

ENFORCEMENT IN TURKEY OF FOREIGN ARBITRAL AWARDS: THE CHALLENGE OF BUSINESS LOCATION

Yabancı Hakem Kararlarının Türkiye’de İcrası: İşyerinin Bulunduğu Yer Sorunu

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ABSTRACT

Turkish arbitration policy has progressed in tandem with international arbitration developments, overcoming a number of shortcomings in the process. Turkish arbitration law is, in essence, still a developing field. There are still problems and gaps in Turkish arbitration law that must be addressed in order to create a more functioning arbitration system. One of the problems related to arbitration stems from the business location. In Turkish arbitration law, the parties may waive their right to apply to court for annulment of arbitral awards in part or fully. Parties who have their domiciles, habitual abode, or place of business outside of Turkey may waive their right to annulment. However, a Turkish company cannot waive its chance to seek an action for annulment. The challenges of business location in terms of enforcing arbitral awards under the New York Convention and Turkish law are examined in this paper, and remedies are suggested.

Key Words: arbitral award, advanced waiver of annulment, New York Convention, business location

ÖZET

Türk tahkim politikası, eksikliklerini gidererek zaman içerisinde, uluslararası tahkim gelişmelerine paralel olarak ilerlemiştir. Türk tahkim hukuku özünde hala gelişmekte olan bir alandır. Daha işlevsel bir tahkim sisteminin oluşturulması için Türk tahkim hukukunda hala çözülmesi gereken sorunlar ve giderilmesi gereken eksiklikler mevcuttur. İptal davasından feragat hakkı bağlamında işyerinin bulunduğu yere ilişkin sorun bunlardan bir tanesidir. Türk tahkim hukukunda taraflar, hakem kararlarının iptali için mahkemeye başvurma haklarından kısmen veya tamamen vazgeçebilirler. Yerleşim yeri, mutad mesken veya iş yeri merkezi Türkiye dışında olan taraflar iptal davası açma hakkından feragat edebilirler. Bu durum iş yeri merkezi Türkiye’de bulunan şirketin iptali hakkından feragat sorununu doğurmaktadır. Bu bağlamda, bu makalede, New York Konvansiyonu ve Türk hukuku kapsamında hakem kararlarının uygulanması açısından iş yerinin bulunduğu yer sorunu ele alınacak ve çeşitli çözüm önerilerinde bulunulacaktır.

Anahtar Sözcükler: hakem kararı, iptal davasından feragat, New York Konvansiyonu, işyerinin bulunduğu yer

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INTRODUCTION

The main and ultimate goal of arbitration is that arbitral awards should be binding and final; therefore, an internal appellate mechanism does not exist in commercial arbitration.¹ In the case that it exists, the losing party may improperly use the appellate authority to prevent the arbitral decision from being enforced.² This will eventually stray from the aim of arbitration; as a result, it is preferable that the courts stay out of the arbitration processes.³ If the arbitral award is in conflict with Turkish arbitration rules, the parties may seek the courts to have the award vacated.⁴ The right to appeal is a legal privilege granted to parties for examining and amending a decision that they believe is incorrect. The basic objective of the right to appeal is to recognize that a higher court can examine a decision before it is final and binding. In litigation, requesting that a higher authority review the case takes numerous forms, such as appellate review and judgment revision. Arbitration, which has its own procedure, does not use traditional methods of appealing a higher authority.⁵ There is no appeal arbitral tribunal or higher authorities that can overturn a decision in arbitration. The only legal remedy available against an arbitrator's judgment in Turkish arbitration law is the vacation of the award.⁶ The Turkish policy and approach to alternative dispute resolution methods, specifically arbitration, is strongly tied to vacation situations.⁷ Turkish arbitration law is still in its infancy; hence, there are still jurisdictional difficulties. The location of the business is a contentious issue under Turkish arbitration rules in this case. Solutions to the challenge of business location in Turkey are provided in this paper by assessing grounds for vacating arbitral awards. Business location is important in terms of enforcement of arbitral awards. If there is an unambiguity of the business location, the award can be vacated. Certain fundamentals must be established from the outset in order to better grasp the issue at hand.

This study focuses on the enforcement of arbitral award and the challenge of business location in Turkish arbitration. The remainder of this paper is divided into three sections. The first section discusses the concept of recognition and enforcement of arbitral awards in Turkey, as well as their efficiency. The second

¹ Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 *Arbitration International* 79, 79.

² Ali Yeşilirmak, *ICC Tahkim Kuralları ve Uygulaması* (Onikilevha 2018) 13.

³ Zamir and Segal (n 1) 80–83.

⁴ Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (7th edn, Beta Publishing 2019) 349–352.

⁵ Thomas E Carbonneau, *The Law and Practice of Arbitration* (Juris 2012) 13–14.

⁶ Ziya Akıncı, *Milletlerarası Tahkim* (4th edn, Vedat 2016) 251.

⁷ *ibid* 253–254.

section examines business location challenge and makes some suggestions. Finally, the third section provides concluding remarks.

I. THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

The most important and crucial factor in the effectiveness of any non-judicial adjudicatory procedure is that it be recognizable and enforceable within legal systems.⁸ That is to say, an arbitration decision must be legally binding and enforceable; if it is not, parties with an unenforceable award can seek other mechanisms to carry out a judgment, such as litigation, but this will not satisfy the need for a quick, efficient, and cost-effective resolution of multinational disputes.⁹ As a result, if arbitration is to be used to encourage international business and investment, the arbitral awards must be valid, recognized, and enforceable in other countries.¹⁰ Various multilateral conventions on the binding effect of foreign arbitral awards have been held for this purpose over the years¹¹. As a result of these conventions, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹², foreign arbitral awards are as powerful and enforceable as a court judgment.¹³

The term "recognition" refers to foreign courts acknowledging the legality of a rendered award, barring a new process originating from the same issue and disputing the arbitration agreement's validity.¹⁴ The phrase "enforcement" refers to the procedure of ensuring that the arbitral ruling is followed.¹⁵ In order for a foreign arbitral award to be enforceable in Turkey, the award must be legally recognised by Turkish courts, otherwise the rendered award will be worthless in terms of resolving disputes.¹⁶ There are several standards in legal

⁸ Carbonneau (n 5).

⁹ Leonard V. Quingley, 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Awards' (1961) 70 *The Yale Law Journal* 1049, 1049; Gerald Herrmann, 'The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts' in Albert Jan van den Berg (ed), *International Arbitration in a Changing World* (1994) 42.

¹⁰ Gary B. Born, *International Arbitration: Cases & Materials* (Aspen Publishers 2010) 1000.

¹¹ Geneva Treaties, the 1923 Protocol on Arbitration Clauses and the 1927 Convention on the Execution of Foreign Arbitral Awards, by League of Nations is a culture of recognizing and enforcing arbitral awards.

¹² Born (n 10) 1001.

¹³ Carbonneau (n 5) 792.

¹⁴ Herbert Kronke, Patricia Nacimiento and Dirk Otto, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International BV 2010) 7.

¹⁵ *ibid*

¹⁶ Akıncı (n 6) 355.



systems to recognize and enforce an arbitral decision. Some legal orders seek the same recognition and enforcement requirements as others, while others do not.¹⁷ Furthermore, courts cannot assess the merits of the disputes in both the recognition and enforcement processes, and may only evaluate if the rendered award satisfies the condition of validity.¹⁸ The requirements for recognizing and enforcing arbitral awards are not the same in Turkey. The requirements for enforceability varies slightly from the requirements for recognizing an award.¹⁹ The judicial review of enforceability by Turkish courts is limited to the grounds of the dispute, and they are not permitted to reexamine it.²⁰

In Turkey, there are two procedures for recognizing and enforcing international awards. The first is through the Turkish International Private and Procedural Code (TIPPC)²¹, which is rarely used to recognize and enforce international awards made in Turkey.²² Second, where the arbitration takes place outside of Turkey, the United Nations Convention on the Recognition and Enforcement of Foreign Awards, more commonly known as the New York Convention, to which the Republic of Turkey acceded on July 2, 1992, allows for the recognition and enforcement of foreign awards. In terms of recognition and enforcement, the rendered arbitral award is not deemed foreign, and it has the same power as a domestic arbitral decision.²³ While a foreign arbitral award is recognized and enforced by Turkish courts, providing it the potential to be carried out in Turkey, a non-foreign arbitral award does not require confirmation *ipso facto*, according to Turkish law.²⁴ The ICC Arbitration Rules judgement has *res judicata* consequences and is as enforceable as Turkish court judgments.²⁵

The recognition of an arbitral award, which only reveals the validity and finality of the award, has no enforcement power in a foreign jurisdiction. However, parties seek recognition of an arbitral award by foreign courts in order to use claim preclusion as an affirmative defense in foreign jurisdictions.²⁶ When one party brings a dispute to court despite possessing a binding arbitral award, the opposing party can claim that the arbitral award was recognized under the doctrine of *res judicata*, which prevents additional adjudication on

¹⁷ Kronke, Nacimiento and Otto (n 14) 7.

¹⁸ Born (n 10) 1135.

¹⁹ Akıncı (n 6) 337.

²⁰ *ibid* 336.

²¹ Official Gazette of the Republic of Turkey 12.12.2007 (Act No.5718).

²² Akıncı (n 6) 338.

²³ *ibid*.

²⁴ Feriha Tanrıbilir and Banu Şit, 'Milletlerarası Tahkim Müessesesi ve Yeni Tahkim Kanunu' (2011) 22 Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 819, 827.

²⁵ Akıncı (n 6) 345.

²⁶ Kronke, Nacimiento and Otto (n 14) 7.

the same subject matter.²⁷ Articles 60, 61, and 62 of the TIPPC set out the rules for the recognition and execution of foreign arbitral awards in Turkish law.²⁸ There is no explicit title for "recognition" in those articles. In practice, Turkey does not separate the process for recognizing arbitral awards from the procedure for enforcing them, as required by the New York Convention, to which Turkey is a signatory.²⁹ That is to say, the mechanism for recognizing and enforcing international and domestic arbitral decisions is the same; as a result, the recognition requirement must meet the enforcement criteria of arbitral awards, as specified in the TIPPC.³⁰ The enforcement of an arbitral decision ensures that a decision made by arbitrators in another nation is executed properly. A foreign award that cannot be enforced is nothing more than a pile of paper; thus, the grounds for the vacation of arbitral awards' recognition and enforcement are a crucial and important topic. There have been significant developments in the enforceability of awards, ranging from League of Nations' Conventions on the implementation of arbitral judgements to United Nations Conventions. The New York Convention, which has been ratified by 168 of the United Nations' 193 member states, is the most important of these international treaties.³¹ In respect of rules of recognition and enforcement, Turkish arbitration law has always followed the New York Convention.³² When it comes to enforcing an arbitral judgement on Turkish land, Turkey adheres to the New York Convention's criteria.³³ When pursuing enforcement of an arbitral judgement in Turkey, parties must show that the award does not contradict Turkish law by getting an official order of enforcement from Turkish courts, often known as "exequatur."³⁴ The court order for enforcement is just as important as the award itself. The award will not be implemented in Turkey if Turkish courts refuse to grant an exequatur. Parties and their successors are eligible to request the initiation of enforcement procedures and court orders under Turkish arbitration legislation. Third parties, on the other hand, do not have the right to seek an exequatur from the courts.³⁵ Article 61 of the TIPPC, which overlaps with the

²⁷ Leonard V. Quingley (n 9) 1063.

²⁸ Akıncı (n 6) 347.

²⁹ Ergun Özsunay and R. Murat Özsunay, 'Interpretation and Application of the New York Convention in Turkey' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards - The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 975.

³⁰ Akıncı (n 6) 348.

³¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Contracting States < <http://www.newyorkconvention.org>> accessed 21 August 2021.

³² Turgut Kalpsüz, 'Hakem Kararlarının İcrası' (2009) 25 Banka ve Ticaret Hukuku Dergisi 5, 14.

³³ Ergun Özsunay and R. Murat Özsunay (n 29) 963.

³⁴ Akıncı (n 6) 17.

³⁵ ibid 351.



provisions of the New York Convention, lists the documentation that must be submitted when seeking enforcement of foreign awards in Turkish courts.

A. The Recognition and Enforcement under the New York Convention

The New York Convention acts as the international standard for commercial arbitration. The New York Convention addresses (1) the enforceability of international awards and (2) the validity of arbitration agreements.³⁶ The New York Convention is a standardized multilateral treaty that ensures the enforcement of an arbitration award;³⁷ however, the Convention cannot be used to recognize or enforce decisions reached through other forms of alternative dispute resolution, such as mediation or conciliation, and it also does not apply to foreign judgments.³⁸ If a State (such as the United States of America)³⁹ seeks particular reciprocity, simply being a signatory to the Convention is sufficient to use the Convention as a tool for award enforcement, as signatory status meets the necessity for reciprocity.⁴⁰ This illustrates that, in terms of enforceability, the arbitral proceeding is the most secure approach for an investment. In Article V of the New York Convention, which serves as a security mechanism for both the contracting state and the parties to the arbitration, the grounds for refusing a foreign arbitral award are stated.⁴¹ In Turkey, the same grounds for refusing to enforce a foreign arbitral award are applicable.⁴² The grounds are as follows:

1. Incapacity and Invalidity

Parties must have a valid agreement to enforce the award in a foreign jurisdiction under the New York Convention, and the validity of the arbitration agreement is established by the applicable law.⁴³ Disputes arising from the arbitration agreement must be resolved according to the applicable law selected by the parties.⁴⁴ If the parties do not choose a law in the arbitration agreement, the Convention states that the law of the location of arbitration will apply.⁴⁵ While the New York Convention requires arbitration agreement be “in

³⁶ Carbonneau (n 5) 784.

³⁷ See *Yusuf Ahmed Alghanim & Sons, WLL v. TOYS “R” US, Inc.*, 126 F.3d 15 (2d Cir. 1997).

³⁸ Born (n 10) 1002.

³⁹ See *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987).

⁴⁰ Born (n 10) 1137.

⁴¹ Senem Bahçekapılı Vincenzi, ‘Verildiği Ülkede İptal Edilen Hakem Kararlarının New York Konvansiyonu Uyarınca Tenfizi’ (2016) 36 Public and Private International Law Bulletin 73, 77.

⁴² *ibid* 75.

⁴³ Born (n 10) 1137.

⁴⁴ Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT’L L. 115, 121 (2018).

⁴⁵ George A. Bermann, ‘Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts’ in

writing” to be valid; failing that, the award is unenforceable⁴⁶, Turkey does not require a written arbitration agreement to enforce it.⁴⁷ Parties must be able to make an arbitration agreement, and if a party does not sign the arbitration agreement himself and instead appoints a representative for the signature procedure, the representative who signed the arbitration agreement must be specifically authorized to make an arbitration agreement on behalf of the party, or the agreement will be invalid.⁴⁸

2. Violation of Due Process:

The lack of due process is a cause for refusing to enforce an arbitral award, according to the New York Convention. Due process is violated in two ways: (1) denial of opportunity to present a party’s claims and defenses, and (2) the procedural irregularity of an arbitration.⁴⁹ In the arbitration proceedings, the parties must be treated equally.⁵⁰ The right to a fair trial may first be violated during the arbitral tribunal selection process.⁵¹ The parties’ right to a fair trial is violated unless they are informed of the tribunal’s selection. Similarly, the fact that the parties are not informed about the trial is also a due process violation,⁵² which might cause the refusal of the enforcement of the award.⁵³ The arbitral tribunal should hear the parties’ claims stemming from the violation of due process.⁵⁴ The tribunal should consider due process violation claims and make a decision on them first; if that fails, parties can take their claims to the courts.⁵⁵ Furthermore, parties cannot file a lawsuit alleging due process violations that they did not submit during the arbitration.⁵⁶

3. Arbitral Awards beyond the Scope of Submission to Arbitration

Parties define the scope of the arbitral tribunal’s authority on the subject matter while drafting the arbitration agreement.⁵⁷ Arbitrators should resolve

George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (2017) 5.

⁴⁶ Born (n 10) 1050.

⁴⁷ Akıncı (n 6) 122.

⁴⁸ Matti Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (Oxford University Press 2010) 35.

⁴⁹ Born (n 10) 1156.

⁵⁰ George A. Bermann (n 45) 46.

⁵¹ *ibid* 43.

⁵² S. I. Strong, ‘Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns’ (2008) 30 *University of Pennsylvania Journal of International Law* 1, 57.

⁵³ Kurkela and Turunen (n 48) 38.

⁵⁴ Akıncı (n 6) 444.

⁵⁵ Kurkela and Turunen (n 48) 15.

⁵⁶ Akıncı (n 6) 444.

⁵⁷ George A. Bermann (n 45) 46.



the case within certain parameters; otherwise, due to the arbitrators' excessive power, enforcement of the award may be rejected. As a result, arbitrators should refrain from deciding on issues that are not covered by the parties' submission to arbitration. When an arbitral tribunal rules on a matter that is not covered by the arbitration agreement, the arbitral award's enforcement may be partially denied if it does not jeopardize the arbitral award's integrity.⁵⁸ Countries such as Portugal, Israel, and Czechia report that parties have not used Article V(1)(c) of the New York Convention, which covers the arbitral awards beyond the scope of submission to arbitration, to annul arbitral awards in their courts.⁵⁹ Some countries, such as Switzerland, evaluate these claims under the doctrine of *iura novit curia*,⁶⁰ which removes the barrier to award enforcement. In Turkey, courts occasionally apply the grounds of an arbitral ruling that go beyond the scope of the arbitration agreement.⁶¹

4. Irregularities of Composition of the Arbitral Tribunal or Arbitration

The arbitral tribunal must be established in accordance with the parties' consent and the arbitration agreement, and the procedural rules of arbitration and how arbitrators conduct the arbitration proceedings may be determined by the parties. Arbitrators must obey the procedural rules agreed upon by the parties while conducting the arbitration.⁶² Courts may reject an award if the arbitral tribunal's composition does not match the parties' intent, or if the tribunal does not follow the procedural requirements that the parties agreed to. In terms of the arbitral tribunal's composition, Turkish arbitration law specifies that it must be made up of odd numbers.⁶³ It is sufficient reason to refuse to enforce the arbitral award.

5. Non-binding or Vacated Awards:

The fact that the arbitral ruling is binding and final is the most important feature of arbitration as an alternative dispute resolution method. If a situation that affects whether an arbitral award is binding emerges, such as suspension, vacation or the setting aside of the award by a court of arbitration place, the enforcement of the arbitral award is to be refused in a foreign jurisdiction.⁶⁴ Even if the arbitral decision is enforced in a foreign jurisdiction, the finalization and

⁵⁸ *ibid.*

⁵⁹ Kurkela and Turunen (n 48) 29.

⁶⁰ Andrea Bonomi and David Bochatay, 'Iura Novit Curia in International Arbitration' in Franco Ferrari and Giuditta Cordero-Moss (eds), *Iura Novit Arbiter in Swiss Arbitration Law* (2018) 337.

⁶¹ George A. Bermann (n 45) 48.

⁶² *ibid.* 49.

⁶³ Akıncı (n 6) 444.

⁶⁴ George A. Bermann (n 45) 52.

binding nature of the award are decided by the law of the arbitration location. It is frequently used as the basis for the vacation of foreign arbitral awards in Turkish arbitration law.⁶⁵

6. Non-Arbitrability:

Arbitration is not applicable to a subject matter that cannot be resolved through arbitration, such as a public law dispute.⁶⁶ An arbitration proceeding that's not restricted to arbitrable subjects is indeed not valid, and the rendered award isn't binding or enforceable. In with the TIAC and the New York Convention, the rules governing domestic arbitration regarding non-arbitrability is valid.

7. Violation of Public Policy

While violation of public policy is frequently claimed as a reason for foreign courts not to enforce an award, its successful application in terms of morality and justice is uncommon.⁶⁷ Because a violation of public policy is intimately tied to national values, customs, and morality⁶⁸, it should not be vigorously interpreted by national courts⁶⁹. Additionally, it necessitates judicial assessment of the merits of the awards.⁷⁰ There are three grounds in Turkish arbitration law for refusing to enforce an arbitral award owing to a violation of arbitration: (1) non-arbitrable subject matter, (2) lack of impartiality and independence of arbitrators, and (3) an irregular arbitral procedure.⁷¹

To conclude, there are criteria that prevent the foreign arbitrator's award from being enforced under the New York Convention. In the case that one of the listed situations arises, foreign courts have the ability to refuse the demand of enforcement. Despite the existence of the grounds set forth in the New York Convention, the foreign court may opt to enforce the arbitral award.

B. The Recognition and Enforcement of Arbitral Awards under the TIPPC

As Turkey is a signatory to the New York Convention, any arbitral award made in relation to signatories to the New York Convention will be recognized and enforced in accordance with the New York Convention. A small number

⁶⁵ *ibid.*

⁶⁶ Born (n 10) 1199.

⁶⁷ George A. Bermann (n 45) 61.

⁶⁸ *ibid* 62.

⁶⁹ From an Anglo-American standpoint, it is a landmark case that clearly states that courts must interpret public policy narrowly. *See Parsons & Whittemore Overseas Co. v. Societe Generale De L'industrie Du Papier*, 508 F.2d 969 (2d Cir. 1974).

⁷⁰ Carbonneau (n 5) 796.

⁷¹ Akıncı (n 6) 333.



of countries has not ratified the Convention.⁷² In Turkish arbitration law, an arbitral award rendered in a non-signatory country is subject to specific enforcement rules established by the TIPPC.⁷³ The TIPPC follows the New York Convention in terms of its provisions. The clauses are practically a literal translation of the New York Convention's provisions. Likewise, the TIPPC's Article 68 grounds for refusing to enforce arbitral rulings overlap with the New York Convention.⁷⁴ If the grounds for refusal emerge, Turkish courts have to reject the enforcement of arbitral awards. In terms of the business location challenge, when the problem emerges regarding the location, the award can be annulled.

II. VACATING ARBITRAL AWARDS: THE BUSINESS LOCATION

An arbitration ruling and award cannot be appealed in Turkish arbitration law. The only way to eliminate arbitral awards through courts is annulment of the arbitral award.⁷⁶ The appeals system was not introduced as part of Turkey's arbitration policy in order to avoid the Turkish Court of Cassation from intervening in arbitral decisions. An arbitral award must be vacated for certain reasons. If these grounds are established, Turkish courts have the power to intervene in the arbitral process and overturn the decision.⁷⁷ According to Article 15 of the Turkish International Arbitration Code (TIAC)⁷⁸, a vacation filing against an arbitral award must be submitted with the courts within 30 days.

The submission period to the courts for the vacation typically starts on the date the arbitrators notify the parties of the tribunal's decision. In Turkish law, applying the courts for the annulment of an arbitrator's decision stops the execution of the arbitrator's decision.⁷⁹ If one of the parties does not begin the vacation process within the period set by the TIAC, the arbitral award becomes final, and the other party can begin the enforcement process. If the right to

⁷² For a detailed list see <https://www.newyorkconvention.org/countries>.

⁷³ Adnan Deynekli, 'Yabancı Hakem Kararlarının Türkiye'de Tanınması ve Tenfizinde Karşılaşılan Sorunlar' (2014) 16 Dokuz Eylül Hukuk Fakültesi Dergisi 105, 106.

⁷⁴ Aysel Çelikel and B Bahadır Erdem, *Milletlerarası Özel Hukuk* (16th edn, Beta 2020) 836; Erman Eroğlu, *Turkish Construction Arbitration: An International Perspective* (Adalet 2021) 121.

⁷⁵ Aysel Çelikel and B Bahadır Erdem, *Milletlerarası Özel Hukuk* (16th edn, Beta 2020) 836.

⁷⁶ Akıncı (n 6) 251.

⁷⁷ Ali Cem Budak, 'Hakem Kararlarının Maddi Hukuka Aykırılık Sebebiyle İptal Edilebilir Mi? Hakem Kararlarının İptal Müessesesi' (2020) 40 Public and Private International Law Bulletin 557, 559.

⁷⁸ Official Gazette of the Republic of Turkey 5.7.2001 (Act No.4686).

⁷⁹ Akıncı (n 6) 260.

appeal a decision is waived, the decision becomes final and enforceable. Any party can relinquish their right to vacate in part. A party that waives his right is unable to pursue legal action. Any party who resides outside of Turkey can waive his right to vacate. According to the TIAC, non-Turkish parties only choose to waive their right to vacation on a limited basis, and those residing in Turkey never waive their vacation rights.⁸⁰ A waiver of the right to vacate might be mentioned as part of the arbitration agreement, or it can be agreed to independently by the parties. Only two circumstances apply to the validity of a waiver of the right to vacate. The first is that the waiver be clear and certain, and the second is that it is written.

A. Grounds for Vacating Arbitral Awards

The restricted grounds for vacation are defined in the Turkish arbitration. The validity and enforceability of the arbitral award are not affected by grounds not listed in the TIAC.

1. The Ex Officio Reasons for Vacation to be Taken into Consideration by the Court

a. Arbitrability

Arbitration processes cannot be held in circumstances where arbitration is not permitted. When arbitration on a non-arbitrable matter is completed and a final decision is rendered, the award becomes invalid. Articles 1 and 15 of the TIAC define arbitrability, including its scope and limitations. There are two types of problems that are not suitable for arbitration in Turkish arbitration: disputes deriving from real property rights and matters that are not subject to the parties' discretion.⁸¹ An arbitration agreement concerning real property rights, on the other hand, is valid if the immovable is located outside of Turkey, even if one of the parties is Turkish. As legal actions involving immovable property in Turkey are considered within the scope of public policy, they cannot be arbitrated. Parties may arbitrate real rights to immovable property outside of Turkey's territory as long as it does not affect Turkey's public policy. Due to the fact that these are matters pertaining to the state's sovereignty, which is directly tied to public policy, arbitration proceedings cannot be held on subjects of criminal law or in disputes deriving from administrative law.⁸²

⁸⁰ ibid 2633–266.

⁸¹ Esra Ögünç, 'Verildiği Ülkede İptal Edilen Hakem Kararlarının Tanınması ve Tenfizi' (2021) 70 Ankara Üniversitesi Hukuk Fakültesi Dergisi 801, 821.

⁸² Burak Huysal, *Milletlerarası Ticari Tahkimde Tahkime Elverişlilik* (Vedat Publishing 2010) 11–19.



b. Public Policy

On the basis of public policy, Turkish courts may overturn the arbitral ruling.⁸³ In both domestic and international law, the concept of public policy may have different meanings; nonetheless, there is no explicit understanding of what public policy is. Similarly, under Turkish law, it is impossible to define what constitutes public order. In domestic law, public policy refers to all of the rules that safeguard Turkish society's essential structure and fundamental interests, which are protected by the Turkish Constitution's fundamental rights and freedoms, the basic concept of Turkish law, and the foundation of Turkish customs and morals.⁸⁴ In international law, public policy is a collection of norms that safeguards a global society's essential structure and interests. The term "public policy" refers to the fundamental norms as well as the social, political, and economic institutions that govern a country or community. Because each country's political, social, and economic structures are unique, a violation of one state's public policy may not be incompatible with another's. Similarly, a country's public policy criteria may change over time; yet, it is self-evident that anything that violates due process rights is against public order everywhere at all times.⁸⁵

2. Parties' Application for Vacation

a. Lack of Legal Capacity and Invalid Arbitration Agreement

To begin with arbitration, the parties must first sign a valid arbitration agreement stating that they have the legal power to sue. The arbitration agreement is not legitimate and binding if one of the parties lacks the legal power to sue.⁸⁶ The concept of legal capacity in Turkish law is taken into account in arbitration proceedings where the TIAC is used. The TIAC outlines the legal rights and capacity for litigation. It will be considered if the parties agree on the applicable law that will establish the validity of the arbitration agreement. If no applicable law is determined, Turkish law will be applied in accordance with the TIAC's Article 4. A common question in Turkish law is whether a person selected by the parties, such as an agent or officer, is authorized to make an arbitration agreement. In fact, the representative needs special approval to enter into an arbitration agreement. If a representative is not expressly allowed to sign an arbitration agreement, the arbitration agreement

⁸³ *ibid* 153–154.

⁸⁴ Cemile Demir Gökyayla, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizde Kamu Düzeni* (Seçkin Publishing 2001) 26.

⁸⁵ Zehra Derya Tarman, 'Yabancı Mahkeme ve Hakem Kararlarının Türkiye'de Tenfizinde Karşılaşılan Sorunlara İlişkin Bazı Tespitler' (2017) 37 *Public and Private International Law Bulletin* 798, 811–815.

⁸⁶ Çelikel and Erdem (n 74) 836.

must be approved by the party. Otherwise, an arbitration agreement will not bind the party. The issue of whether the representative has exclusive authority to make an arbitration agreement must be examined.⁸⁷

b. Failure of the Selection of Arbitrators

Parties have the power to appoint any person as an arbitrator. The number of arbitrators is the only restriction on the composition of the arbitral panel, which should be uncommon. The arbitral award, on the other hand, can be vacated if the arbitral tribunal's structure is not constituted in accordance with Turkish arbitration legislation. When the parties appoint a specific individual as an arbitrator in the arbitration agreement, the designated arbitrator must be a member of the arbitral panel and should supervise the proceedings. An arbitration agreement cannot be conducted out by anyone except the authorized arbitrator; otherwise, the award could be overturned by the courts. In general, both parties must appoint one arbitrator, and then the third arbitrator, who is also the chair of arbitration, is chosen by a group of two arbitrators. If one party chooses an arbitrator but the other does not, the Turkish courts have the authority to appoint an arbitrator in place of the party who does not. If the parties and arbitrators are unable to agree on a third arbitrator, the Turkish courts will be able to do so.⁸⁸

c. The Time Period for Rendering the Award

Arbitrators have a set amount of time once the arbitration processes begin to make their decisions.⁸⁹ If these deadlines are not met, the arbitrator's decision may be considered invalid. Within one year after the meeting, the arbitrators must make an arbitration decision.⁹⁰

d. Exceeding the Scope of the Power of Arbitrators

Arbitrators can determine on their authority under Turkish law. Objections to the arbitrators' powers must be made as soon as possible. When an objection to an arbitrator's power is raised, the tribunal must decide whether the objection is valid or not.⁹¹ The tribunal's decision on the authority of arbitrators objection is final and binding, and the parties cannot appeal to the court to have the decision overturned. Once the parties have agreed on the matters to be decided by the arbitrators, the arbitrators should only deal with those problems. In arbitration proceedings, arbitrators are not allowed to exceed their jurisdictional authority. Arbitrators are only permitted to deliver decisions on the subject matter stated

⁸⁷ Akıncı (n 6) 289-290.

⁸⁸ ibid 297-298.

⁸⁹ Çelikel and Erdem (n 74) 836.

⁹⁰ Akıncı (n 6) 299.

⁹¹ Çelikel and Erdem (n 74) 836.



by the parties in an arbitration agreement; that is, arbitrators must exercise their arbitral powers within the parameters established by the parties. The parties have the right to challenge the arbitrators' decisions if they are made outside of their subject matter jurisdiction, and they can bring an annulment action against the decisions. Any claim submitted in the arbitration proceedings must be decided by the arbitrators. The parties may ask the arbitrators to make a complementary decision or go to litigation to vacate the arbitral award. The arbitrators do not have the ability to set their own fee, nor can they increase it. The award may be partially annulled if they increase or change their fee.⁹²

e. Procedural Irregularities:

If the parties agree on applicable procedural rules for the arbitration, the proceeding must follow those rules; otherwise, the parties might use it as a basis for challenging the judgment. Any procedural irregularities must have a substantial impact on the merits of awards; otherwise, the decision will not be vacated under Article 15 of the TIAC. The impartiality and independence of arbitrators, failure to inform the parties, and violations of due process rights are all common grounds for award vacation in arbitral practice. If arbitrators change the language of the procedures in a way that is not in accordance with the parties' agreement, and the parties are unable to properly express themselves, the award may be vacated.⁹³

f. The Violation of the Equality Principle

In arbitration processes, the notion of fair treatment is critical. Objections and defenses must be made equally by both parties. Similarly, the party-appointed arbitrators must maintain an equal distance from all parties; otherwise, the decision may be vacated. Equal treatment, or the concept that all parties should be treated equally throughout the process, is *conditio sine qua non*.⁹⁴

B. The Challenge of Business Location: A Time to Change

The parties may waive their right to go to court for annulment in part or entirely, according to TIAC Article 15. Parties whose domiciles, habitual residence, or place of business are located outside of Turkey may waive their right to seek an annulment.⁹⁵ It is not possible for a Turkish firm to waive its right to file an annulment case in this circumstance. As a result, both parties' domiciles, habitual residence, or place of business must be outside Turkey in

⁹² Akıncı (n 6) 301–306.

⁹³ *ibid* 307–308.

⁹⁴ Maxi Scherer, Dharshini Prasad and Dina Prokic, “the Principle of Equal Treatment in International Arbitration” (September 3, 2018) available at <<https://ssrn.com/abstract=3377237>> accessed 18 August 2021.

⁹⁵ Akıncı (n 6) 264.

order to file an annulment case. In construction arbitration, for example, the contracting party could be a group of companies, such as a joint venture. The arbitration must include all parties of the joint venture. When a dispute emerges, they must all file an arbitration case. If one of the joint venture partners is a Turkish company, it is unclear if the annulment case will be waived. Stating the grounds above, there is no explicit definition whether the arbitration award may be vacated in terms of business location challenge.

From the past to the present, Turkish arbitration law has evolved. As a result, there are various areas that need to be developed, as well as several jurisdictional issues that need to be addressed. One of the uncertainties that needs to be answered is the company's location. Over the course of time, the requirements of business life may lead to deficiencies in the law. While business life is flowing rapidly, keeping the rules stable may affect their effectiveness. Turkish arbitration law has also changed over time and has adopted many new issues in order to keep up with the requirement of business life. Turkish arbitration law needs revision on some issues. In practice, it is possible that this situation can be remedied with a simple amendment to the TIAC. A clear statement about business location challenge will heal all the problems arising from it. The way to settle the dispute from the outset is mandatory provision regarding business location challenge in arbitration agreement.

CONCLUDING REMARKS

In summary, Turkish arbitration is continuously evolving in great harmony with contemporary arbitration rules, and Turkish arbitration is more likely to satisfy the parties' demands in arbitration proceedings. With regard to the enforcement of arbitral awards in the context of business location, Turkey needs to adopt a more arbitration-friendly policy and should make rules. A provision in the TIAC may solve the entire problem at once. As the legal community, we are proceeding towards a future where arbitration becomes the rule and court trial becomes the exception. The solutions suggested in this study are devoted to a future with fewer problems in arbitration towards seeking for the *de lege ferenda*.

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