

Law of Foreign Arbitration in Turkmenistan: An Introduction

Kluwer Arbitration Blog

December 15, 2017

Hannepes Taychayev (Korea University)

Please refer to this post as: Hannepes Taychayev, 'Law of Foreign Arbitration in Turkmenistan: An Introduction', Kluwer Arbitration Blog, December 15 2017, <http://arbitrationblog.kluwerarbitration.com/2017/12/15/law-foreign-arbitration-turkmenistan-introduction/>

The specter of communism that was once lingering over the Europe has long faded away, and the alliance, one of the biggest socialist experiments in the history of mankind, that stood to safeguard and promote its ideals has failed. In 1991 out of the remains of the Soviet Union emerged five independent Central Asian states. The current legal system of Turkmenistan is primarily rooted into the one the Turkmen Soviet Socialist Republic ("Turkmenistan," 2017) used to have. Up until recently international arbitration was a novel concept to the region and alternative dispute resolution mechanisms (ADR) as means for settling disputes between two private parties was an alien idea (Rubins & Sur, 2008). Consequently, the most widely used mechanism for dispute resolution was the judiciary (Knieper & Ziyaeva, 2017). The judiciary has been supplemented by state-organized arbitration courts which are attached to the ordinary civil courts of general jurisdiction, with the exception of the Arbitration Court of the City of Ashgabat, with jurisdiction over disputes between corporations and other commercial disputes (Knieper & Ziyaeva, 2017).

Turkmenistan is a civil law country, which is to a great extent based on the legal system and institutions from the Soviet era. The judiciary of Turkmenistan represents a three-tier system: local trial courts; regional appeal courts; and the Supreme Court. However, according to Article 32 (2) of the Law on the Judicial System and the Status of Judges of Turkmenistan arbitration courts of the country act as the first instance for settlement of commercial disputes with the Supreme Court acting as the court of appeals. The Supreme Court of Turkmenistan can review appeals against the court and arbitral awards.

Sources of Arbitration Law

There are a number of sources that form the body of arbitration law in Turkmenistan. According to Article 3 (1) of the Arbitral Procedural Code, the arbitral proceedings in Turkmenistan are based on the Constitution of Turkmenistan, the Law on the Judicial System and the Status of Judges of Turkmenistan and the Arbitral Code of Turkmenistan. The law allows not only the nationals but also foreign natural and juridical persons to bring their claims before the arbitration courts of the country. International commercial arbitration is governed by the International Commercial Arbitration Law (ICA) and other relevant domestic laws of the country.

In 2016 the government of Turkmenistan adopted the ICA, which in a number of ways follows the UNCITRAL Model Law. For instance, it allows ad hoc arbitration, recognizes the doctrine of kompetenz-kompetenz, as opposed to domestic law on arbitration which sets rather stringent requirements (see Article 4 of Annex 1 to the Civil Procedural Code (CPC)), the ICA grants the parties to a dispute the

freedom of selection and the procedure of selection of arbitrators and sets rather lenient requirements for definition of the arbitration agreement. With the new Law in force, now many disputes of transnational commercial character, as well as many types of civil disputes, involving foreign investors, can be resolved by international commercial arbitration within Turkmenistan where the parties so agree.

Recognition and Enforcement

Turkmenistan is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Thus, the recognition and enforcement of arbitration awards that were rendered abroad between Turkmen and non-Turkmen parties are governed by the relevant laws of Turkmenistan and other international or regional treaties.

As to applicable law, it is also important to note that if an award of a foreign tribunal has been overruled by a judgment of a foreign court, the judgment revoking the award will be subject to the CPC not the ICA.

Article 3 on the Objectives of enforcement proceedings of the Law of Turkmenistan On Enforcement Proceedings and the Status of Enforcement Agents holds that the order of enforcement of judgments of international and foreign courts and arbitral tribunals in Turkmenistan shall be determined based on international treaties of Turkmenistan and the Law of Turkmenistan On Enforcement Proceedings and the Status of Enforcement Agents in accordance with legal norms of Turkmenistan. With regard to foreign judgments revoking awards, Article 421 of the CPC, the courts of Turkmenistan can recognize and enforce the judgement of a foreign court based on the principle of reciprocity with certain exceptions. Article 420 (1) of the CPC defines judgments of foreign courts as the ones pertaining to civil cases and excludes ones dealing with economic and other disputes related to business and economic relations. Its enforcement is subject to a ruling of a corresponding court on its enforcement. A court reviewing the enforcement application has the right to rule only on the condition of enforcement and not the merits of the judgment.

The recognition and enforcement of foreign arbitral awards is governed by Article 46 of the ICA. The language of the Article in many ways is based on the UNCITRAL Model Law. Namely, the Article holds that “an arbitral award, irrespective of the country in which it was made, upon application in writing to the courts of Turkmenistan, shall be recognized and be enforced subject to the provisions of part 2 of this article and article 47 of the present law, and in accordance with procedural legislation of Turkmenistan and its international treaties.” Further, part 2 of Article 46 holds that “the party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof, the original of the arbitration agreement, stipulated in Article 7 of the present law, or a certified copy thereof. If the award is not made in an official language of this State, a party to the dispute has to present a certified copy of the documents in the State language of Turkmenistan.”

Article 6 (2) of the ICA holds that a party seeking enforcement of a foreign arbitral award can apply with such request to provincial courts (welayat) in the regions of Turkmenistan, but in Ashgabat the enforcement action has to be brought before the Arbitration Court of Ashgabat.

Grounds for Refusal

Under the domestic law of Turkmenistan, Article 47 provides grounds for the refusal recognition or enforcement, irrespective of the country in which it was made, of an award rendered by an international arbitration tribunal. The grounds for refusal stipulated in the Article reflect the one provided in the UNCITRAL Model Law with a few tweaks.

International and Regional Treaties

Turkmenistan has concluded a number of bilateral and multi treaties that are regional or international in character. Important regional conventions are the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (2002 Chisinau Convention), the Kiev Convention on Settling Disputes Related to Commercial Activities (Kiev, 1992), and the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minks, 1993). The regional conventions regulate and provide rules on various aspects of legal cooperation on the matters related to civil, family and criminal issues between the Commonwealth of Independent States (CIS). They are also of note here because they also deal with issues related to the recognition and enforcement of foreign court judgments, arbitral tribunals and conflict of laws among the signatory States. The importance of these two Agreements for arbitral procedures is manifold. For instance, Article 3 of the Kiev Convention holds that the market participants of the CIS region shall have unhindered access to courts, arbitration and other competent bodies of member states.

There are two key multilateral investment agreements Turkmenistan is a party to: the Energy Charter Treaty and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). According to the data provided by UNCTAD, Turkmenistan has also concluded 27 Bilateral Investment Treaties.

Conclusion

The ICA is a step in the right direction and meets the basic requirements set by the UNCITRAL Model Law. However, there is further room for development such as ratifying the New York Convention. For international arbitration to be effective, its awards must be enforceable across borders. As it stands now, in case the arbitration is seated in Turkmenistan, its enforcement abroad will be subject to the laws of a jurisdiction where the enforcement is sought. Basically, under international law its enforcement will depend on the principle of reciprocity. However, with adoption of the New York Convention, it could be enforced across the borders. In other words, if an arbitration award is unenforceable in the jurisdiction in which the losing party has assets, the award does not hold much of a legal currency. Enforcement is what gives value to an international commercial arbitration. Ratification of the New York Convention is also associated with a number of other benefits such as increase in trade, inflow of foreign investment, more importantly it would allow Turkmen companies to enforce contracts in other jurisdictions (Knieper & Ziyaeva, 2017).