, Article 3

⁴⁵⁷ Fei (2010)

In the matter of reservations to the New York Convention, it provides two reservations which a State may adopt when acceding to the Convention.⁴⁵⁸ The first reservation allows a State to apply the New York Convention on the basis of *reciprocity*, and the second one allows a State to apply the New York Convention only to those transactions considered *commercial* under its own national law.⁴⁵⁹

Subject to the statutory restrictions, it should be noted that Turkey signed the New York Convention with two reservations which mentioned above. In other words, the awards made only in the territory of another *contracting State* can be enforced in Turkey⁴⁶⁰, and only the awards based on *commercial disputes* can be enforced in Turkey.⁴⁶¹ As the New York Convention refers to the national law, the Convention can be applied only if the dispute indicated in the arbitral award falls within the scope of *commercial affairs*⁴⁶² in Turkish law.

As a result, the foreign awards rendered in another *contracting State* on disputes classified as *commercial*, under the Turkish Commercial Law No. 6102, enacted on 13 January 2011, will be enforced according to the New York Convention.⁴⁶³

In acceding to the New York Convention, China also adopted both the *reciprocity* reservation and the commercial reservation. Briefly, China will recognize and enforce only those arbitral awards made in other *contracting States*.⁴⁶⁴ The commercial reservation limits the scope of recognition and enforcement only to arbitral awards that have been rendered in commercial cases.⁴⁶⁵ By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of the recognition and enforcement created by the New York Convention.⁴⁶⁶

⁴⁵⁸ See Article I(3) of the New York Convention

⁴⁵⁹ Blackaby & Partasides QC (2015) p: 618-619; Bermann (2014) p: 11-12

⁴⁶⁰ Akinci (2011) p: 234; Bermann (2014) p: 20-22

⁴⁶¹ Ibid.

⁴⁶² It should be kept in mind that the definition of commercial affair under Turkish Commercial Law is very broad. Therefore, the reservation is not very effective in limiting the scope of the New York Convention.

⁴⁶³ See Article 3-19 of the Turkish Commercial Law No. 6102

⁴⁶⁴ Zhang (2015) p: 10-12

⁴⁶⁵ Ibid.

⁴⁶⁶ Nia (2017) p: 160

I believe, it is very precious to find out how the enforcement of foreign arbitral awards designated under the Model Law, promulgated in 1985 as amended in 2006, as the TIAL Act No. 4686 is based mainly on the Model Law.⁴⁶⁷ The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards.⁴⁶⁸ Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.⁴⁶⁹

By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between *international* and *non-international* awards instead of relying on the traditional distinction between *foreign* and *domestic* awards.⁴⁷⁰ This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the seat of arbitration in international cases.⁴⁷¹

As the Model Law,⁴⁷² any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable. The Model Law does not lay down procedural details of the recognition and enforcement, which are left to national procedural laws and practices.⁴⁷³ The Model Law merely sets certain conditions for obtaining enforcement under its Article 35(2).

In brief, I believe that it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as in the New York Convention.

⁴⁶⁷ Akinci (2011) p: 16

⁴⁶⁸ See Article 35-36 of the Model Law

⁴⁶⁹ See <http://www.newyorkconvention.org/uncitral/model%20law> (Accessed on 1/9/17)

⁴⁷⁰ Born (2009) Vol. 2; p: 2702

⁴⁷¹ Nia (2017) p: 124

⁴⁷² See Article 35(1) of the Model Law

⁴⁷³ Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006

3.3. Recognition and Enforcement of Foreign Arbitral Awards Under the TPIPL Act No. 5718

As mentioned in the previous chapter, arbitration proceedings in Turkey are regulated under different legislation. Firstly, *domestic* arbitration is a matter of the TCPL Act No. 6100 contains the provisions that apply to disputes that have a) no foreign element; and b) Turkey agreed as the seat of arbitration.⁴⁷⁴ Secondly, the only specific law relating to the *international arbitration* proceedings is the TIAL Act No. 4686 contains the primary provisions to be applied in disputes a) with a foreign element where Turkey is the agreed seat of arbitration; or b) where the parties, the sole arbitrator or the arbitral tribunal have agreed that the TIAL Act No. 4686 will apply.⁴⁷⁵

In the past, foreign awards and foreign judgments based on the same grounds and in the same circumstances.⁴⁷⁶ In 2007, the TPIPL Act No. 5718 was enacted to give effect to the international treaties, which Turkey is a party to, enabling them to become operative in Turkey.

In respect of enforcement of foreign arbitral awards in Turkey, provisions of the TPIPL Act No. 5718 are applicable *only* if the award is decided by a non-contracting State to the New York Convention.⁴⁷⁷ I also want to emphasize that there are no significant differences between the rules of enforcement provided in the TPIPL Act No. 5718 and the provisions of the New York Convention.

Under the TPIPL Act No. 5718, only the foreign arbitral awards that are final, executable and binding for the parties can be enforced.⁴⁷⁸ According to this, a final award that is enforceable in Turkey is also binding in Turkish national courts and arbitral tribunals sitting in Turkey.⁴⁷⁹ The finality of award will have to be considered under the *lex arbitri*,⁴⁸⁰ the

⁴⁷⁴ Soylu (2016) p: 37-60; Akinci (2016) p: 6-22

⁴⁷⁵ Ibid.

⁴⁷⁶ Akinci (2011) p: 235-248

⁴⁷⁷ Soylu (2016) p: 135-141

⁴⁷⁸ See Article 60 of the TPIPL Act No. 5718

⁴⁷⁹ Ibid.

⁴⁸⁰ Redfern & Hunter (2004) p: 92 "*Lex arbitri*" is the Latin term for law of the place where arbitration is to take place in the conflict of laws. It covers a broad range of matters, many of which involve procedural issues, and it

enforceability under Turkish law, and therefore, under the New York Convention in case of a foreign award.⁴⁸¹

Under the TPIPL Act No. 5718,⁴⁸² the Court shall refuse the request for enforcement of foreign arbitral award if:

- a. *There is an absence of an arbitration agreement or an arbitration clause;*
- b. *The subject of the matter of the dispute is not capable of settlement by arbitration under the laws of Turkey (such as civil status cases);*
- c. *The recognition or enforcement of the award would be contrary to the public policy and general ethics of Turkey (such as military related issues);*
- d. *The party, against whom the award is invoked, was not properly presented through the arbitration process;*
- e. *The person against whom the enforcement of the arbitral award is invoked, was not given proper notice about the selection of the arbitrators or he has not been given an opportunity to present his arguments and defend himself;*
- f. *The arbitration agreement or arbitration clause is not valid under the law to which the parties have agreed or if there is no such agreement, according to the law where the arbitration award was rendered;*
- g. *The selection of the arbitrators or the procedural rules applied by the arbitrators is contrary to the agreement of the parties or, if there is no such agreement, contrary to the law where the arbitration award was rendered;*
- h. *The arbitral award is on a matter that is not included in the arbitration agreement or clause, or, if it is party outside the scope of the agreement it will not be enforced as to that part;*
- i. *The award submitted for the recognition and enforcement has not yet become binding on the parties, or has been set aside or suspended by a competent body.*

is generally to be found in the law of the seat of the arbitration, which tends to be the place chosen by the parties for the conduct of arbitration. Redfern and Hunter mentioned the idea of universal *lex arbitri* “the law governing arbitrations would be the same throughout the world” in the sense that it is illusory since each state has its own national characteristics, interests and concept of arbitration implementation.

⁴⁸¹ Soylu (2016) p: 135-141

⁴⁸² See Article 62 of the TIPPL Act No. 5718; similarly, See Article V of the New York Convention

The examination of the recognition and enforcement request by the Turkish Courts is limited to determination of the fact that whether the arbitral award and the arbitral proceedings meet the conditions under the TPIPL Act No. 5718 or the New York Convention. In Turkish legal practice, if trial Courts determine the case in relation to its merits, then such decision would be *ultra vires* and the Appellate Courts⁴⁸³ may overrule the decision of the recognition and enforcement accordingly.⁴⁸⁴

As an exception to this above mentioned general rule; if the foreign arbitral award violates the main principles of the public policy and general ethics of Turkish legal system, the Courts may rule the award regarding the merits as well if one of the parties of the dispute also sought for relief on those merits.⁴⁸⁵

3.4. Recognition and Enforcement of Foreign Arbitral Awards Under Chinese Law

In general, a foreign arbitral award is entitled to enforcement in China pursuant to Article III of the New York Convention. Due to the accession to the New York Convention on 2 December 1986, China is subject to the *reciprocity* reservation that the Convention will be applicable to the awards made *within the territory of another contracting state*.⁴⁸⁶

Apart from the New York Convention, the SPC Opinions provides a classification of domestic and non-domestic arbitral awards depending on the presence of a *foreign element*.⁴⁸⁷ That being said, inconsistencies arise in categories dividing arbitral awards under the Civil Procedure Law of the PRC. An international arbitral award shall fall in the categories of an award made by the foreign-related arbitration institution and an award made by a foreign arbitration institution.

⁴⁸³ Court of Appeals (American English); Appeals Court (British English); Yargıtay (in Turkish)

⁴⁸⁴ Nomer & Eksi & Gelgel (2016) p: 57-58; Baklaci & Akinturk (2010) p: 150

⁴⁸⁵ Ibid.

⁴⁸⁶ Zhang (2014) p: 86

⁴⁸⁷ Ibid, p: 140

According to the latest Civil Procedure Law of the PRC, when there is a conflict between the rules of China's civil procedure law and the Convention in the recognition and enforcement of foreign arbitration, the Convention's rules take precedence, except with regard to those clauses of the Convention on which China has reserved.⁴⁸⁸

In the Ningbo case,⁴⁸⁹ the Ningbo Intermediate People's Court held that the ICC award made in China shall be considered as a *non-domestic award* under Article I of the New York Convention. Accordingly, the court decided to recognize and enforce the award because of no grounds that existed in the New York Convention for refusing to enforce an award. Such a decision reflects a positive trend in opening up the market for international arbitration in China to foreign arbitration institutions, however, this ruling only reflect the view of a particular court and the lack of certainty and consistency in other Chinese courts is still an issue for most foreign enterprises when choosing an arbitration institution in China.

Furthermore, under Article 12 of the 2006 Interpretation, the SPC mandates that any jurisdictional challenge on the basis of a non-existent or invalid arbitration agreement, whether it is foreign-related or domestic, will be received by the intermediate people's court generally equipped with better qualified judges in the commercial arbitration arena.⁴⁹⁰

Article 58 of the Arbitration Law of the PRC specifies the People's Court may set aside an arbitral award based on public policy considerations. If the People's Court determines that the enforcement of the award goes against the social and public interest it will not allow enforcement on the ground that the violation threatens the moral order of the country of sovereignty of the Chinese courts.⁴⁹¹

As the New York Convention applies to the mutual recognition and enforcement of arbitration awards between countries; it does not extend to mutual recognition and enforcement between mainland China and Hong Kong, Macau, and Taiwan. For that, China has established

⁴⁸⁸ See Article 260 of the Civil Procedure Law of the PRC

⁴⁸⁹ *supra* note 194

⁴⁹⁰ Zhang (2014) p: 147

⁴⁹¹ *Ibid*, 315-333

a separate mechanism for the mutual recognition and enforcement of such arbitration awards.⁴⁹²

One of the difficult issues in the recognition and enforcement of foreign arbitration awards in China is the identification of *foreign-related* elements.⁴⁹³ Current civil law in China allows a dispute that contains a foreign element to choose a foreign arbitration organization for dispute resolution. Even without any foreign related element in the contract parties, objectives, and content, some domestic companies in China still prefer to use the foreign arbitration process.

To determine whether an arbitration clause is valid or not, it must first choose the *applicable law* for the arbitration.⁴⁹⁴ With respect to the question of how to confirm the applicable law in foreign commercial arbitration, the Convention has provided that the court should prioritize the application of the law that was agreed upon by the parties.

Currently, the principal laws in China that identify foreign arbitration awards include the New York Convention, to which China acceded in 1986, the Civil Procedure Law of the PRC, amended in 2012, and the relevant documents issued by the SPC. The Convention has applied a double standard, both based on the definitions of *territory* and *Non-domestic*. According to Article 1, Clause 1, the Convention should be applied to not only *awards made in the territory of a state other than the state where the recognition and enforcement of such award[s] are sought*, but also the *awards not considered as domestic awards in the state where their recognition and enforcement are sought*.⁴⁹⁵

However, in the Civil Procedure Law, the standard is based on the arbitration organization. In accordance with the Law: “*if an award made by a foreign arbitral*

⁴⁹² “Arrangement of the SPC on Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region”

“Arrangement of the SPC on Mutual Enforcement of Arbitration Awards between the Mainland and the Macau Special Administrative Region”

“Regulation Concerning Recognition and Enforcement of Arbitration Awards in the Taiwan Region”

⁴⁹³ Zhang (2014) p: 284

⁴⁹⁴ Ibid, p: 287

⁴⁹⁵ Ibid, p: 291-292

organization requires the recognition [and] enforcement by a people's court of the People's Republic of China [,] the party concerned shall directly apply to the intermediate people's court of the place the party subjected to enforcement has his domicile or his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded [and] acceded to by the People's Republic of China with the principle of reciprocity."⁴⁹⁶ However, at the same time, the SPC has published the Information Concerning the Implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards that China acceded. It stipulates that China apply this Convention to the recognition and enforcement of the arbitration award made in another state's territory.⁴⁹⁷

In summary, there are three different standards applicable to the definition of a foreign arbitration award, which are derived, separately, from the New York Convention, Civil Procedure Law of the PRC, and Information Concerning the Implementation of the New York Convention that China acceded.

I believe that China will enhance its system for the recognition and enforcement of foreign arbitration awards. Indeed, China currently is exploring actively certain new actions concerning the recognition and enforcement of foreign arbitration awards (free trade zone etc.).

3.5. Comparative Evaluation of the National Legislations and International Conventions on the Enforcement of Foreign Arbitral Awards

I assume that evaluation of the Turkish national legislation and Turkey's international obligations regarding international commercial arbitration in the last decade is progressive. In the overall evaluation of the legal framework regarding international commercial arbitration in Turkey and the legislation especially the recent changes have been positive and been in tune with international qualifications. Below, I will provide insight into the main differences and similarities among the Geneva Convention, European Convention, New York Convention and Model Law by indicating their significance in Turkey's and China's legal practices.

⁴⁹⁶ See Article 283 of the Civil Procedure Law of the PRC

⁴⁹⁷ See Article 1 of the Information Concerning the Implementation of the New York Convention

Article VII of the New York Convention provides that the Convention does not affect the validity of other international treaties on the recognition and enforcement of arbitral awards which are in force in the enforcement State. And it also specifies that the parties are entitled to seek the recognition and enforcement of an award pursuant to either the New York Convention or another treaty or national laws, whichever is more favorable.⁴⁹⁸

First of all, the way foreign arbitral awards is defined in the Geneva Convention and the New York Convention are, however, not much different.⁴⁹⁹ Both emphasizes on the dispute being *commercial* in nature. The requirement that the award be *binding* is established by the New York Convention,⁵⁰⁰ which replaced the requirement in the Geneva Convention that the award be *final*.⁵⁰¹ While the Geneva Convention requires that the award should become *final* in the country where it was made,⁵⁰² however, there is no definition of the meaning of the *binding* is given in the New York Convention. The Geneva Convention lays down mainly five conditions⁵⁰³ for the enforcement of an award abroad and additionally three in the following provision.⁵⁰⁴ The New York Convention lists the grounds for refusing the recognition and enforcement under Article V(1) and (2) as mentioned above. On the other hand, in the European Convention and the New York Convention, the attention rightly focuses on the *refusal* of the recognition and enforcement of foreign arbitral awards. At first the plan, therefore, is the question on what grounds the decision rendered in the country and may be subject to denial of its recognition and enforcement in the country. Grounds contained in the European Convention⁵⁰⁵ is almost similar to those contained in the New York Convention.

⁴⁹⁸ Gaillard & Banifatemi (2008) p: 169

⁴⁹⁹ See Article 1(1) of the 1923 Geneva Protocol; See Article I(3) of the New York Convention

⁵⁰⁰ See Article III of the New York Convention

⁵⁰¹ See Article 1(d) of the Geneva Convention

⁵⁰² Ibid.

⁵⁰³ Ibid, Article 1(a-e)

⁵⁰⁴ Ibid, Article 2(a-c)

⁵⁰⁵ See Article IX(a-d) of the European Convention

With regard to *public policy*, the Geneva Convention,⁵⁰⁶ the New York Convention⁵⁰⁷ and the Model Law⁵⁰⁸ have a public policy exception for awards contrary to the principles of the law and awards violating fundamental principles of the law. However, the New York Convention and the Model Law clearly portrays that the public policy should be that of the enforcement State.⁵⁰⁹ As a matter of fact, it helps those countries to exercise discretion and to preserve their state control over the international arbitral disputes.⁵¹⁰ In comparison, this rule is even not mentioned under the Geneva Convention.

As mentioned earlier, the Model Law supplements, without conflicting with, the regime of the recognition and enforcement created by the New York Convention. The Model Law distinguishes between *international* and *non-international* awards instead of relying on the traditional distinction between *foreign* and *domestic* awards.⁵¹¹ This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the seat of arbitration in international cases.

With respect to the relationship between the New York Convention and national law of the State in which enforcement is requested, the New York Convention does not establish a comprehensive procedural regime for the recognition and enforcement of foreign awards.⁵¹² The New York Convention only provides rules on the burden of proof and the documents to be submitted by the requesting party. It is silent on other procedural matters. The New York Convention provides that contracting States shall recognize and enforce arbitral awards in accordance with the rules of procedure of the State where the award is relied upon.⁵¹³ Thus, the other procedural matters for the recognition and enforcement of foreign awards are governed by national law.

⁵⁰⁶ See Article 1(e) of the Geneva Convention

⁵⁰⁷ See Article V(2)(b) of the New York Convention

⁵⁰⁸ See Article 36(1)(b)(ii) of the Model Law

⁵⁰⁹ Milhem (2012) p: 17-23

⁵¹⁰ Ibid.

⁵¹¹ Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration

⁵¹² Gaillard & Banifatemi (2008) p: 208

⁵¹³ See Article III of the New York Convention

As mentioned above, there are no significant differences between the rules of enforcement provided in the TPIPL Act No. 5718 and the provisions of the New York Convention. However, one of the most important difference between the TPIPL Act No. 5718 and the New York Convention is about the determination of the *foreign element* of an award.⁵¹⁴ While the principle of territoriality is accepted by the New York Convention,⁵¹⁵ the TPIPL Act No. 5718 has not defined the foreign arbitral award.

With regard to *public policy*, it is an undefined area in Turkish laws, and the New York Convention only refers to *international public policy* rather than domestic. However, narrow interpretation of public policy is not each case adopted by the Turkish Court of Appeals. The notion of public policy is rather regarded as vague and subjective under Turkish Law and the judges have wide discretion in terms of interpretation of public policy.⁵¹⁶ Nevertheless, based on the decision of the Constitutional Court stating that “... *the power granted to the legislator can under no circumstances be used to undermine or exclude the public policy...*”, this wide discretion granted to the judges is with limitations.⁵¹⁷

Recent decisions by the Turkish Court of Appeals provide insight into when an arbitral award seated in Turkey may be annulled or when a foreign arbitral award may be denied enforcement for violating or contravening public policy. In a decision, the Turkish Court of Appeals ruled that customs and tax laws pertain to public policy, and as a result, foreign arbitral awards calling for receivables that contravene the tax legislation may be denied enforcement on the basis of the public policy clause found in Article V of the New York Convention.⁵¹⁸ According to the Turkish Court of Appeals, in such cases the merits of the dispute may be partially examined by the Court, but only to the extent necessary to determine whether the award is contrary to public policy; thus, the merits of the case would not technically be reviewed. The Turkish Court of Appeals reversed the court of first instance’s decision to enforce the foreign arbitral award stating that the investigation conducted was not sufficient to determine whether enforcement would result in tax evasion and violate the tax legislation.

⁵¹⁴ Akinci (2011) p: 259

⁵¹⁵ See Article I(1) of the New York Convention

⁵¹⁶ Ibid.

⁵¹⁷ Decision of the Constitutional Court, File No. 1985/1, Decision No. 1986/4

⁵¹⁸ Turkish Court of Appeals, 19th Civil Law Chamber, 15/9/2009, File No. 2007/5703, Decision No. 2009/8256.

Subsequent to a 2012 decision, the Turkish Court of Appeals ruled that an arbitral award regarding receivables in violation of the tax legislation may also be annulled on the basis that customs and tax laws are a matter of public policy, while stating that partial review of the merits may be necessary to examine objections relating to public policy.⁵¹⁹ In this case, which concerned a dispute between a Turkish governmental agency and a telecommunications company, the Court found the arbitral award to violate public policy because the award ruled that it was no longer mandatory for the telecommunications company to make previously agreed-upon payments to the state for its expenses. The Turkish Court of Appeals held that even though these payments for the authority's expenses are not taxes, they represent an important and continuous form of income deriving from the transfer of public services by the state, and thus, cannot be left to the discretion of the telecommunications company. Also of note in this decision was the Court's finding that compliance with public policy shall be evaluated pursuant to the governing law chosen by the parties, which was Turkish law in this particular case. Consequently, the award was annulled pursuant to Article 15 of the TIAL Act No. 4686.

In another enforcement decision, the Turkish Court of Appeals examined the extent to which an arbitration agreement may be contrary to public policy if such agreement grants a superior position to one of the parties during the arbitral proceedings. In this case, the Court ruled that an arbitration agreement or clause granting the right to appoint the arbitral tribunal to only one of the parties would be invalid, and, as a result, not enforceable. However, since the arbitration agreement in this case granted the right to choose the arbitral tribunal to both parties, the agreement is valid and cannot be considered against public policy.⁵²⁰ The Court also found that an arbitration agreement providing the choice between two alternative arbitration centers is valid since the parties clearly intended to submit any dispute to arbitration. On the other hand, in a different decision, the Turkish Court of Appeals refused enforcement of an arbitral award rendered in a different arbitral institution than the one determined in the arbitration agreement.⁵²¹

⁵¹⁹ Turkish Court of Appeals, 19th Civil Law Chamber, 14/4/2012, File No. 2012/1885, Decision No. 2012/5598.

⁵²⁰ Turkish Court of Appeals, Plenary Session of Civil Law Chambers, 8/2/2012, File No. 2011/13-568, Decision No. 2012/47

⁵²¹ Turkish Court of Appeals, 13th Civil Law Chamber, 17/4/2012, File No. 2012/8426, Decision No. 2012/10349

Finally, in a decision regarding the enforcement of a foreign court decision,⁵²² the Turkish Court of Appeals' General Assembly for Unification of Judgments addressed the issue of whether a foreign judgment that does not contain reasoning violates public policy. The Court held that, although it is mandatory for all Turkish court decisions to contain the court's reasoning, this cannot be a ground on which to deny the enforcement of a foreign judgment. Such a requirement would contravene the principle of *lex fori*, whereby a judgment is subject to the procedural laws of the country where it is rendered. During the course of determining whether a lack of reasoning violates public policy, the Court provided examples of what would constitute a public policy violation:

- a. *the violation of fundamental principles of Turkish law, Turkish morals and public decency;*
- b. *the basic notion of justice and general policy behind the Turkish legislation, fundamental rights and freedoms in the Turkish Constitution;*
- c. *the general principles of international law;*
- d. *the good faith principle of private law; and*
- e. *the violation of human rights and freedoms.*

Regarding the enforcement of foreign arbitral awards, the General Assembly of the Turkish Court of Appeals has defined *public policy* as follows:

*"... public policy is entire set of rule and institutions which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time..."*⁵²³

A judge shall use this discretion considering the conditions and characteristics of each specific case. At this point, I would like to analyze a decision of the Turkish Court of Appeals which is deemed as the violation of public policy under Turkish law.⁵²⁴

On 17 April 2012, the Turkish Court of Appeals set aside an arbitral award related to an arbitration proceeding conducted under the ICC Arbitration Rules and seated in Istanbul for

⁵²² Turkish Court of Appeals, Plenary Session of Civil Law Chambers, 26/11/2014, File No. 2013/11-1135, Decision No. 2014/973

⁵²³ Turkish Court of Appeals, General Assembly, 8/2/2012, File No. 2011/13-568, Decision No. 2012/47

⁵²⁴ Turkish Court of Appeals, 13th Civil Chamber, 17/4/2012, File No. 2012/8426, Decision No. 2012/10349

a case arising out of a concession agreement subject to Turkish law between a state agency and a telecommunications company, where the latter should pay a contribution of %0.35 of its gross sales to the treasury. The telecommunications company initiated arbitration proceeding claiming that it was not supposed to pay a contribution to the treasury and as a result prevailed in arbitration. Upon filing of a set aside action by the state agency on grounds that the award was contrary to the public policy and that the arbitral tribunal exceeded its authority under Article 15 of the TIAL Act No. 4686, the local court dismissed the set aside request. The state agency appealed the local court's decision and the Turkish Court of Appeals then overruled the decision and set aside the relevant arbitral award due to the violation of public policy. With this decision, the Turkish Court of Appeals made a distinction between public policy in local law and in private international law stating that *"public policy in local law is the entire set of rules protecting the fundamental structure and fundamental interests of the Turkish society... The notion of international public policy is more limited compared to that of local law. Therefore, a situation considered as a violation of public policy in local law may not be considered as violation of public policy in international law."* The court also determined that *"in the present case, the arbitration agreement between the parties provides that the dispute shall be resolved by Turkish law, thus in terms of determination of the violation of public policy, the notion of public policy as per the applicable Turkish law should be considered."* In this decision, the Turkish Court of Appeals referred to the doctrinal definition of public policy as mentioned above and added that although the treasury share and contribution fees which were agreed to be paid under the concession agreement are not deemed as tax debts, they are continuous and significant items of income arising out of the transfer of the State's public service. Accordingly, an arbitral award ruling that the telecommunications company is not supposed to pay such fees violates the purpose of the State's income generation, the mandatory principles of Turkish law and thus public policy. This decision on set aside proceedings is significant given that the Turkish Court of Appeals adopted a broad definition of public policy.⁵²⁵

As for the Chinese law, it is noteworthy that as New York Convention provides that signatory states may refuse to recognize and enforce arbitral awards that are contrary to the State's public policy, for purposes of the public policy exception, the Chinese courts have

⁵²⁵ Akinci (2016) p: 98-114; Baklaci & Akinturk (2010) p:159

generally accepted the terminology in the Civil Procedure Law of the PRC,⁵²⁶ which provides that a court may refuse the enforcement of an arbitral award if it determines that the award is against the social and public interest of China.⁵²⁷

In order to achieve a better understanding on how the Chinese courts apply the concept of public policy to foreign arbitration awards, I will analyze a specific case study below.⁵²⁸

On 22 December 1995, one Chinese company, Jinan Yongning Pharmaceutical Co., Ltd. (Yongning Company), and three non-Chinese companies signed a contract to set up a joint venture. The joint venture contract provided that any disputes arising under the contract would be submitted to arbitration under the rules of the ICC in Paris. Subsequently, a leasing dispute occurred between the Yongning Company and the joint venture entity. A Chinese court, accepting jurisdiction over the dispute, ruled in favor of the Yongning Company, and ordered that the assets of the joint venture be impounded. As a result of this impounding, the operation of the joint venture was suspended and the joint venture was eventually closed. In July 2005, the three non-Chinese parties to the underlying joint venture contract, invoking the arbitration clause in the contract, commenced an ICC arbitration in Paris against the Yongning Company. After hearing both sides, the ICC arbitration tribunal ruled that the Yongning Company had breached the joint venture contract by petitioning a Chinese court to impound the assets of the joint venture. As a result, the ICC tribunal ordered the Yongning Company to pay US\$6,458,708.40 as damages.

Because the Yongning Company did not pay the money mandated by the ICC arbitration award, the three non-Chinese companies lodged a lawsuit in Jinan Intermediate People's Court on 10 September 2007, seeking the court's recognition and enforcement of the foreign arbitral award. The Court, however, held that the arbitration clause in the joint venture contract only bound the disputes between the contracting parties, and therefore did not bind the leasing disputes between the Yongning Company and the joint venture. As a result, the Chinese court ruled that the ICC arbitration award, by purporting to resolve a dispute that was subject to the jurisdiction of the Chinese courts, violated China's *judicial sovereignty* and Chinese

⁵²⁶ See Article 274 of the Civil Procedure Law of the PRC

⁵²⁷ Xia (2011); Chen & Howes & McDermott & Will & Emery (2009)

⁵²⁸ See <http://www.hg.org/article.asp?id=35495> (Accessed on 5/9/17)

public policy. Accordingly, the Jinan Intermediate People's Court held that the arbitral award should not be enforced, which decision was affirmed by the SPC.

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The dispute arose from a letter of guarantee that contained an arbitration agreement. According to the arbitration clause, arbitration proceedings were to be conducted pursuant to the Arbitration Rules of CIETAC, where a final award was rendered. Upon the respondent's failure to comply with the award, the claimant commenced enforcement proceedings before the commercial court of first instance.

The respondent opposed the enforcement action on the grounds that: (i) the competent court was the Civil Court of First Instance, not the Commercial Court of First Instance; (ii) the claimant should have provided the security required of foreign applicants, in the absence of an available exemption; and (iii) the originals or duly authorized copies of the arbitral award and the agreement containing the arbitration clause, and certified translations of these, were not submitted. The respondent also argued that enforcement of the arbitral award should be refused on certain grounds stated in Article 62 of the TPIPL Act No. 5718, which is similar to those provided in Article V(1) of the New York Convention, namely that the arbitral tribunal violated the respondent's right to defense, that the respondent was not notified of the appointment of the arbitral tribunal and of the arbitration proceedings, that the arbitral award did not refer to such facts, and that it was not notified of the arbitral award.

The Commercial Court of First Instance rejected all of respondent's allegations and ordered enforcement. On appeal, the Court of Appeals upheld the appeal. It held that the Commercial Court of First Instance had erred in law in ordering enforcement since the original or duly authorized copies as well as certified translations of the arbitration clause/agreement and the award had not been submitted. The Court opined as follows:

“In a claim for the enforcement of a foreign arbitral award, the claimant must submit the original and certified copies of the documents stated in Article 61(1) of the TPIL. According to this provision: *‘The claimant must submit the following documents, together with copies for*

⁵²⁹ X v. Y, Turkish Court of Appeals, 19th Civil Law Chamber, 10.11.2015, File No. 2015/14419

the respondents, when requesting enforcement of a foreign arbitral award: a) original or duly authorized copy of the arbitration agreement or clause; b) original or duly authorized copy of the final, binding and enforceable arbitral award; and c) translated and certified copies of the documents stated in (a) and (b).’ Contrary to the decision of the trial court and its reasoning, rendering a decision without the application of this provision and on an insufficient examination is against the law and must therefore be overruled.”

The Commercial Court of First Instance's decision was unanimously overruled.



CONCLUSION

This thesis gives a brief introduction to the *international commercial arbitration legislation* of Turkey and China, and as well as explores the scope and content of the *recognition and enforcement of foreign arbitral awards* in both countries.

Turkey has many advantages by way of geography, being a bridge between Asia and Europe, with its cultivated people and good education system. More importantly, having a strong government support that devoted to making the country financial hub and popular arbitration center is the inherent advantage of Turkey to promote the *culture of arbitration*.

Since the introduction of the Arbitration Law of the PRC, arbitration activity has exploded in China, tracking the rapid expansion of economic and business activity in the region. Indeed, CIETAC is now reputed to be one of the busiest arbitral institutions in the world. Yet, despite its rapid growth and *increasing popularity*, the law and practice of arbitration in China is not often well understood outside of China, not least because of its procedural peculiarities and the absence of uniform or clear rules on a number of issues.

Notwithstanding a trend of convergence towards transnational standards, Chinese arbitration still retains some peculiarities; although China has acceded to the *New York Convention*, the *Arbitration Law of the PRC* is different from *Turkish Arbitration Law* in some respects. However, arbitration institutions in China may play a fundamental role in filling the gaps, catalyzing and anticipating the process of reform. The new *CIETAC Arbitration Rules* aimed at modernizing the arbitration framework, introducing innovative provisions on delicate issues like interim relief, the language of the proceedings and the taking of evidence.

Whereas Turkey's international commercial arbitration law largely consists of the Model Law, China's international commercial arbitration law is substantially different from the Model Law, and generally provides a lower level of *party autonomy*. Among other things, an *ad hoc arbitration*, with its seat in Mainland China, will not be recognized according to the Arbitration Law of the PRC. Ad hoc arbitration is available under Turkish International Arbitration Law. On the other hand, China's arbitration legislation only allows *foreign-related* arbitrations to have their seats outside Mainland China. In Turkey, there is no such restrictions under Turkey's arbitration legislation.

The main finding of this thesis is that, the *competence-competence* doctrine is generally accepted in Turkish arbitration legislation. Regarding the *interim measures*, Turkish courts are empowered to decide before or during the arbitral proceeding when a party or arbitrator requests. The courts will appoint the arbitrator if there is a dispute among the parties regarding such an appointment. By contrast, the competence-competence doctrine is not recognized in Chinese arbitration legislation and practice. Furthermore, with regards to the *appointment of arbitrators*, the parties' freedom of choice is limited. Along the same line, the *seat of arbitration* is not a concept expressly provided in the Chinese arbitration legislation, while the freedom of choosing the seat of arbitration is widely recognized in the Turkish arbitration legislation. CIETAC Arbitration Rules, however, specifies the parties' freedom to choose the seat of arbitration. In addition to these, the Article 15 of the TIAL Act No. 4686 seems to provide a convenient arbitration system to the practitioners. However, the Turkish courts do not seize the same approach with the legislator and display a different attitude in the *set aside* proceedings. On the other hand, Article 58 of the Arbitration Law of the PRC stipulates a very limited set aside reasons, when compared to Turkish law.

Another key point to remember is that, in the Turkish legal system, the recognition and enforcement of foreign arbitral awards is mainly regulated by the *TPIPL Act No. 5718* and the New York Convention. Nevertheless, provisions of the TPIPL Act No. 5718 are applicable only if the award is decided by a non-contracting State to the New York Convention. On the other hand, the *Arbitration Law of the PRC* does not mention the recognition and enforcement of foreign arbitral awards directly. With respect to foreign arbitral awards made outside of Mainland China, the *Civil Procedure Law of the PRC* provides that the recognition and enforcement of such foreign arbitral awards will be determined in accordance with the New York Convention. Whereas the Turkish courts have a supportive role as regards enforcement of arbitral awards, the Chinese courts easily impose judicial restrictions and narrow textual interpretations when determining the *validity of arbitration* agreements. As it is examined above, it is clearly noticeable that national courts play an important role in arbitration processes, in regard to *public policy*, in Turkey and China. This role can be complementary and sometimes interventionist at different stages of the arbitration process. The courts can react either by request from any of the parties or upon the initiative of the arbitral tribunal. But we also see an almost unique system in both of these countries.

To sum up, the legal infrastructures of Turkey and China are suitable for development and promotion of arbitration. Having a reputable arbitration center and maintaining its competitiveness as an arbitral seat would greatly contribute to the Turkey's and China's legal systems; and enhance the reliability in international platform. I truly believe that further efforts will be made in improving services for cross-border commercial disputes, and in promoting the development and enforcement of dispute settlement both in Turkey and China. There is no doubt that the number of cases being resolved under the auspices of foreign arbitral institutions will grow. Adoption of the Model Law will make Chinese laws more suitable to the increasingly globalizing business world.



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