

## Arbitration - Turkey

### Legal Nature of Terms of Reference under Turkish Law

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July 09 2009

Previous decisions of the International Chamber of Commerce and decisions of other jurisdictions have reviewed the legal nature of terms of reference (ie, whether they constitute a new arbitration agreement). There appears to be no common position on the issue of terms of reference: some argue they constitute a new arbitration agreement, while others argue that the main arbitration agreement signed by the parties represents the intentions of the parties and cannot be amended by the terms of reference.

This issue was discussed by the 15th Chamber and the General Assembly of the Civil Chambers of the Court of Appeals in Decision E 2007/15-444, K 2007/554 (July 18 2007).

In a dispute between the Ministry of Agriculture and Rural Affairs and a private construction company, which arose from an agreement of December 2 1993 in relation to the construction of the Eskisehir Research Complex, the courts considered whether the terms of reference had the effect of amending the arbitration clause.

In the agreement the parties agreed that disputes would be resolved by three arbitrators under the Settlement and Arbitration Rules of the International Chamber of Commerce, and that the arbitrators shall be subject to Turkish law.

At the time of signing of the agreement, the governing provisions for arbitration under Turkish law were those provided under the Procedural Law.<sup>(1)</sup> When the dispute was submitted to arbitration, the parties' attorneys chose the International Arbitration Law,<sup>(2)</sup> as cited in the terms of reference, as the governing law of the arbitral proceedings. Accordingly, the question for the courts was whether the terms of reference may be deemed to have the force of amending the arbitration clause in the agreement.

The court of first instance decided to apply the provisions of the terms of reference and reviewed the dispute pursuant to the provisions of the International Arbitration Law.

However, the 15th Chamber of the Court of Appeals held that, even if it could be accepted that the terms of reference constituted a new arbitration agreement, the parties raised no claim in relation to the existence of such new arbitration agreement. Accordingly, the court annulled the decision of the Court of First Instance on the grounds that the parties' intention is the key factor to be taken into account in determining the applicable law to arbitral proceedings. The court stated that the provisions set forth under Articles 516 to 526 of the Procedural Law should have been applied instead of the International Arbitration Law, because (i) the Procedural Law was the only law in force at the time of signing of the agreement with respect to arbitration, and (ii) the International Arbitration Law included no specific provisions for its retroactive applicability.

Upon the 15th Chamber's ruling, the court of first instance insisted on its former decision and the dispute was taken before the General Assembly of Civil Chambers of the Court of Appeals.

The General Assembly decided that even if the terms of reference stated that the arbitration was subject to the International Arbitration Law, they did not constitute a new arbitration agreement or a document having the force of amending the agreement. The General Assembly further stated that the agreement between the parties was the main reference point and the terms of reference could not be considered to be a new agreement or arbitration clause. The General Assembly concluded that the intention of the parties is the key element in arbitration, and that the intention of the parties was clearly set forth in the agreement: "Arbitrators shall be subject to Turkish laws", which should be interpreted to refer to the Procedural Law, as that was the only law in force with respect to arbitration at the time of signing of the agreement.<sup>(3)</sup>

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## Endnotes

(1) The Procedural Law contains no provision referring to terms of reference.

(2) Article 10/E of the International Arbitration Law refers to terms of reference as follows:

*"Unless otherwise agreed by the parties, the arbitrator or the arbitral tribunal shall prepare terms of reference following the submissions of the petitions of the claim and the response.*

*The terms of reference contains issues such as the name and title of the parties, their addresses for notification during the arbitration, a summary of their claims and defence, their requests, explanation of the dispute at hand, the name, surname, title and address of the arbitrators, the place of arbitration, the term of arbitration, the commencement of the term, explanations relating to the procedural provisions applicable to the dispute and whether or not the arbitrators are granted the authorization to act as amiable compositeur.*

*The terms of reference shall be signed by the arbitral tribunal and the parties."*

(3) For the same reasoning with respect to the force of the terms of reference, see also Decision E 2006/15-609, K 2006/656 (October 18 2006) of the General Assembly of Civil Chambers of the Court of Appeals.