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Arbitration of Corporate Law Disputes in Turkey: Is the Tide Turning?

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Arbitration of commercial disputes is a common practice in Turkey, especially for those with an international element. The same, however, cannot be said for corporate law disputes, i.e. intra-corporate claims based on or concerning statutory rights, articles of association ("AoA") or corporate resolutions. This has been the case due to a couple of judgments rendered by the Turkish Court of Cassation (the "TCC" or the "Court") that have cast doubt over the arbitrability of such disputes as well as the validity of arbitration clauses in AoAs. Yet, there are signs that a more favorable approach to corporate arbitration is gaining the upper hand in Turkish law. This post explains the reasons for and the consequences of the said jurisprudence, the recent developments signalling that a more prominent role for arbitration in corporate law disputes might be on the cards, and how such change could be expected to come to fruition.

Background

There are two separate though interrelated issues that need to be addressed concerning the arbitration of corporate disputes. The first is whether these disputes are arbitrable. Disputes arising from issues "subject to parties' consent" are considered arbitrable in Turkish law. It is accepted that an issue being subject to parties' consent means that parties may freely dispose of the matter in dispute by way of settlement. This criterion is satisfied in most corporate law disputes. Yet, decisions rendered in certain corporate law disputes, such as corporate dissolution and invalidity of general assembly resolutions, bind even those who are not parties to the dispute. In turn, these practically *erga omnes* effects raise difficult questions; because an arbitral award may, in principle, be enforced only between the parties to the dispute (*inter partes* effect). The second issue is validity of arbitration clauses stipulated in the AoA. The concern that minority shareholders may not be afforded adequate protection in arbitral proceedings makes this a contested matter.

In fact, the more traditional and conservative views in the Turkish legal literature had long opposed arbitration of corporate law disputes mainly for these reasons. Although the TCC found disputes concerning the request for registration in the stock ledger and directors' liability are arbitrable,[1] the Court later changed its attitude towards arbitrating corporate disputes. In 2012, the TCC adopted the conservative view when it ruled that claims for annulment of a general assembly resolution cannot be resolved by arbitration and an arbitration clause to that end in the AoA was thus not

valid.[2] Again, a few years later, the Court decided that disputes concerning corporate dissolution are also non-arbitrable in a nearly identically worded judgment.[3] In light of the case law, companies and shareholders have been understandably reluctant to include an arbitration clause in the AoAs. As a result, not many new cases on the issue have appeared before the Court since the aforementioned judgments.

Recent Developments

A series of recent developments indicate that the role of arbitration in Turkish corporate law is likely to grow in the future. Sketching out the developments in approach to corporate arbitration in comparative law might be useful in this context, given its guiding role in the growing pro-arbitration trend in Turkey. In Germany, the Federal Supreme Court found that disputes concerning validity of shareholder resolutions can be submitted to arbitration provided that the arbitration agreement abides by certain conditions regarding the procedure. The Swiss legislator has recently passed a legislative amendment confirming that the AoA of joint stock-companies can contain an arbitration agreement and corporate disputes can be resolved by arbitration. Given many rules and principles of Turkish corporate law have their origins in these two jurisdictions, it should be no surprise that there is increasing support for arbitration in the Turkish legal literature.

Indeed, a clear majority of Turkish scholars now argue that disputes regarding the validity of general meeting resolutions are arbitrable.[4] According to the majority view, such disputes can indeed be resolved by way of settlement, this being a clear indication of their arbitrability under Turkish law. The question of whether the board needs prior authorization from the general assembly to settle the dispute is deemed as a corporate law issue that has no bearing on arbitrability. Moreover, the specific procedural rules prescribed by the Turkish Commercial Code, such as pending of the case until the term of litigation expires and consolidation of actions concerning the same general meeting resolution, are no longer viewed as obstacles to arbitration. Rather, scholars largely agree that the aforementioned rules can and should be integrated into the arbitral procedure. Therefore, the focus of the debate seems to be shifting from the question of arbitrability to the procedural aspect of corporate arbitration. Accordingly, it is also proposed that arbitral awards in such disputes should be granted *erga omnes* effect, because the interested third parties – shareholders in particular – will be provided with sufficient protection within the adequate procedural framework. Similarly, there is a growing acceptance that an arbitration clause can be validly inserted into the AoA, despite the persisting discussion as to whether such clauses would bind the shareholders joining the company later on.

Other actors have also signalled a favorable view of corporate arbitration. In a symposium held in October, officials from the Istanbul Commercial Registry (“ICR”) expressed openness to registration of arbitration clauses in AoAs, with representatives from the Ministry of Trade echoing the ICR’s positive attitude. This was followed by the registration of an arbitration clause in the AoA of a joint-stock corporation in November last year upon inspection by the ICR and the Ministry. Finally, ITOTAM, one of the leading arbitral institutions in Turkey, has shared with its members a sample arbitration clause for AoAs based on the arbitration clause registered earlier.

Looking Ahead

It is now clear that there is a growing interest in and support for corporate arbitration in Turkey. That being said, the TCC decisions still give rise to reservations about arbitrability and validity of statutory arbitration clauses in AoAs. There are two principal ways in which those question marks can be eliminated. First, the TCC can reverse or at least soften its previous jurisprudence in the light of evolving liberal scholarly views and the institutional support by the Ministry, the ICR and prominent arbitration centers. Second, the legislator can step in and amend the Turkish Commercial Code to clarify that corporate law disputes are arbitrable and the AoA may contain an arbitration clause. The Ministry of Trade's supportive stance could be a sign that such an amendment is not a distant possibility. Moreover, the legislator has been aggressively promoting (and even requiring) mediation for commercial disputes in the last few years to ease the caseload of commercial courts. Thus, a similar legislative approach to arbitration of corporate law disputes would not come as a surprise.

Even without a legislative amendment or a change in the case law, we believe that the current legal framework can accommodate arbitration in the field of corporate law. The concerns about referring disputes to arbitration in this context boil down to the protection of shareholders with procedural mechanisms. This requires ensuring that shareholders can use their rights of action effectively in multi-party arbitral proceedings. Shareholders should also be provided with the necessary procedural safeguards even when they are not a party to the dispute but would nevertheless be legally affected by its outcome. To that end, a set of carefully designed arbitration rules that include provisions addressing the problems peculiar to corporate law disputes is needed. Such rules should integrate specific procedural rules for corporate disputes regulated in the Turkish Commercial Code. In particular, the rules should cover the notification of shareholders about the proceedings, requirements for consolidation of actions, and participation of other concerned parties (e.g. shareholders, directors and/or the company) in the arbitral proceedings, either as a party or an intervenor. Similar procedural rules pertaining to corporate law disputes which were enacted by the DIS (see Annex 5 to DIS Arbitration Rules) provide a good example in this respect.[5)] Therefore, we recommend that arbitral institutions draft supplementary rules for corporate law disputes and model clauses for AoAs. Doing so would not only help remove the existing reservations about arbitration of corporate law disputes but also serve as a basis for legislative changes and court decisions in the future.

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References

?1 See 11th Civil Chamber, 7.4.1983, 1983/1595, 1983/1780, and 15.2.2010, 2008/9429, 2010/1780 respectively

?2 11th Civil Chamber, 5.12.2012, 2011/13485, 2012/19915; also see 1.7.2019, 2019/2226, 2019/5000

?3 11th Civil Chamber, 9.4.2014, 2014/141, 2014/6951. An in-depth analysis of the case law and scholarly views concerning arbitration of corporate disputes can be found here and here

?4 For a non-exhaustive list of proponents of this view, see footnote 39 here

?5 Also notable is the set of draft rules currently under discussion in Switzerland

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