The Culture of the International Arbitration of Turkey

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Introduction

On June 12-14, the legendary Silk Road once again reopened in the legal dialogue between China and Turkey. Such legal dialogue is the very first of its kind that marked history between Chinese and Turkish Scholars. Much more has been debated, and the legal regime of both countries was critically examined during the dialogue. Arbitration, nevertheless, became one of the heated topics of debate during the large-scale dialogue between the Chinese and Turkish scholars.

As an example, during the heated debates in the international arbitration discussions, both scholars in the Turkish and Chinese legal systems were confronted by similar criticisms as to the practice of International Arbitration. A few particular illustrative examples were the Local court's intervention, the recognition of arbitral awards, the ethics of the Arbitrators, and the difference between domestic arbitration rules and International arbitration rules.

Istanbul as a Promising Venue for International Arbitration

Over the past few years, the discussion regarding establishing an International Arbitration center in Istanbul has continually been raised. In the near future, a dramatic change can be expected at the International Arbitration Culture of Turkey. [2]

This raises the important question of whether Turkey is ready to establish its own Institutional Arbitration Center that can have an equal standing

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[1] Upon receiving an invitation from Professor Mustafa Erkan at the Law School of Marmara University, the author came to the Marmara Law School in the Year of the Dragon as a visiting scholar. Together with Professor Erkan, she co-chaired the international law conference entitled "Reopening the Silk Road in the Legal Dialogue between Turkey and China."

[2] Asat Rayhan, "Are we there yet? Istanbul as a center for international arbitration". Journal of Marmara Law School.

with other well established globally recognized International Arbitration Centers.[3]

Turkish International Arbitration Act of 2001

In 2001, Turkish Parliament enacted international Arbitration law 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 system.[4] Therefore, in 2001, a modern Turkish international arbitration act (Hereinafter TIIA) came into existence.[5]The arbitration act is inspired by UNICITRAL Model Law and international arbitration section of the Swiss Federal Private International Law of 1987[6]. One of the rational to develop model law by the UNICITRAL is that uncertainty about the local law with the inherent risk of frustrations may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration.[7] Accordingly, due to such uncertainty, a part may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. One could say the same rationale does apply for the venue of arbitration. For a new center without an international reputation, what model law provides is a it is easily recognizable, meets the specific needs of international commercial arbitration and provides and international standard based on solutions acceptable to parties from different legal system. Indeed, one should realize that choosing simultaneously a new country as a place of arbitration and an unfamiliar arbitration institution to administer the process may often appear as a risky adventure for foreign parties, especially when they come from western countries and when the place of arbitration considered is located in a developing country[8]

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3 Ibid.

4 Candaner Elver, Nazan, "Turkish International Arbitration Law and Restriction to its application", Journal of International Arbitration, 21(5), 2004, page 453.

5 Published in the official Gazette dated 5 July 2001, numbered 24453.

6 Ansay, Turgul, "Current Development: International Arbitration in Turkey," 14 Am. Rev. Int'l Arb., 333, 2003, p. 3.

7 Note prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; although it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an earlier draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI - 1985). Available Online at: http://faculty.smu.edu/pwinship/arb-24.html.

8 Kassir, Walid John, "Current Development: The Potential of Lebanon as a Neutral Place for International Arbitration," The American Review of International Arbitration, 14 Am. Rev. Int'l Arb. 545, 2003, p. 14

It is fair to say Arbitration 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. [9] It has been argued by many scholars that the lack of modern international arbitration law and the court interference was a major hindrance of the development of the International Arbitration in Turkey. The court of Appeal of Turkey's practice in respect of the application of New York Convention on the recognition ad enforcement of foreign Arbitral Awards was considered to be another big hindrance to the development of International Arbitration. The case law demonstrates that the Court of Appeal widely invoked public policy exception as a ground for refusal of enforcement of arbitral awards.

Generally speaking, it is the legal environment that will crucially affect the outcome of the dispute and thus. In turn, influence the choice of venue. [10]

According to a survey on international arbitration conducted by the School of International Arbitration at Queen Mary, University of London 2010[11], 62% of the respondents opined that formal legal infrastructure or statutory framework was the most decisive factor in choosing a place of arbitration.

A number of the Factors influencing choice of arbitration venue. choices for arbitration lie in the confidentiality and language, as well as the reasonably strong preferences regarding governing law and seat. In relation to the choice of governing law as to the substance of the dispute, the most important factor is the perceived neutrality and impartiality of the legal system, followed by the appropriateness of the law for the type of contract and familiarity with and experience of the particular law. Below we will discuss some of the mentioned factors.

1. Enforceability of the award through an arbitration-friendly legal framework.

As in Turkish jurisdiction and many jurisdictions, not surprisingly one would fine it to be a common phenomenon to abuse the public policy exception. For instance, the public policy is so widely interpreted by the Chi-

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[9] CEYDA Surel, LLM, "Nearly a Decade on the Perception of International Arbitration Law by Turkish Courts," Arbitration International, Volume 26, Number 3, 2010, p. 421.

[10] Pernyhough, QC Richard, "A World of Choice: The Competition for International Arbitration Work Part 1," 44, 2008 Asian DR.

[11] Corporate Attitudes / Empirical Research 2010, International Arbitration Study 2010 International Arbitration Survey: Choices in International Arbitration

nese court in the past. 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. [12] This concern has been expressed by professor Peerenborn in the following paragraph:

One crucial issue that continues to haunt investors is the lack of guidance on how PRC courts are subject to interpret violation of "public policy", the fear has long been that PRC court would find that enforcement virtually any ward against a Chinese party would violate public policy or social public interest.

Such bad reputation attached to china for a long time. Now, public policy exception to enforcement is generally not widely used in China to deny enforcement of international arbitration awards owing to the Pre-reporting system.[13]Counties should be cautioned against the frequent use of public policy.

2. Procedural Flexibility and Party Autonomy

Procedural flexibility has always been one of the critical factors in the choice of Arbitration center. In terms of choice of arbitrators, Hongkong arbitration center was very successful, one of the reason being there is no restriction in Hong Kong on lawyers or other professionals from outside jurisdictions acting as representatives or arbitrators in arbitration proceedings, something which is "a winning point for Hong Kong",[14]

Within the legal framework, I would be focusing on few selective provisions TIIA that stand out and representative of a modern arbitration act.

Party autonomy

Turkish law encourages the autonomy of the parties. In the spirit of this principle, many of the provisions of the Turkish Arbitration Law are caveated by the sentence "unless otherwise agreed between the parties".

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[12] Lanfang Fei, Public policy as a bar to enforcement of international Arbitral Awards: A review of Chinese Approach, arbitration international volume, 26, 2010.

[13] The scrutiny of foreign-related awards is subject to a special reporting system. According to the SPC Notice on Issues Concerning Setting-aside Foreign-related Arbitral Awards by the People's Court dated April 23, 1998, a court wishing to set aside an award or to notify a tribunal to re-arbitrate shall report its preliminary decision to a Higher People's Court to which it is subordinated within thirty days after receipt of the said application. Peter Thorp, "The PRC Arbitration Law: Problems and Prospects for Amendment**,** Journal of International Arbitration, Kluwer Law International 2007 Volume 24 Issue 6, page 620.

[14] According to Keith Ho, partner with Wilkinson & Grist in Hong Kong.

Non-intervention by courts

Courts may only intervene in the arbitral proceedings if they are entitled to do so in accordance with the Turkish Arbitration Law, which limits the intervention of the courts in arbitral proceedings to specific circumstances.

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.[15]

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.[16] 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. [17]

Competence to Rule on Jurisdiction

The arbitral tribunal may rule on its own jurisdiction, including any objections raised regarding the existence or validity of the arbitration agreement.

A plea that the arbitral tribunal does not have jurisdiction must be raised in, or prior to, the submission of the statement of defence. A party is not precluded from raising such plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. The arbitral tribunal will rule on the above-mentioned plea as a preliminary question and, if it should decide that it has jurisdiction, it will resume the arbitral proceedings. Such a decision by the arbitral tribunal cannot be appealed to the courts.

The Turkish Arbitration Law 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. 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 coun-

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15 Varela, Karine Cherro, "New Chilean Arbitration Law: Will Chile Become an Arbitration Venue?" Max Plank Year Book of United Nation Law, V10, 2006, p. 681-729.

16 Ibid.

17 Sarialioglu, A. Simel, Oner, Seteny Nur, "Role of Courts in International Arbitration: preliminary Injunctions", Legal News Bulletin Turkey", 2011/1, page 59.

try. Though the arbitration law article 6 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. The inherent result of interim measures fails to find the meaning in the practice. [18]

However, from the practical point of view, prior to the international Arbitration Act, the procedural law stipulates that upon the parties request of preliminary injunctions is succeeded in the local court, parties are bound to initiate arbitration proceedings in 10 days, however, the TIIA in considering the complex structure of international arbitration, stipulated that parties should start arbitration proceedings in 30 days, so it is still considered to be progress compare to the previous procedural law.

No appeal for the arbitral award, under the new arbitration act, recourse to state court does not imply review of the merits of arbitration, however, the cancelation of arbitration award can parties resort to the court.

Time Limit

The TIAL provides a time period for arbitration. Arbitrators, unless otherwise agreed by the parties, are required to render a decision on the substance of the case in question within one year from the date of their first hearing or meeting.[19] This term may be extended by party agreement, or failing this, by the court. If the court dismisses the request to extend this term, the arbitration will be terminated. The language of arbitration must be either Turkish or a language of a country, which is recognized by Turkey.[20]Such provision offers certain advantage to the party in dispute to avoid in situation where the arbitrators prolong the process by not rendering an arbitral award.

Amiable Compositor

The IAA recognizes the possibility for the arbitrators to decide ex aequo et bono or asamiable compositor, provided that the parties authorized them to do so. (IAA Art. 12/C/III). This provision of the IAA is considered to be a novelty in Turkish Arbitration Law.

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[18] Yesillirmark, Ali, The Turkish International Arbitration Law of 2001, Journal of International Arbitration 19 (2), 2002, page 172.

[19] See Yesillirmark, page 175

[20] Ibid.

Principle of good faith

Although there is no express provision in the arbitration legislation to indicate the applicability of the principle of good faith to disputes subjected to arbitration, [21]the fundamental principle of good faith is reflected in the Supreme Court jurisprudence where the court ruled that in respect of Assessment of the Objection to the Formal Invalidity of an Arbitration Agreement, shall be decided in Accordance with the Principle of Good Faith. [22]

In its judgment, the Supreme Court[23]ruled that the parties may raise objections to the formal invalidity of an arbitration agreement during proceedings to enforce the resulting award. The Supreme Court underlined that it is incorrect to claim that there can be no objections to the formal invalidity of an arbitration agreement once the award has become final and conclusive. However, if the court is convinced that the party raises the invalid of the arbitration agreement as a weapon to prevent the enforcement of the award on purpose, the court would consider the principle of good faith. [24]

The selected provisions discussed in this essay do demonstrate that The TIIA Constitutes the integral part of modern legal system of Turkey, the progress that made in the arbitration act is a welcome addition to the reflection of the private justice nature of international arbitration. There is no doubt that it is warmly welcomed by the international community.

Conclusion

It seems to me that Arbitration friendly, more correctly speaking, supportive legal system towards recognition of arbitral award is a huge advantage for the country to promote an arbitration venue.

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.

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[21] Nuray Eksi, Chapter V, A critical Analysis of the Precedents of the Turkish Court of Appeal Relating to the Enforcement of the Arbitral Awards, Kluwer Arbitration, page 484.

[22] Ibid.

[23] Turkish Supreme Court 11th Civil Chamber decision, numbered 2004/3751.

[24] See Eksi, page 684.

In addition, Learning from valuable lessons of leading arbitration centers and closely model the best practice and at the same time, define unique approach that could be applicable to Turkey is critical matter. [25]

In addition to the modern arbitration law, Turkey has many advantages by way of geography, being the bridge between Asia and Europe, with its cultivated people, good education. 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 . Nevertheless, international arbitration will pave its way to become a preferred method of dispute resolution.

[25] See Asat page 11.