

# Kluwer Arbitration Blog

## Two Potential Pitfalls for Arbitration in Turkey Come to Light at the 16th ICC Turkey Arbitration Day

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The 16<sup>th</sup> ICC Turkey Arbitration Day was held virtually on 17-18 March 2021 in four sessions (click [here](#) for the event booklet). The first session was reserved for discussion of the judiciary's approach to arbitration in Turkey. In the second session, Alexander G. Fessas, the Secretary General of the ICC International Court of Arbitration, shared the latest ICC updates. Claudia Salomon, who has recently been recommended for election as President of the ICC International Court of Arbitration, shared her vision for ICC arbitration in the third session, and finally, the panellists discussed M&A disputes. This post engages with two discussions from the first session: (i) whether a Turkish broker may agree upon arbitration in an agreement it concludes on behalf of its non-Turkish principal and (ii) obtaining certificate of execution for international arbitral awards rendered in Turkey.

### Does Turkish Law Allow Arbitration Agreements Concluded by a Turkish Broker on Behalf of Its Non-Turkish Principal?

As the first speaker, Judge Dr. Adem Aslan (member of 11<sup>th</sup> Civil Chamber of Turkish Court of Cassation, which deals mostly with commercial disputes and arbitration-related matters), started his speech by presenting some recent decisions. In the second part, he raised a legal discussion on the basis of Article 105/2 of the Turkish Commercial Code numbered 6102 ("TCC" – click [here](#) for the TCC).

This article provides that a broker of a principal may sue or may be sued in Turkey on behalf of its principal (as a representative only) and any contractual provision stating otherwise shall be null and void. This article is intended to prevent the misuse of jurisdiction clauses in standard terms and conditions used by international merchants and to grant foreign merchants the right to sue before Turkish courts. Considering this article, Judge Aslan questioned whether a Turkish broker of a non-Turkish principal may conclude a valid arbitration agreement on behalf of its principal.

Before he linked the matter to arbitration agreements, he referred to some decisions of the 11<sup>th</sup> Civil Chamber.<sup>1)</sup> These decisions were based on essentially the same contention: (i) Article 105/2 of the TCC provides for exclusive jurisdiction of Turkish courts for agreements concluded with the involvement of Turkish brokers of foreign principals, (ii) the agreement was concluded by a

Turkish broker, (iii) the jurisdiction clause in favour of a non-Turkish court stipulated in the agreement is null and void as it is against the exclusive jurisdiction of Turkish courts and (iv) even though the claim is raised against the principal that is situated outside of Turkey (but addressed to the broker in Turkey).

The important question is whether this line of argumentation can be applied to arbitration clauses under similar circumstances. In other words, can disputes arising from agreements concluded through a Turkish broker of a non-Turkish principal be referred to arbitration or do they have to be resolved before Turkish courts on the basis of the latter's exclusive jurisdiction?

This discussion is of great importance as brokers play an important role in Turkish commercial activities. Particularly in maritime trade, almost all agreements (in the form of standard terms and conditions) are concluded through Turkish brokers and those agreements provide for arbitration – mostly – in a country other than Turkey.

Finally, Judge Aslan raised the following questions for further deliberation:

1. Is it possible to stipulate arbitration with a seat outside of Turkey?
2. Is it possible to stipulate arbitration with a seat in Turkey?
3. As the broker itself will not be party to the arbitration agreement, is it still possible to sue the broker on behalf of the principal before Turkish courts?
4. Is it possible to apply to Turkish courts although there is an arbitration agreement stipulating arbitration seated in Turkey?

While Judge Aslan did not answer three of these four questions, he then responded affirmatively to the second question. In my view, in doing so, he contradicted the Chamber's above-mentioned position. If there is an exclusive jurisdiction in favour of Turkish courts, then the seat of the arbitration should not matter. If the seat of the arbitration has an effect on the jurisdiction of Turkish courts, then the courts' jurisdiction cannot be exclusive. This contradiction reveals that the chamber does not interpret the exclusivity in Article 105/2 of the TCC in terms of the jurisdiction of the courts and arbitral tribunals, but mostly associates it with the place of the proceedings.

In addition to this flawed interpretation of exclusivity, the chamber should consider that exclusivity in jurisdiction should not be confused with arbitrability. Exclusive jurisdiction of state courts is not an obstacle for a valid arbitration agreement, provided that the subject matter is arbitrable. If the matter is arbitrable, parties should preserve their autonomy to agree upon arbitration, regardless of whether Turkish law provides for exclusive jurisdiction.

### **How Will an International Arbitration Award Rendered in Turkey be Executed in Turkey?**

The second speaker of the first session was Judge Nevzat Bozta? (President of 14<sup>th</sup> Civil Chamber of Istanbul Regional Court of Appeal). In answering the questions from the audience, Judge Bozta? expressed his views on the execution in Turkey of an international arbitral award rendered in Turkey.

There are two main pieces of legislation that regulate arbitration in Turkey: the International Arbitration Act no. 4686 ("IAA" – click [here](#) for the IAA) and the Civil Procedure Code no. 6100 ("CPC" – click [here](#) for the CPC). The distinction between international and domestic arbitration in

Turkey is based on the existence of a foreign element. The IAA applies mainly to arbitrations in which there is a foreign element whereas the CPC applies to arbitrations without a foreign element.

Unlike the CPC, a party may not apply to execution offices directly for execution of an award rendered in accordance with the IAA. Pursuant to Article 15(B) of the IAA, a certificate of execution is required to execute an award through the execution offices (the problems to be mentioned here relates to cases where no annulment lawsuit was filed). This certificate is issued by the competent court. Except for an *ex-officio* examination on arbitrability and public order, the conditions for issuing this certificate are not regulated in any legislation. This lack of regulation creates important problems in practice, which were raised to Judge Bozta?. Unfortunately, his responses did not comfort the arbitration community in Turkey.

When an application is made to the competent court (which has to be an *ex-parte* application in my view), the court notifies the counter-party (the losing party in arbitration) to comment on the applicant's (winning party in arbitration) request for the issuance of an execution certificate. As the IAA regulates international arbitration and, in most cases, one of the parties is situated outside of Turkey, the court has to notify the applicant's request to the counter-party by applying international notification regulations. Usually, this procedure takes around six months. Once these notifications are completed, the parties will make written submissions and this will alter the conduct and nature of the proceedings. A mere request for the issuance of an execution certificate will become an ordinary lawsuit.

Once these complaints were raised, both of the judges opined that such way of action is necessary to grant the counter-party the right to be heard. They also stated that the decision of the local court would be subject to appeal as well, which might take an additional year.

In my view, the courts are over-cautious about the right to be heard in such applications. First of all, a certificate of execution can only be issued if the arbitration award becomes final, *i.e.* no annulment application is made (according to Article 15/A of the IAA, an annulment application will automatically suspend the execution of the arbitral award, unlike the CPC). If the losing party had had any concerns regarding arbitrability and/or public order, it had 30 days to file an annulment action on these grounds. Secondly, by granting the losing party an additional right to raise its arguments on arbitrability and public order to challenge the issuance of an execution certificate even after 30 days, the 30-days deadline for setting-aside the award will be *de-facto* extended. Thirdly, years of delay caused by the courts in the execution of the award to protect the losing party's right to be heard, is actually a violation of the winning party's right to fair trial. Lastly, the reasoning of the courts is against the nature of arbitration: parties to an arbitration aim to collect their receivables as soon as possible. Delay of execution with ungrounded procedural interpretations, and transformation of a request for an execution certificate to a case for "enforcement of awards", is against that purpose.

Therefore, it is of utmost importance that local courts and the judges of higher instances change their stance as regards this practice. The provision in the IAA should be used as a tool by the courts to perform a limited review upon an *ex-parte* application in order to prevent execution of awards that are against public order and/or rendered in a non-arbitrable matter. Any interpretation beyond that will harm the arbitration practice in Turkey.

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### References

Decisions (i) dated 22.06.2020, numbered 2019/3799E., 2020/3051K.; (ii) dated 25.02.2020, ?1 numbered 2019/8298E., 2020/2018K., (iii) dated 05.02.2020, numbered 2019/293E., 2020/953K. and (iv) dated 26.12.1964, numbered 2428/4446.

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