The Development of Arbitration Law in Turkey and the Comparison of the New Act with UNCITRAL Model Law

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1 HISTORICAL DEVELOPMENT OF ARBITRATION LAW

Arbitration is not a new concept in Turkish law; it was regulated as early as the Ottoman Civil Code, Mecelle (1870) within Article 1790. However, the modern meaning of legislation relating to arbitration was codified only in the 1920s after Turkey was established; first, regulated by the Code of Civil Procedure (hereinafter referred to as the CCP) in 1927 and then the International Private and Procedural Law 1982 (hereinafter referred to as the IPPL), and finally the International Arbitration Act (hereinafter referred to as the IAA). Turkey now has a modern arbitration system after a long period of ratification of treaties and amendments to its Constitution.

1.1 Constitutional amendments

In the late period of the Ottoman Empire, most of the economic investment sector was given to foreign investors with concession agreements because of the need for technological modification in the main industrial sectors and a shortfall of money from domestic sources. The misuse of these concession agreements by the foreign investors and the lack of regulation by law caused economic dependence on and political interference from foreign governments. It was commonly argued that the capitulations were one of the main reasons for the collapse of the empire. As a result, the new Concession Agreements Act 19101 allowed investment agreements only with Turkish joint stock companies.

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1 Menafi-I Umumiye Müteallik İniyaz Hakkında Kanun.
Until the 1980s, the state-controlled economical system had continued. After the 1980s, due to the increase in globalisation and free trade and the need for improvement in technological and infrastructure sectors, the economical policies of Turkey changed: privatisation has started; a liberal economy system has been adopted; foreign investment is also welcomed. However, the restrictions and prohibitions imposed by constitutional and administrative law lasted until 1999. The Turkish Constitutional Court did not permit the Government to make contracts under the framework of the build, operate and transfer model\(^2\) or other kinds of agreements with foreign investors such as production of electricity by the companies apart from National Electric Company\(^3\) and construction and maintenance of the highways.\(^4\) Thus, the government had to change some articles of the Constitution. The amendments and reforms of the Constitution aim to clear all obstacles to attracting foreign investment.

The amendments of the Constitution in Articles 125 and 155 with Act 4446\(^5\) have allowed the Government to conclude the concession contracts with foreign investors regarding public services. It entitles the parties to exclude the administrative procedure in the disputes having a foreign element and to refer them to international arbitration. Act No. 4492 has amended some of the rules of the Act of the Council of State and of the Administrative Procedural Act.\(^6\) With Act 4575, the power of the Supreme Administrative Court to examine, review and approve is limited only to making recommendations; there is no power to change, or jurisdiction to make, concession contracts that refer to the arbitration. Besides, to prevent delay, the law imposes a two-month time limit that commences with the submission of the case. The other legislation changes have supported this new arbitration-friendly environment: Act No 4493 has expanded the applicability of the build, operate and transfer contracts\(^7\) and Act No. 4501 has regulated the procedure of arbitration related to the disputes in concession agreements in public services that have a foreign element.\(^8\) There are also some other acts which were enacted in relation to arbitration such as Act No 4586: The Law for the Oil Pipe Lines,\(^9\) Act No 4734: The Regulation for Bidding of the Public Goods and Services\(^10\) and Act No 4875: Foreign Direct Investment Act.\(^11\) According to another amendment, Article 90(5) of the Constitution states that you cannot claim the unconstitutionality of the international treaties at the Constitutional Court. Therefore, international treaties have special importance in Turkish law since an international treaty has a privilege compared with a national law in the event of conflict between them. Those improvements to Turkish law made in 1999 and 2000 enabled foreign investment in the public sector and gave freedom to refer those disputes to international arbitration.

\(^2\) Build–Operate–Transfer Act (BOT Act) Act No. 3996.
\(^3\) Turkish Electricity Administration Act (TEK Act) Act No. 3096.
\(^4\) General Directorate of Highways Act (KGM Act) Act No. 3465 SK.
\(^6\) Ibid., No. 23913, dated 21 December 1999.
\(^7\) Ibid., No. 23914, dated 22 December 1999.
\(^8\) Act No. 4501, accepted by Turkish Parliament on 21 January 2000.
\(^10\) Ibid., No. 24648, dated 22 January 2002.
\(^11\) Ibid., No. 25141, dated 17 June 2003.