

Arbitration - Turkey

Courts confirm International Arbitration Law does not apply retroactively

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Background

The International Arbitration Law⁽¹⁾ entered into force on July 5 2001. However, its temporal application remains an issue. Although there is no clear provision in the law on such matters, the Court of Appeals has rejected arguments that the law has any retroactive effect, deeming it inapplicable to arbitration agreements signed before July 5 2001, even in cases where the relevant dispute arose after such date. The court's rationale is based on the true intention of the parties – the parties to an arbitration agreement signed before July 5 2001 could not have intended to apply the law to their disputes.

A 2007 decision of the Assembly of the Civil Chambers of the Court of Appeals relating to an action to set aside an arbitral award under the law demonstrates the court's reasoning.⁽²⁾

Facts

The claimant was the Ministry of Agriculture and Regional Affairs and the respondent was a construction company. The construction agreement between the parties (dated December 2 1993) contained a dispute resolution clause in which the parties agreed that any dispute arising from the agreement would be settled by three arbitrators appointed in accordance with the International Chamber of Commerce Rules. In the same clause, the parties also stipulated that the arbitrators would be subject to Turkish laws.

Although the work was accepted on March 4 1999, the parties could not agree on the amount of the internal source deductions, among other things, and the claimant initiated arbitration proceedings. In the terms of reference, the parties and the arbitrators agreed to apply the International Arbitration Law to the dispute.

However, following the award, on February 16 2005 the claimant filed an action to set aside the award. On February 21 2006 the first-instance court set aside the award by applying the law. The respondent appealed the decision.

Court of Appeals decision

The Court of Appeals overruled the first-instance court, on the following grounds:

"i. the construction agreement, subject to the dispute was executed between the parties before the International Arbitration Law entered into force by being published in the Official Gazette on July 5 2001;

ii. in article 67 of the agreement titled dispute resolution, it was agreed that the matters subject to dispute shall be finally settled by three arbitrators appointed in accordance with the ICC rules;

iii. there is the provision of 'the Arbitrators will be subject to Turkish laws' in the following section of the same article;

iv. therefore, it should be understood from this provision that the arbitrators shall rule on the agreement between the parties pursuant to Turkish laws, existing at the time of the execution of the agreement;

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v. even if it would be acceptable that there was a new arbitration agreement [with the agreed terms of reference] the existence of a new agreement was not alleged;

vi. the real intention of the parties shall be accepted and the provisions between 516-526 of the Civil Procedure Law⁽³⁾ shall be applied."

Ignoring the Court of Appeals decision, the first-instance court insisted on its first decision and decided to set aside the arbitral award under the law. The respondent appealed.

Assembly decision

The Assembly of the Civil Chambers of the Court of Appeals⁽⁴⁾ examined whether the law applicable to the dispute was the Civil Procedure Law or the International Arbitration Law.

The assembly also evaluated whether the terms of reference signed by the parties and the arbitrators modified the arbitration agreement and, if so, whether the terms of reference could be deemed to constitute an arbitration agreement.

The court stated that the terms of reference did not have the power to modify the arbitration agreement and did not form a new arbitration agreement. Thus, the court declined the claimant's assertion that the arbitration was subject to the International Arbitration Law, since when executing the agreement, the parties could not have intended for that law to apply to their dispute.

Furthermore, the court concluded that the action in the case at hand could not be defined as an "action to set aside" (as set forth under the law) as, under the Civil Procedure Law, it is only possible to appeal an arbitral award.⁽⁵⁾

There were two dissenting opinions to the court's decision. Both dissenting judges felt that the first-instance court decision should have been approved and that the award was subject to the action to set aside under the International Arbitration Law. They gave the following reasons:

- The law is a procedural regulation and thus should be applied retroactively.
- The law provides that it will apply with respect to disputes containing foreign elements for which Turkey is determined as the seat of arbitration.⁽⁶⁾ Therefore, the law should apply to the case at hand.
- The law also provides that it is applicable if it is chosen by the parties or the arbitrators.⁽⁷⁾ In the case at hand, the arbitrators and the parties chose to apply the law in the terms of reference.

Comment

In eight further decisions of the 15th Chamber of the Court of Appeals and one other decision of the Assembly of the Civil Chambers of the Court of Appeals, the Court of Appeals reached the same conclusion and did not apply the law to an arbitration agreement signed before July 5 2001.

Only one decision, rendered in 2003 by the 19th Chamber of the Court of Appeals, goes against this trend. The 19th Chamber did not discuss the applicability of the law at all, but still approved the first-instance decision to apply the law to an arbitration agreement signed in 1993.

Therefore, despite the decision of the 19th Chamber, and the fact that a large majority of Turkish scholars have argued that the law should be applied retroactively, the established case law of the Court of Appeals is that it does not apply to arbitration agreements signed before July 5 2001.

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Endnotes

(1) The International Arbitration Law (4686), published in the *Official Gazette* on July 5 2001.

(2) Decision of the Assembly of Civil Chambers of the Court of Appeals, July 18 2007, E 2007/15-444, K 2007/554.

(3) The Civil Procedure Law (1086/1927) was replaced by the new Civil Procedure Law (6100), published in the *Official Gazette* on February 4 2011.

(4) The Assembly of Civil Chambers of the Court of Appeals decides cases where a

first-instance court insists on its first decision, despite its reversal by the Court of Appeals on appeal.

(5) Similar to the International Arbitration Law, the only remedy against an arbitral award under the new Civil Procedure Law (6100) is an action to set aside. An appeal is no longer possible.

(6) Article 1(2) of the International Arbitration Law.

(7) *Id.*

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