

Trends in Turkish Dispute Resolution: The Rise of Arbitration

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Could you provide an overview of the current dispute resolution landscape in Turkey? How would you describe the infrastructure and processes in place to support dispute resolution?

Commercial disputes are on the rise in Turkey due to recent economic instability arising from local and regional political fragility. The Turkish lira weakening against the US dollar and euro should have fuelled exports; however, regional instability has hindered exports by Turkish companies. Therefore, manufacturers relying on local sales and regional exports have suffered as they could not turn their products into cash. As a result, they could not make payments to suppliers during recent months, giving rise to lawsuits, collection proceedings and applications to delay or execute bankruptcies.

While it was hoped that the recent elections would end economic volatility, it seems the recent political crisis between Turkey and Russia will add another problematic dimension to cross-border deals and transactions. Potential exists for commercial cases and commercial or treaty arbitrations to arise, given that Turkish companies in Russia are now receiving hostile treatment, several Russian state-supported projects have been suspended and Russia has imposed sanctions over certain goods exported from Turkey.

Commercial disputes are heard by commercial courts, located in all major cities. Disputes above certain amounts are handled by a council composed of three judges. Commercial court judges are appointed from among the most senior judges, having considerable experience. Although expert opinions are a decisive factor in commercial cases, the manner in which commercial courts approach disputes in Turkey has a settled method and reliability, compared to other developing countries. Particularly, commercial court judges in cities such as Istanbul, Ankara, Izmir, Bursa and Adana are quite experienced, having heard thousands of different commercial conflicts.

I believe the Achilles' heel of Turkish commercial dispute resolution mechanisms is the lack of specialised courts. Specialised courts do exist in Turkey, such as IP courts. However, the degree of specialism and the immeasurable variety of commercial transactions seem to require more specialised courts than currently exist. Personally, I would prefer to take my cases to a court specialised in construction in Istanbul, similar to the Technology and Construction Court in London, as opposed to engaging in ad hoc arbitration. The lack of specialism among commercial judges places increased significance on court appointed experts in commercial courts; the more complex the case, the more judges rely on experts. Methods exist to tackle this problem, but it is an ongoing issue with Turkish commercial dispute resolution.

On the other hand, use of injunctions is quite important given that commercial cases can take between one and three years under normal circumstances. If an injunction is not obtained, it may not matter whether or not

the case is won, since the defendant could dissipate the assets during the proceedings. No mechanisms exist to deter parties from dissipating assets during a case, such as monetary penalties, criminal consequence or debarment. Thus, the need for injunction is highlighted, along with the consequences of this not existing. Generally, courts request collateral equal to 15 percent of the subject asset's value. However, I have seen examples where the courts did not ask for collateral at all, or asked for collateral equal to just 1 percent.

How prevalent is the use of alternative dispute resolution in Turkey? How might this approach be more beneficial than proceeding directly to litigation?

For a variety of reasons, parties do not prefer domestic arbitration institutions. These reasons include costs, as well as a lack of awareness and general arbitral culture in Turkey. Several arbitration institutions exist, operated by chambers of commerce, with minor market share in Turkey. In the absence of reliable arbitral institutions, ad hoc arbitrations composing academic arbitrators have been more attractive to parties. However, the lack of arbitrators' industry expertise, secretariat and pace are heavily criticised. As in the case of commercial courts, local arbitral panels rely heavily on expert opinions, raising questions of efficiency.

Although panels at local arbitrations are more flexible in selecting experts, the way experts can impact cases has almost no difference to court proceedings. Besides, arbitrator fees are extremely high in local ad hoc proceedings, despite their slow pace and questionable expertise. Accordingly, parties are prompted to think twice before choosing arbitration instead of court processes.

With these concerns in mind, a new arbitral centre was recently established in Turkey, named the Istanbul Arbitration Centre. The new forum is intended to provide the necessary expertise, impartiality and independence, as well as to promote a culture and use of arbitration in Turkey, along with other alternative dispute resolution methods. The Centre recently declared its fee structure, under which it seems arbitrations will be resolved for fees equalling no more than 10 percent of court fees.

In your opinion, what are the strengths and weaknesses of Turkey as seat a for arbitration proceedings?

Turkey should be seen as an appropriate arbitral seat for all foreign and domestic parties. Particularly, Istanbul has huge potential, given that it is a centre which ties not only continents, but also cultures and history. Turkey is unique in a geographic sense because Istanbul can be reached by 50 percent of the world's population within four hours.

Although the International Chamber of Commerce in Paris or the London Court of International Arbitration Centre are regularly selected as institutions, due to visa problems for non-European parties, it is increasingly common to have trials in Turkey.

International or regional trade and business in sectors such as construction, transport and energy, often involving Turkish parties, puts Turkey in a position to be good seat for international arbitrations. Consequently, Istanbul has a higher chance to be an international arbitration seat rather than being an arbitration centre in the region, at least in the short term. Having said that, if Istanbul becomes a preferred seat for international arbitration, the Istanbul Arbitration Center will follow this lead and gain momentum compared to other international arbitration institutions.

What advice would you give to parties looking to commence arbitration proceedings in Turkey? How should a company go about developing an effective strategy?

While it firmly depends on the sector in which parties operate, I would recommend that arbitration or court proceedings should be considered as a last resort, given enforcement related problems. If possible, it is advisable to enter a negotiation and then mediation phase, prior to embarking on arbitration, even if it these stages are not procedurally required. In fact, surprisingly, a large number of Turkish companies are not litigious at all, particularly those which are above SME size. They do business in Turkey or abroad with commercial parties or sovereigns and tend to solve their problems amicably, if this is possible.

The construction industry is a trendsetter in terms of dispute management and avoidance, achieved through dispute avoidance and dispute review boards. Involving experts in contracts long before disputes arise contributes massively to developing a manageable and sustainable relationship.

However, if disputes are inevitable, the way in which parties kept their records will be quite decisive, irrespective of whether they engage in institutional or ad hoc arbitration. If the rules of Turkish Civil Procedural Law are followed during arbitrations in Turkey, written evidence submitted by the parties will play a crucial role.

Equally, parties should carefully select their arbitrators. Academics without any commercial tenure, or without a practitioner's experience or knowledge about commercial arbitration, can slow down the process, as well as make unpredictable procedural or substantive decisions. As indicated above, experts dominate arbitration proceedings. Accordingly, parties should be aware of this and pay close attention during appointment of experts.

To what extent is the autonomy of the arbitral process fully recognised in Turkey? What, in your opinion, are the benefits and drawbacks of such self-determination?

Pursuant to Article 424 of Turkish Civil Procedural Code numbered 6100, parties are entitled to determine procedural rules for arbitrators to apply in the course of arbitration proceedings, provided the rules do not contradict mandatory aspects of the Code.

Arbitral awards can be cancelled by state courts. Therefore, the autonomous character of parties seeking recourse to arbitration can be interfered with on the basis that the arbitrated decision is against public order. We believe that complete autonomy is necessary for arbitration proceedings to reflect parties' true intentions.

Do any particular challenges or issues exist in terms of enforcing arbitral awards in Turkey? How are foreign arbitral awards dealt with in light of the UNCITRAL Model Law and the New York Convention, for example?

In accordance with the New York Convention, to recognise a foreign arbitral award in Turkey, the arbitral decision must not contradict the Turkish public order. However, Turkish judges are particularly interested in this public order exception as a method to review the merits of arbitral decisions. Turkish judges continue to find reasons to set aside arbitral awards.

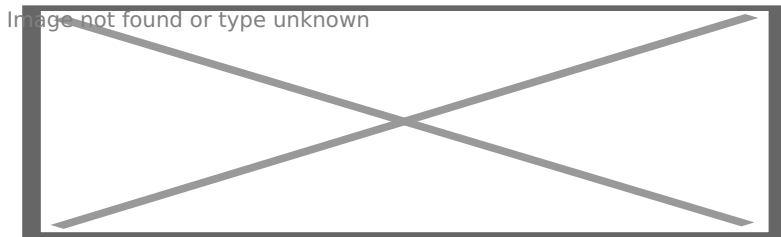
Nevertheless, commercial courts in big cities such as Istanbul and Ankara have a more reasonable approach. It is a relief that courts in other cities have started to be influenced by this approach. Another challenge is that no special chamber of the Turkish Supreme Court exists to review set-aside applications. Therefore, there is no uniform approach on which parties can rely when enforcing their awards.

What future developments and trends do you expect to see in dispute resolution in Turkey over the years ahead? Does Turkey have the capacity to become an arbitration hub to rival more established European seats such as London, Paris and Geneva?

The Istanbul Arbitration Center was recently established and has been drawing much attention. It has been widely discussed that a new approach to adjudication of commercial disputes is urgently needed in Turkey. Turkish lawyers, parties, judges and expert witnesses have all become frustrated by the way commercial disputes are handled in Turkey by state courts, ad hoc arbitral bodies and local arbitration institutions.

Such frustration could present an opportunity for the new arbitration centre to gather momentum, becoming the arbitration centre which stakeholders in Turkey have long waited for. In addition, the Istanbul Arbitration Center has the advantage of strong government support to make the country a financial hub, which needs an arbitration centre.

However, government support could backfire if it is not subtle and gives the impression the centre is not independent, but rather is an alternative arm for the government to resolve disputes. Only time will tell whether the Istanbul Arbitration Center becomes widely used. We are optimistic about this initiative moving forward, and hope it continues to gain traction and momentum in the near future.



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