International Commercial Arbitration in the European and Turkish Context

verfasst von / submitted by
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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of
Master of Laws (LL.M.)

Wien, 2016 / Vienna, 2016

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:
A 992 548

Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:
Europäisches und Internationales Wirtschaftsrecht / European and International Business Law

Betreut von / Supervisor:
Univ.-Prof. Dr. Dr. h.c. Peter Fischer
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<tr>
<td>BITs</td>
<td>Bilateral Investment Treaties</td>
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<tr>
<td>BOT</td>
<td>Built-Operate-Transfer</td>
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<tr>
<td>Panama Convention</td>
<td>Inter-American Convention on International Commercial Arbitration, Panama, 30 January 1975</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>ICSID Convention</td>
<td>Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 18 March 1965</td>
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<td>TBMM</td>
<td>Grand National Assembly of Turkey</td>
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<td>TCCP</td>
<td>Turkish Code of Civil Procedure, No. 1086, 18 June 1927</td>
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<td>TIAC</td>
<td>Turkish International Arbitration Code, No.4686, 5 July 2001</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on the International Trade Law</td>
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<td>UNCITRAL Arbitration Rules</td>
<td>UNCITRAL Arbitration Rules, 1976</td>
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CHAPTER I

INTRODUCTION

Globalization has started after World War II, catalyzed by the impacts of major developments such as industrialization, improvements in technology, communications and transportation and has led to the interdependence of national market and increasing integration of commerce, economy, and people in one global marketplace. Globalization has contributed to economic growth and increased living standards by promoting the global competition, which led increasing improvement on the quality of products and services, promoting foreign trade activities, opening up new working areas, increasing investment and capital flows, encouraging technical developments, and spreading the culture and education as the result of integration. Beyond the political, economic, cultural integration, the most important category of integration is the economic integration. Two key elements of this integration are international commercial activities and the free flow of the trade cross-border investment activities through the elimination of tariffs and other barriers to trade. However, economic integration did not appear on the same levels in all of the countries and the standards governing such integration are varied from state to state. Thus, this lack of uniformity caused some concerns in the international community and generates disputes because of the uncertainty of applicable law and often results in conflicts of rights and obligations that parties have. As a result, when the parties failed to reach a solution by mediation or negation, international arbitration appeared as an effective alternative method beside litigation for solving the dispute.

Global economic integration supported by many international agreements and national regulations, in terms of international commercial activities and the free flow of trade cross-border investment activities by eliminating tariffs and other barriers to trade. The concept of international economic law consists international and national rules that regulate international economic relations. The major subjects of the international economic law are foreign investment and the World Trade Organization law. General Agreement on Tariff and Trade (GATT), which is a multilateral agreement, aimed to eliminate quotas and reducing tariff duties among the signatory
states signed in 1947. The single undertaking approach of Uruguay Round of the GATT led to the establishment of World Trade Organization (WTO) in 1994. The WTO, which provides the common institutional framework by individual agreements and related legal instruments for conducting the trade relations among its member States is a very important pillar of world trade order and can be considered as a turning point in the development of international economic relations.¹

Another important subject of globalization is the foreign investment activities. Foreign investment can be described as tangible or intangible assets in a foreign State territory, which are owned or, total or partial controlled by an investor of another State. Foreign investments are possibly under the risk of direct or indirect nationalization by the host country. Until the Communist Revolution in Russia, neither the states nor the legislations paid any attention to the rules regarding the protection of foreign investments. After the Communist Revolution, the Soviet Union expropriated national enterprises without any compensation and justified this action by relying on the national treatment standard.² Thenceforward, within the increasing liberalization of the national economics, the security of liberal capital movements gained importance. Many developed and developing countries opened their economies to foreign trade activities by concluding bilateral investment treaties (BITs), which is an agreement between two countries for reciprocal encouragement, promotion and protection of investments en each other’s territories by companies based in either country, as UNCTAD described.

There is no doubt that there might be some disputes, which arise from BITs. Normally, when there is a dispute between a foreign investor and a state, this dispute would be settled by the national courts of host state. From investor’s point of view, this is not an attractive solution because of the mistrust to the national court of the host state due to lack of impartiality concerns. The courts of the investor’s home country or the courts of a third country is also not an option because mostly they lack jurisdiction over investments taking place in another state. Because of these reasons, BITs contain an alternative dispute settlement process, such as arbitration and conciliation. Especially the arbitration became an excellent alternative to traditional methods with creating a

¹ Peter-Tobias Stoll and Frank Schorkopf, WTO: World Economic Order, World Trade Law (Martinus Nijhoff 2006) 14, 15
² Dolzer Rudolf and Schreuer Christoph, Principles of International Investment Law (2nd edn, Oxford University Press 2012) 1, 2
better climate to attract foreign investments. Because the arbitration is much more formal, legal proceeding while the conciliation is an informal attempt to reach a settlement without any legal significance.³

Arbitration is a consensual dispute settlement process that allows parties who agreed to put an end their dispute without recourse to the courts of law. Arbitration is a preferred method for resolving international disputes, especially for the commercial disputes because of practical advantages such as party control, flexibility, confidentiality and the ease of enforcing arbitral awards across national borders. Furthermore, international commercial arbitration is not only applicable to the disputes between private entities, but also applicable to the disputes may arise from an agreement between private entities and states.

The movement towards to economic liberalization and integration to the global marketplace also influenced Turkey. Turkey’s economy was quite closed until the 1980s. Later on, under the impact of close relationships with the EU and its objective to meet membership requirements of World Trade Organization, Turkey commenced to alter its inward-oriented development policies to the outward-oriented strategies. Moreover, a customs union between Turkey and the EU established in 1996, which led to the adaptation of EU’s most liberal most favored nation (MFN) tariff rates on industrial products by the implementation of customs union agreement. Turkey applied the MFN tariff for institutional products, same as the rates EU’s Common External Tariffs which is one of the lowest. As a result, Turkey’s economic liberalization and integration level drastically increased.⁴

Turkey as new developing country, needed to attract foreign investors to afford expensive energy and infrastructure projects. In order to achieve economic development, Turkey has enacted a number of legislations, ratified many major international agreements and conducted several BITs. However, Turkey as a developing country was not capable to cope with this increasing investment speed. This situation caused some investment problems concerning the subjective arbitrability of

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³ Dolzer Rudolf and Schreuer Christoph, Principles of International Investment Law (2nd edn, Oxford University Press 2012) 235, 236
⁴ Sübidey Togan, Economic Liberalization And Turkey (Routledge 2010) 13
concession agreements involving investment in public services, which required some legislative and constitutional amendments.

This study is about the international commercial arbitration and its procedure and practice in Turkish judicial system. The first part of the study covers the international commercial arbitration in general terms and consists two chapters. The following chapter discusses the origins of arbitration as a concept, and historical development and major agreements/conventions of international arbitration framework. The third chapter deals with the characteristics and advantages of arbitration as an alternative dispute resolution mechanism compared to other methods of dispute settlement, in order to profoundly understand the concept of international commercial arbitration. In this respect, the content and formation of the arbitration agreement, the notion of the subjective and objective arbitrability, the difference between ad hoc and institutional arbitration including the characteristics of major arbitration institutions, and the composition of the arbitral tribunal will be discussed. The second part of the study comprises the international commercial arbitration under Turkish judicial system. In this respect, sources of the international commercial arbitration in the Turkish judicial system, the problematic issues of international commercial arbitration in Turkey, a general overview of the Turkish International Arbitration Code in comparison with the UNCITRAL model law, and the recognition and enforcement of foreign arbitral awards in Turkey will be focused in the fourth chapter.
CHAPTER II

HISTORICAL DEVELOPMENT AND INTERNATIONAL REGULATORY FRAMEWORK OF THE INTERNATIONAL COMMERCIAL ARBITRATION

The roots of arbitration as a dispute settlement go back to ancient Greek and Roman Laws. The states of ancient Greece developed an arbitral proceeding with groups of arbitrators similar to modern international tribunals. As Demosthenes said “A vast deal of business was done at Athens by arbitrators; some of whom were chosen by the parties to settle their disputes in private, others were appointed by the state, and were a sort of inferior judges. These were forty in number, four being chosen by annually from each tribe. They were required to be at least fifty years of age, and took an oath to discharge their duties faithfully…” As Fraser noted, presumably the first example of international arbitration the Greek history was the dispute between Andros and Chalcis regarding possession of the deserted city of Acanthus. Several examples, such as the famous *Melos v Cimolos* case, can be found in the Macedonian and Hellenistic periods. After the Hellenistic period, the Roman Republic entered the stage of Greek history via the Wars of Alexander the Great and the annexation of Greece hereby the beginning of Roman Greek period. With the influence of the Hellenistic princes, the Romans adopted the arbitration to adjudicate the issues between states. As Wolayer noted, it was common among the Romans “to put an end” to litigation by means of arbitration. Even though these cases are not suitable examples for international commercial arbitration, they are important to understand the origins of the concept of arbitration.

From the point of Turkish law, the concept of arbitration has been known for several years and the origin of arbitration goes back to the Ottoman Empire era. In the Ottoman Civil Code, *Mecelle*, references to arbitration, mediation and conciliation can

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5 Demosthenes and Charles Rann Kennedy, *Translation Of Select Speeches Of Demosthenes* (J & JJ Deighton 1841) 169
6 Henry S Fraser, *A Sketch Of The History Of International Arbitration* (Cornell University, College of Law 1926) 186, 187.
be found. Moreover, as Gemmel noted, the Mecelle of Legal Provision of Ottoman Empire was legislation that has a section for arbitration, which many Islamic countries relied on until they developed their own civil code. However, the arbitration under Mecelle was more like conciliation, because the arbitral awards were only final with the judgment of a court.

In England during the middle ages, merchants used arbitration to adjudicate the disputes outside of the Royal Courts because the Royal Courts was not able to serve the needs of trade and traders efficiently. Thus, the members of the trading communities took their disputes to special tribunals such as the Courts of the Boroughs. Moreover, the members of the institution known as the gild merchant were bound to bring their disputes before the gild before the litigation process. Thus, the role of gilds concerning regulation and settlement of difficulties that occurred among its members is considered to be arbitration. Furthermore, arbitration played an essential role in resolving the commercial disputes in France. Since, there were mistrust and doubts about whether the state courts could effectively solve commercial disputes, arbitration became the sole way to adjudication in the 16th century.

Despite the fact that arbitration has been accepted as an appropriate system for dispute resolution by the commercial world, most arbitration cases were held on ad hoc basis and the process was under intervention of the national courts. Since there was no international regulation, the enforcement of arbitral awards was dealt with differently in every country under their national laws and possible political factors. The development of modern international arbitration has begun in the late 19th century and 20th century and countries regulated their national laws on the matter that arbitration procedure and enforcement of arbitral awards. However, during this time, arbitration was still

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10 The History, Importance and Modern Use of Arbitration, p.11
12 Kyriaki Noussia, *Confidentiality In International Commercial Arbitration* (Springer 2010) 14
considered as an exception to the litigation and it was based in national laws.\textsuperscript{13}
Eventually, some legislative provisions were made for arbitration and it received legal recognition. Thenceforward, international commercial arbitration has become the most preferred alternative as a dispute resolution mechanism, which is exemplified by the number of arbitration processes initiated with major arbitration institutions each year. It has taken the primary role in the settlement of international commercial disputes.\textsuperscript{14}

Since international commercial activities have increased all around the world due to globalization, the necessity to create a mechanism for the enforcement of arbitration agreements and awards that was internationally recognized became essential. As a result, the Permanent Court of Arbitration was established based on Hague Convention for the Pacific Settlement and International Disputes in 1907. Additionally, in 1923 the ICC Court of International Arbitration was established in Paris by the Chamber of Commerce in order to provide the framework and decide on the commercial disputes that involve parties from different countries.\textsuperscript{15} Hereinafter, the ICC Court of International Arbitration is referred to as the “ICC”.

International agreements concerning commercial arbitration originally took the form of bilateral treaties. Even though bilateral treaties still continue to be significant for the recognition and enforcement of arbitration agreements and awards, multilateral conventions sought to facilitate international arbitration by encouraging states to achieve this aim.\textsuperscript{16} The Geneva Protocol of 1923 was the first international convention on international commercial arbitration that aimed to introduce arbitration as an alternative dispute resolution mechanism. The Protocol’s main focuses were the enforcement of arbitration agreements and facilitation of domestic enforceability of arbitral awards made pursuant on such agreements in signatory states that awards were made. Then, the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 required the enforcement of arbitral awards rendered pursuant to arbitration

\textsuperscript{14} Martin Platte, \textit{Introduction to International Commercial Arbitration, Volume 1 of Verona Lectures} (Aracne 2006) 4
\textsuperscript{16} Gary Born, \textit{International Commercial Arbitration: Commentary and Materials} (2\textsuperscript{nd} edn, Kluwer Law International 2001) 19
agreements subject to the Geneva Protocol and thereby expanded the enforcement of arbitral awards. Even though the Geneva Protocol and Convention were important steps on the way to the effective international framework of international commercial arbitration, they were ratified by only twenty-four states.\footnote{Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, \textit{Comparative International Commercial Arbitration} (Kluwer Law International 2003) 19}

The successor to the Geneva Protocol and Geneva Convention is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards that was signed in 1958, hereinafter referred to as the “New York Convention”. This treaty is often recognized as the beginning of the modern era in the field of international commercial arbitration\footnote{Gary Born, \textit{International Commercial Arbitration: Commentary and Materials} (2\textsuperscript{nd} edn, Kluwer Law International 2001) 1921}, because it managed to facilitate the recognition and enforcement of arbitration agreements and arbitral awards by establishing an international system to be adopted by national judiciaries. Currently, the New York Convention has 156 state parties. However, the ratification by parties did not occur as fast as the conclusion, for instance, Pakistan signed the Convention in 1958 but ratified it in 2005. Most recently, Comoros ratified the Convention last April.\footnote{Uncitral.org, "Status" <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 22 November 2015.} Turkey, as one of the signatory countries of the New York Convention, ratified it in 1991 and amended its Constitution to ensure consistency.

The Inter-American Convention on International Commercial Arbitration, which is also known as the Panama Convention, entered into force in 1975 and was ratified by more than fifteen states including, the United States. The aim of the Panama Convention is similar to the New York Convention in terms of facilitating the recognition and enforcement of arbitral awards within the signatory countries. Yet, the Panama Convention contains further provisions that do not exist in the New York Convention. For example, if the parties have not clearly opted to institutional arbitration or other arbitration rules, the rules of “Inter-American Commercial Arbitration Commission” will be implemented.\footnote{Richard M Asbill and Steven M Goldman, \textit{Fundamentals Of International Franchising} (American Bar Association 2001) 316} The Panama Convention has been efficient in promoting the acceptance of arbitration in Latin American countries.
The European Convention on International Commercial Arbitration signed in 1961 to promote rules to deal with issues arising out of the arbitration agreements concerning trade disputes between European countries and contains provision regarding the grounds for setting aside an award. Turkey had also signed the European Convention in 1961 which was then ratified by Turkish Civil Procedure no.3730 in 1991. The European Convention of 1961 is significant for Turkey because it was the first legislation in Turkish Law regarding international and commercial arbitration law and lead to several new legislation on the matter.\(^\text{21}\)

International commercial arbitration was also on the agenda of many international organizations such as the United Nations, the World Bank, and the World Trade Organization. Another important step for the improvement of the framework of international commercial arbitration is the ICSID Convention, which was promoted by the World Bank in order to encourage foreign direct investments by offering an alternative dispute resolution center to secure capital and investments. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, hereinafter known as the “ICSID Convention”, is a multilateral international treaty that concluded in 1965 and was ratified by more than 150 countries, including Turkey. The ICSID Convention is particularly important for Turkey because it was the first major international agreement accepted by Turkey and it contributed to the growth of the economy by conclusion of many foreign investment treaties under its scope. The Center for the Settlement of Investment Disputes (ICSID) constitutes by this convention in order to establish the facility and the rules for conciliation and arbitration of international investment disputes between investor and the State. The Convention provides a framework for settlement through arbitration and conciliation for investment disputes with the consent of both investor and the State.\(^\text{22}\)


\(^{21}\) Yusuf Caliskan, \textit{The Development Of International Investment Law} (Dissertationcom 2008) 322

\(^{22}\) “International Centre For The Settlement Of Investment Disputes (ICSID)” (1991) 6 ICSID Review.
Arbitration Rules were revised in 2010. The UNCITRAL Model Law served an essential function in the development and establishment of uniform international arbitration laws by providing a model legislative code that can be adopted by enacted by the states. The UNCITRAL Arbitration Rules aim to create model law for states in order to draft their own national regulations, set of rules available for ad hoc arbitration, sample provisions that can be arranged the parties needs in arbitration agreements, and also serves as a guide to arbitral institutions in the development of their own rules. Many countries, including Turkey, enacted international commercial arbitration according to general understanding and the framework of UNCITRAL. In the Turkish judiciary, international commercial arbitration has been governed by the International Arbitration Code No.4686 since 2001, which is formulated based on the UNCITRAL Model Law. UNCITRAL Model Law has many default provisions that can be adopted by parties especially in ad hoc arbitration. UNCITRAL Model Law may be considered the most important step in the development of the framework for international law after the New York Convention.

24 Steven P Finizio and Duncan Speller, A Practical Guide To International Commercial Arbitration (Sweet & Maxwell/Thomson Reuters 2010) 32
CHAPTER III

MAIN CHARACTERISTICS AND ADVANTAGES OF THE INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration is a consensual dispute settlement process that allows parties who agreed to adjudicate their transnational commercial dispute outside any judicial system. International commercial arbitration has become a preferred dispute resolution mechanism due to globalization and increasing transnational commercial activities. The international commercial arbitration adopted by many agreements as a dispute settlement process due to practical advantages such as procedural flexibility, party control over the process, and ease of enforcing arbitral awards across national borders and flexibility.

Arbitration gives the parties flexibility and a significant power and control over the process that will be used to resolve their disputes. Parties can decide whether the arbitration will be administrated by an institution or whether it will be ad-hoc, which means parties can determine their own arbitration procedures, rules, and applicable law. Furthermore, they can make their own selections of decision makers without any institutional involvement. Moreover, parties can also decide the seat of arbitration and the language of arbitration. This kind of flexibility makes arbitration particularly attractive and gives both parties an equal chance for a fair trial in a more neutral forum. Similarly, the parties have the opportunity to appoint arbitrators who are knowledgeable on the subject matter of the dispute. Additionally, having a trial in the country of one of the contracting parties gives that party an appreciable advantage, while international arbitration offers both of the parties a neutral territory to compromise.

Opt into arbitration is a consensual process and parties may agree to refer disputes to arbitration as a matter of contract with an agreement to arbitrate. According to UNCITRAL Model Law Art.7/1, “Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract
or in the form of a separate agreement.” It should be clearly stated on the arbitration agreement that the legal relationship can lead to dispute and are subject to the arbitral tribunal. In other words, it is not convenient to state on the arbitration agreement that all of the disputes between specific parties lead to arbitration. Thus, all of the contracts between parties must have an arbitration clause or there should be a master contract that contains the contracts that are subject to arbitration. Parties are free to choose how broadly they want to frame the arbitration agreement. They may refer only specific aspects of the disputes to arbitration, or they may agree to refer all of the dispute’s roots from a certain agreement to arbitration. Some jurisdictions do not stipulate any formal requirements, such as France. According to New York Convention Art.2 and UNCITRAL Model Law on International Commercial Arbitration Art.7, the formal requirement of arbitration agreements is written correspondence. The signature is not necessary because New York Convention Art.7 states, “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” The New York Convention indicates these requirements in order to reach an enforceable arbitration agreement. For instance, if an oral agreement concluded and stated in France but is going to be enforced in Austria, the agreement might be recognized under France’s judicial system, however, since the article 2 of New York Convention requires written form, it may not be recognized and enforced in Austria. Thus, an arbitration agreement must be in a written form of exchange of information. In addition, according to Article 4 of the Turkish International Arbitration Code the written form is also a requirement to conclude an arbitration agreement under Turkish Law.

Subjective arbitrability defines the ability of persons involved to conclude an arbitration agreement. Private parties are generally free to decide whether they want their disputes to be decided by state courts or by arbitration tribunals. However, this is not always the case for states and states entities. It is common to find laws that restrict the capability of states or state entities to enter international arbitration agreements. For example, in Saudi Arabia, Iran and Syria the state or the state entity must obtain approval for the relevant authorities before it can enter into an arbitration agreement. The agreement can be void because of the lack of subjective arbitrability to enter into an agreement. Therefore, private parties should verify that no such restriction exists when they enter into an agreement with a state party.
The agreement to arbitrate describes which disputes will be referred to arbitrators for adjudication. Objective arbitrability determines the subject matters that can be referred to arbitration. That is to say, a matter must be capable of being settled by arbitration in order to be referred to arbitration. This issue typically varies significantly from one jurisdiction to other, because it is a political issue regarding how much competence they do give away from the court of the states. Typically, public law disputes matters such as criminal cases, family law matters like divorce cases, and sensitive public policy issues that have state interests and cannot be referred to arbitration.

Arbitration agreements typically contain the scope of arbitration clause, the seat of the arbitration, the appointment of arbitrators, the composition of the arbitral tribunal, choice of law clause, and the language of arbitration. Also, the agreement defines the arbitration as an ad-hoc or institutional arbitration and if it is an institutional arbitration, the agreement contains the arbitration institute and its rules.

As mentioned above, one of the decisions parties must take is whether they want their arbitration to be administrated by an arbitral institution, or whether they want an ad hoc arbitration. There are advantages and disadvantages for each of the choices. Institutional arbitration is a kind of arbitration that is supported by a specific institution such as the International Chamber of Commerce, the London Court of Arbitration, etc. that undertakes certain organizational functions and performs case management functions. There are several arbitration institutions and parties may choose the most convenient one for their specific dispute. Each institution has its own set of rules for the administration and conduct of arbitral process. Thus, parties should be aware of the differences between the arbitration institutions’ set of rules and select the institution most suited to their conflict.

The ICC became one of the major institutions that administer international commercial arbitration since the 1920s. A recent survey by the Queen Mary University of London entitled Improvements and Innovations in International Arbitration, demonstrates that for more than 10 years, the ICC holds the top position for an
institution in the field of arbitration. The ICC has its own institutional rules and general framework that design the procedures suitable for the particular dispute without impinging the rights of arbitrators and secretariat that receive applications. One of the main characteristics of ICC arbitration is the existence of ICC Court and its scrutiny applied to arbitral awards, which is a unique formal process of ICC arbitration. The ICC Court monitors and supervises the conduct of the arbitral process in order to achieve the highest level of quality and efficiency of process. Moreover, every ICC arbitral award is closely examined by the ICC Court on the points of substance and the form of award must be confirmed by the ICC Court. Even though the ICC Court has no authority to alter the award, it can send its opinion on the awards to the arbitrators in order to achieve the highest quality possible. Another distinctive characteristic of ICC arbitration is that the parties must fill and sign a document called the “terms of reference” that are drafted by the tribunal at the beginning of the arbitration. This document contains the name of the parties, the summary of the claims and relieves sought, the list of issues, the place of arbitration and the procedural rules. The document aims to ensure the awareness of process by the parties. The arbitral awards made under the ICC rules have binding for the parties of arbitration.

Another major arbitral institution is ICSID center, which provides facility for the settlement on the investment disputes between states and foreign investors. ICSID jurisdiction is based on the consent given by both parties on the settlement of investment dispute, which are contracting state and contracting state’s national. One of the most important characteristics of ICSID arbitration is that the consent given by the parties constitutes a compulsory jurisdiction on the specific dispute. Another unique characteristic of ICSID arbitration is the absolute binding feature of arbitral awards that are given by the ICSID tribunal.

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26 Michael Bühler and Thomas H Webster, Handbook Of ICC Arbitration (3rd edn, Thomson/Sweet & Maxwell 2011) 28
28 Paul E Comeaux and N. Stephan Kinsella, Protecting Foreign Investment Under International Law (Oceana Publications 1996) 29
One of the main advantages of institutional arbitration is the availability of pre-established rules and protocol that ensure the arbitration proceedings progress in due time. This timeliness due to structure is supported by the fact that each arbitral institution has its own rules that provide a framework for the arbitration and its own form of administration to assist the process. Institutions have default rules on multiple important issues and the arbitration rules of the institution are usually very effective in handling most issues that may arise. Institutions provide administrative assistance, candidates of arbitrators, experts, set of rules and case management. Moreover, institutions provide a framework for the appointment of arbitrators and challenges to arbitrators. Also, institutional arbitration can be advantageous for the arbitrators because it is pre-financed and therefore makes sure the arbitrators are appointed by defined deadlines and that fees and expenses are paid in advance. In addition, some institutions may offer quality assurances such as International Chamber of Commerce. However, since those services are not free of charge, institutional arbitration may be more expensive than ad hoc arbitration. Additionally, parties may be required to respond with unrealistic time frames within institutional arbitration. In spite of these disadvantages, we should consider that institutional arbitration is important since it can assist in encouraging reluctant parties to proceed with the arbitration. This form of arbitration may easily deal with challenges during the process, since the arbitration rules of institutions are time tested and effective.29

On the other hand, ad hoc arbitration occurs when the parties opt for arbitration without administration of an arbitral institution. The ad hoc arbitration tends to be more flexible, faster and cheaper than institutional arbitration. Since there is no administration fee within ad hoc arbitration or expenses that arise out from bureaucracy, ad hoc arbitration might be more cost effective than institutional arbitration. However, it is also possible that ad hoc arbitration might also be expensive when a case necessitates an expert’s knowledge or a secretary to deal with an administrative work. In this case, the secretary fee and expertise expenses will add to the cost burden of arbitration. Moreover, in the case of a lack of cooperation between parties or a delay in the tribunal conducting, a party might seek court intervention and therefore this litigation would increase the cost of arbitration. Another advantage of the

29 Martin Platte, *Introduction to International Commercial Arbitration, Volume 1 of Verona Lectures* (Aracne 2006) 9,10
ad hoc arbitration is confidentiality. Ad hoc arbitration may be more confidential than institutional arbitration because of it is held in a non-public hearing. Moreover, parties may designate their own rules and procedure for a particular kind of dispute or they may choose the UNCITRAL rules that typically are used for ad hoc arbitration, a set of institutional rules such as ICC rules of arbitration, incorporate juridical process or adopt an ad hoc provision from other contracts. Thus, ad hoc arbitration may be advantageous for disputes that need more flexibility. However, this flexibility may lead to confusion, inefficiencies, additional expenses when they are seeking to agree on the terms of arbitration, and also may cause difficulties in parties not adhering to defined terms therefore decreasing cooperation.\textsuperscript{30}

As can be seen, one of the major upsides of international arbitration is the flexibility and the degree of control conferred upon the parties. Parties are free to designate an arbitral agreement with any applicable rules, applicable laws, treaty and conventions, the seat of arbitration, the language of arbitration, the appointment of arbitrators, and the procedure. Parties may agree on a single language agreement or a bilingual agreement. However, as the bilingual agreement needs translation, it may lead to additional costs and a longer duration of proceedings. Parties can agree on a procedure that is best suited for the particular dispute. Albeit arbitral institutions and domestic law provide a framework for the conduct of arbitration, the majority of the procedural provisions in national arbitration laws are not mandatory. Thus, parties have the freedom to opt out of permissive rules. Besides, each of the parties are entitled to choose their own arbitrator or select the procedure for appointing the arbitrator or arbitrators who have experience and qualifications relevant to the particular dispute.

Arbitral rules typically decree that there must be one arbitrator, whom is known as sole arbitrator or three arbitrators to form a tribunal. A sole arbitrator is generally appointed by with both parties consent, which is not very likely, or when they fail to reach an agreement on the matter, by the arbitral institution. On the other side, with the

\textsuperscript{30} Giuditta Cordero-Moss, \textit{International Commercial Arbitration}(Cambridge University Press 2013), 61-82
three-member tribunal, parties each nominate one arbitrator and the third arbitrator appointed by agreement of the parties or arbitrators or, failing that, by the institution.  

There are some factors to be taken into consideration to decide the number of tribunal members. Those factors are the amount in dispute, the complexity of case, the potential length of proceedings, and cost effectiveness. Clearly, the major upsides of having sole arbitrator are the comparable speed of the decision-making process as well as the cost advantage. Since there will be no deliberation meetings to make a decision or fix the hearing dates, a sole arbitrator can act, decide and draft the award relatively quickly and without the complexities of dissent. Nevertheless, this situation might be problematic for some complex cases that need more attention and brainstorming to allow a fair conclusion. Thus, a three-member tribunal may provide a safeguard against mistakes and misconduct by the tribunal and it decreases the workload density by sharing the burden of conducting the hearing and drafting the award. Therefore, the three-member tribunal has considerable advantages even though it costs more and takes a longer time for members to coordinate and reach a decision.

Parties may wisely select the seat and applicable law of arbitration because by choosing the seat of arbitration, that state’s mandatory national laws determine the procedure or rules that govern the arbitration as well as which national court in what extent it may intervene the arbitration. Moreover, parties may need assistance by court, for instance, in the matter of the appointment of the arbitrator; in this case, the competent court is the court of the place of arbitration. Firstly, it is important to select a country that has ratified the New York Convention. Also, it is essential to choose an “arbitration-friendly” state that does not interfere in the arbitration procedure by using anti arbitration injunctions as a tool to stop the proceeding.

In addition to flexibility and party control, another striking feature of arbitration is the confidentiality. Mainly, the national courts offer few guarantees of confidentiality to parties. For example, under the Turkish judicial system, court hearings should be accessible to the public but there are some exemptions to this provision, such as cases

32 Michael McIlwrath and John Savage, International Arbitration And Mediation (Wolters Kluwer 2010) 68, 69
that are determined to affect public security.\textsuperscript{33} The hearings of international arbitration are typically limited in terms of participants, as well as closed to the press and public. However, the confidentiality is something more than privacy and it is difficult to establish on a legal basis. For example, if an arbitrator talks about the case with his friend, is there a loss of confidentiality? The limit of confidentiality is a controversial issue. Thus, the confidentiality duty and its extent should be demonstrated under the terms of reference contract. This point may be a grand upside for some commercial disputes because certain information will not be revealed to commercial competitors.

Another advantage of international arbitration is the cost and efficiency. The procedural flexibility of international arbitration may allow efficient and cost-effective dispute resolution, although any form of complex dispute resolution is generally not considered a low cost endeavor. For example, as Brig advised, parties may put a limit on the time period starting at the demand for arbitration being filed to the final hearing, or be as specific as possible about types of discovery that will be allowed, or pick a cost-efficient location for dispute resolution, or form of tribunal in order to achieve efficient and cost-effective arbitration.\textsuperscript{34} International arbitration is presumably less expensive than litigation; however, it depends on the amount of disputes.

Finally, the last feature that makes international arbitration attractive is the finality of the arbitral awards. The purpose of international arbitration is to reach a binding and enforceable decision on the dispute, and international and institutional arbitration rules designed to support this goal. For example, the UNCITRAL Rules, Article 32(2) state that the award shall be final and binding on the parties and the parties undertake to carry out the award without delay.\textsuperscript{35} Under the New York Convention, the arbitral awards are enforceable in the 156 signatory countries. Article 3 of the New York Convention requires each signatory country to recognize arbitral awards as binding and to enforce them according to local rules of procedure where the

\begin{itemize}
\item Article 28 of the Turkish Civil Procedure Code 2011 “(1) Main hearing is open to the public. (2) In cases, where it is strictly necessary in respect to public morale or public security, the court may rule that the main hearing be conducted partially or wholly closed to the public.”
\item Alan Redfern, \textit{Law And Practice Of International Commercial Arbitration} (Sweet & Maxwell 2004) 621
\end{itemize}
award is relied upon; there shall not be substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards imposed. Enforcement of arbitral awards is much easier than enforcing court judgments internationally due to the fact that there is no such instrument concerning court judgments because the larger number of signatory countries enables the larger number of possible enforcement jurisdictions36

Contrary to litigation, the grounds of refusal for recognition and enforcement of arbitral awards are limited and a state cannot deny recognition and enforcement on the ground that the arbitral tribunal made a mistake of fact or law. According to Article 5 of the New York Convention, refusal can be on the ground of validity of the arbitral agreement, inappropriate composition of the tribunal, lack of jurisdiction like exceeding the scope of the submission to arbitration, and due process such as the absence of notice of proceeding or appointment of the arbitrator. The recognition and enforcement of the arbitral award can also be refused if the subject matter of the dispute is not capable of settlement by arbitration and if the recognition and enforcement would be contrary to the public policy of the country where recognition and enforcement is sought. Many national judicial systems allow the first instance of judgments to be reviewed on the attentive reconsideration of factual and legal matters, but the court generally cannot review the arbitrators’ determinations on issues of fact. Since there are various stages of appellate process in national court systems, reaching a final and binding determination may take a number of years. Thus, the finality of arbitral awards and limited grounds of refusal of recognition and enforcement lead to advantages in terms of cost and speed and make international arbitration a favored method to solve the international disputes.

Litigation and arbitration are similar processes in terms of adjudicating a dispute by a neutral decision maker while giving an opportunity to each party for a fair hearing, natural justice and reaching a binding decision. The main difference between arbitration and litigation is party control and the flexible nature of arbitration. While national courts’ decision makers are the agents of the state, an arbitrator is a private individual who has been appointed by the parties or an arbitration institution to

adjudicate their dispute. Moreover, arbitration provides a dispute resolution procedure that is agreed by the parties outside of the framework of national courts. As discussed above, arbitration offers some advantages over litigation in terms of speed and cost of the settlement process, confidentiality, finality and enforceability of the awards internationally, party control and flexibility over the procedure and a neutral territory to compromise on international disputes.

Mediation is an informal, confidential process that parties agreed to in order to receive support from a neutral intermediary to assist them in order to facilitate a settlement of their dispute. Mediation is an unregulated and unsupervised process in which the results are enforceable in contract. Mediation and arbitration are similar from the point of appointing a neutral third-party to oversee the process. However, unlike arbitration, the results of mediation are typically non-binding. In arbitration, the parties can appoint one or more arbitrators and the arbitral award is final and binding, which can be challenged only on limited grounds. Mediation on the other hand, typically is assisted by solely a third-party neutral that basically helps parties to facilitate discussion and reach a settlement of the dispute, rather than finding fault or making determination. That is to say, mediation is less formal, faster and a less expensive process than arbitration. Thus, mediation may be beneficial for some ongoing commercial relationships to solve the dispute quickly; however, it is not suitable for complex issues that cannot be easily compromised and that also need a binding determination.38

Expert determination is a consensual, confidential procedure where an independent expert decides on specific disputed questions such as technical, scientific or business related issues between the parties. Expert determination may be binding or non-binding based on the agreement. The main similarity between expert determination and arbitration is that both of these procedures are consensual and flexible because parties are free to design the elements of the dispute settlement in terms of the formation of their process, speed and the formality. Moreover, each alternative dispute resolution method leads to a final and binding result. However, typically, expert

37 Felix Steffek, Hannes Unberath, Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads (Bloomsbury Publishing, 2014) 156
38 Steven P Finizio and Duncan Speller, A Practical Guide To International Commercial Arbitration (Sweet & Maxwell/Thomson Reuters 2010) 17
determination is less formal than arbitration and it is more useful for evaluation of highly technical matters or disputes resulted from these kinds of specific issues that require a specialized knowledge. On the other hand, in arbitration, parties are more likely to appoint an arbitrator to decide on all legal and factual issues with full authority, such as a judge, which issues fall within the scope of arbitration clause. Thus, it would be safe to say that expert determination may be more focused, faster and less expensive than arbitration. Moreover, since expert determination is a less formal process, some procedural restrictions, which are valid for arbitration such as deciding the matter only on the evidence submitted by the parties, does not apply to the expert determination. 39 Last but not least, even though the results of expert determination may be final and binding, generally, the New York Convention does not apply to the expert determination. Consequently, enforcing the expert determination internationally may be more difficult than enforcing the arbitral awards.

CHAPTER IV

PROCEDURE AND PRACTICE OF INTERNATIONAL ARBITRATION IN
THE TURKISH LEGAL SYSTEM

A. The Development and the Sources of the International Commercial
Arbitration in the Turkish Judiciary System

International arbitration law in Turkey is governed both by international treaties
and the relevant legislations. Turkey is a signatory country to almost all major
multinational conventions on international commercial arbitration including, the
European Convention on International Arbitration, the ICSID Convention and the New
York Convention. Moreover, Turkey is a party within the Energy Charter Treaty and to
several Bilateral Investment Treaties (BITs)\(^40\) and in some of the BITs, Turkey
confirmed the arbitration procedure as a settlement mechanism for the disputes
between Turkey and the foreign investors.\(^41\)

The earliest source of arbitration in Turkey is the Turkish Code of Civil
Procedure of 1927, hereinafter referred to as the “TCCP”. The TCCP was taken from
the Swiss Code of Civil Procedure, the Notchel Code de Procedure Civile and contains
provisions in Articles 516 to 539 regarding arbitrability and procedure of arbitration.
However, the provisions of The Turkish Code of Civil Procedure are only applicable to
domestic arbitration issues. Article 516 and 517 of the TCCP deal with the arbitration
agreement that contains clear and writing consent of both parties and is concluded in
separate agreement stipulated in the main contract. Article 518 defines the arbitrability
and states disputes relating public policy, family law and insolvency law cannot be
conferred to the arbitration. The composition of arbitral tribunals is elucidated by the
Articles between 520 and 523. Under these provisions, parties are free to appoint their
arbitrators without any restriction regarding nationality of arbitrators and parties may
decide the number of arbitrators. If parties fail to appoint arbitrators, it can be referred
to the national courts. Moreover, the challenge of arbitrators shall be decided by state
court with the submission by parties within the first hearing or five days after the
appointment of arbiter noticed to the parties. Articles between 523 and 529 contain the

\(^{40}\) Turkey’s BITs available at <http://investmentpolicyhub.unctad.org/IIA/> accessed 6 December 2015.
\(^{41}\) Ziya Akinci, Arbitration Law of Turkey: Practice and Procedure (Juris 2011) 11
rules regarding arbitral proceeding. Arbitral tribunal is competent to adjust the procedural rules and arbitral process, and the timetable of the process is limited to a maximum of six months, unless parties give their consent and decided otherwise. The procedure, scope and formation of arbitral award dealt under Articles between 530 and 532. The final articles between 533 and 539 provide the framework for the grounds of challenging the arbitral award.

Until 1982, the enforcement of the foreign arbitral awards in Turkey was not formally possible due to the lack of legislation. Only the foreign arbitral awards concluded based on the BITs with Italy and Australia were enforceable in Turkey and the Court of Appeal has ruled the enforcement of foreign awards. In 1982, Turkish International Private and Procedural Law (hereinafter referred to as the “TIPPL”) that contains provisions about the recognition and enforcement of foreign arbitral awards were enacted. According to Article 50 of the TIPPL, a foreign award that is final and enforceable in the country where it was rendered, may be enforced in Turkey. Moreover, according to Article 54 of the TIPPL, in order to enforce a foreign award in Turkey, there should be either a reciprocity agreement between the country that the foreign decision concluded and Turkey, or a provision of law or a de facto practice in that country that provides enforceability of Turkish courts’ decisions in that foreign country.

Later on, the New York Convention, the convention ratified by the Turkish Civil Procedure no. 3731 and entered into force by publication in the Official Gazette in 25 September 1991. Article 62 of the TIPPL Code states the refusal grounds of the enforcement of foreign arbitral awards and they are almost exactly same as the Article 5 of the New York Convention. However there are some differences, according to Article 5/2(b) of the New York Convention, an award may be refused on the ground that it is contrary to public policy of the country that the award will be recognized and enforced in. The TIPPL adopted by this provision has an addition that “common moral principles” may be another reason of refusal. Furthermore, it should be noted that the notion of “foreign arbitral award” is not described under the TIPPL or under any other

42 Ziya Akinci, Milletlerarası Tahkim (Vedat Kitapçılık 2013) 47
44 Ziya Akinci, Arbitration Law of Turkey: Practice and Procedure (Juris 2011) 13
Turkish Codes. The Court of appeal interpreted the concept of foreign arbitral award as ‘an award delivered under foreign authority’. However, the New York Convention stipulated the criteria that shall be considered as the territory of a foreign state, rather than the foreign authority.45

Until the end of 1970s, Turkey’s economy was quite closed. Economic and trade liberalization in Turkey commenced in the 1980s with alteration of the inward-oriented development policies to the outward-oriented strategies. This alteration is exemplified especially by the close relationships with the EU and the objective of meeting membership requirements of World Trade Organization. Both desires motivated Turkey to open up its economy allowing it to integrate into the world economy.46 Thus, Turkey has enacted several laws and implemented certain ratified international agreements to attract foreign direct investments and promote liberalization of its economy. Eventually, Turkey has signed many bilateral investment treaties to encourage foreign investment in Turkey and protect investors’ investment in the foreign counties on the basis of reciprocal promotion and protection of investments47 Turkey also signed the Washington Convention on the Settlement of Investment Disputes in 1987 and ratified it in Turkish Civil Procedure no.3460 in 1988 with two reservations. Turkey stated that disputes regarding real property rights will be out of the jurisdiction of ICSID and, the disputes concerning interpretation and application of the Convention may not be submitted to the International Court of Justice and shall be settled through negations between the parties. ICSID Convention is particularly important for the development of international arbitration in Turkey, not only because it is the first convention that was ratified regarding international arbitration, but also that ratification of ICSID Convention motivated Turkey to conduct several BITs.

Turkey has signed many major multinational agreements on international arbitration; however, it did not ratify them until the beginning of the 1990s. In accordance with Article 90 of the Turkish Constitution, the enforcement of an international agreement shall be possible with the ratification of the Grand National Assembly of Turkey (TBMM) and when an international agreement is ratified by the

45 Serdar Bezen, Recent Developments In International Commercial Arbitration In Turkey (Mealey Publications 2001) 5, 6
46 Sübidey Togan, Economic Liberalization And Turkey(Routledge 2010) 1
47 Yusuf Caliskan, The Development Of International Investment Law (Dissertationcom 2008) 317-321
Turkish Grand National Assembly, it becomes equal to national laws. The New York Convention was signed in 1958 by Turkey; however, it was ratified and enacted in 1991, with two reservations concerning the reciprocity and commercial disputes. The scope of enforcement and recognition of foreign awards according to The New York Convention in Turkey is limited by the awards that arise out of relationships that are determined as commercial under Turkish national law, regardless of if they are contractual or not. Moreover, on the basis of reciprocity, Turkey shall recognize and enforce only the awards those rendered in other signatory states of the New York Convention.\(^{48}\) However, as mentioned above, enforcement can be still possible under the TIPPL. However, the ratification of the New York Convention restricted the application of the TIPPL in practice. According to Article 3/1 of New York Convention, the TIPPL is only applicable to non-contracting states’ arbitral awards and pursuant to Article 7 of New York Convention. Parties may seek the recognition and enforcement of arbitral award in accordance with the TIPPL. Nonetheless, since the New York Convention is more efficient and wider than the TIPPL, none of the parties would want to use this second probability.\(^{49}\) The recognition and enforcement of the foreign arbitral awards in Turkey will be discussed in detail later on.

In the 1980s, Turkey needed to attract foreign investors to afford major projects for the purpose of development. For this reason, Turkey made tremendous efforts to promote and encourage foreign investments in terms of implementing international agreements, enacting laws and conducting BITs. However, Turkey as a developing country was incapable to cope with this increasing investment speed, which caused some investment problems in public sectors. These issues required legislative and constitutional amendments. During this time, Turkey encouraged and invited foreign investors with the Law No. 3096 and Law No. 3465 regarding infrastructure and energy sectors, such as developing the electricity industry, roads and gas pipelines. Both regulations provide for concession agreements concerning public services between foreign investor and the public sector concluded the Built-Operate-Transfer

\(^{48}\) “In accordance with the Article I, paragraph 3 of the Convention, the Republic of Turkey declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State. It further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.”

\(^{49}\) Serdar Bezen, \textit{Recent Developments In International Commercial Arbitration In Turkey} (Mealey Publications 2001) 5
(BOT) model. At this point, Turkey faced an international commercial arbitration related problem on the matter of the subjective arbitrability of concession agreements involving investment in public services. First of all, Article 125 of the Turkish Constitution has provided legal remedies against the disputes resulted from the acts and transactions of the administration; however, it did not contain any arbitration procedure. According to the Article 155 of the Turkish Constitution, concession contracts were subject to the review of the Turkish Supreme Administrative Court. Moreover, any disputes arising out of the concession agreement were subject to the scrutiny of the Turkish Administrative Courts. This situation caused some concerns from the point of foreign investors regarding the competence of the Turkish Administrative Court to solve an international dispute. The concerns were related to the ability to conduct a fair trial, because the administration could act on behalf of the interests of the State. To eliminate these concerns Law No. 3996 regarding the Carrying Out of Certain Investments and Services within the Framework of the Build-Operate-Transfer Model was enacted in 1994. Pursuant to Article 5 of Law No. 3996, BOT agreements regarding public services stated in this code shall be in the form of non-concession agreements and governed by private law. This article tried to eliminate the exclusive jurisdiction of High Administrative Court and application of administrative law to BOT contracts. Later on, the Constitutional Court annulled Article 5 of Law No. 3996 based on contrariety to the Constitution. The Constitutional Court underlined that BOT agreements are concession agreements within the scope of administrative law, because the BOT agreements relate to public services. Even though the Constitution defined neither the notion of concession agreements nor the notion of public service, Constitutional Court defined both of its decisions\textsuperscript{50} and interpreted BOT agreement as a concession agreement.\textsuperscript{51}

Another aspect of the problem regarding concession agreements occurred as overruling of ICSID Convention. As mentioned above, according to Article 90 of the Turkish Constitution, when an international agreement ratified by the Turkish Grand National Assembly, it become equal to national laws and cannot be referred to the Supreme Court with the allegation of inconsistency with the Constitution. Moreover,

\textsuperscript{50} Constitutional Decision No:1994/65-2, Constitutional Decision No:1995/23
\textsuperscript{51} Serdar Bezen, \textit{Recent Developments In International Commercial Arbitration In Turkey} (Mealey Publications 2001) 8-10
according to the same provision, if there is a conflict between a national law and a ratified international agreement, the provision of international agreement overrules the provision of national law. Pursuant to this provision of the Turkish Constitution, if the parties accepted the jurisdiction of the ICSID Center with given consent, the exclusive jurisdiction of Turkish Supreme Administrative Court over concession agreements shall be overruled by the Convention. Moreover in accordance with the Article 25 of ICSID Convention, given consent cannot be withdrawn unilaterally. Thus, Turkey as a contracted state, cannot unilaterally withdraw its consent to ICSID arbitration given by BIT. However, the Supreme Administrative Court insisted to eliminate arbitration clause in concession agreements.\textsuperscript{52} Turkey’s attitude on this matter was open to discussions. Yildirim Uler claimed that: “Despite the fact that Turkey gave consent to arbitration by some BITs, Turkey may refuse the recognition and enforcement of arbitral award on the ground of contrariety to public order.”\textsuperscript{53} On the other hand Ugur Emek stated that: “Up until now, Turkey signed 37 BITs, ratified many major international arbitration agreements including the ICSID Convention, the New York Convention, the European Convention on International Arbitration. The Decision of the Constitutional Court is contradictory to international agreements because these international agreements enter into force by ratification of the Turkish Grand National Assembly.”\textsuperscript{54}

These problems were solved through amendments on certain provisions of the Constitution and the enactment of some relevant legislations. Articles 47,125 and 155 of the Constitution were amended by the Law No.4446 in 1999. Article 47 of the Constitution regards the nationalization policy and national security that empowers the State to nationalize a private investment if it has a public service characteristic. Firstly, the heading of Article 47 changed from “Nationalization” to “Nationalization and Privatization” to provide the grounds of privatization and two new subclauses inserted as noted below:

\textsuperscript{52} Serdar Bezen, \textit{Recent Developments In International Commercial Arbitration In Turkey} (Mealey Publications 2001) 10-11 \\
\textsuperscript{53} Cem Çağan Ortak, "Kamu Hizmeti İmtiyaz Sözleşmeleri ve ICSID Tahkımı" (2005) 4 Ankara Barosu Dergisi 81 \\
\textsuperscript{54} Üğur Emek, "Kamu Hizmeti İmtiyaz Sözleşmeleri Ve Uluslararası Ticari Tahkimin İlişkisi" (Rekabet Kurulu, Ankara, Turkey, 1999).
“Principles and rules concerning the privatization of enterprises and assets owned by the State, State Economic Enterprises and other public corporate bodies shall be prescribed by law.

Those investments and services carried out by the State, State Economic Enterprises and other public corporate bodies which could be performed by or delegated to real or corporate bodies through private law contracts shall be determined by law.”

The amendment eliminated the barriers and explicitly permitted the privatization. Moreover, this amendment opened an opportunity to remove the concession agreements from the category of administrative agreements and accepted them as private law contracts. Consequently, since the arbitration procedure is only available for private law contracts in the Turkish Judicial System, it became possible to refer the disputes arising due to concession agreements to international commercial arbitration. It should be noted that, this provision does not enable the arbitration for administrative contracts generally. It only enables the arbitration by defining some contracts between administration and private sector as private law agreements. The same point that indicates the BOT contracts as private law contracts and arbitrable is also emphasized by the Law No.3996 Amending Some Articles of Concerning Realization of Some Investments and Services under Framework of BOT Model, in order to prevent any possible debates.

Secondly, a new sentence annexed to the first paragraph of Article 125 of the Constitution as follows:

“National or international arbitration may be suggested to settle the disagreements that arise from conditions and contracts under which concessions are granted concerning public services. International arbitration can only be applied in the case of the disagreements which involve foreign components.”

55 Hayrettin Yıldız, "Kamu Hukuku İle Özel Hukukun Kesiştiği Yer: Kamu Hizmeri İntiyaz Sözleşmelerinde Tahkim Yolu" (2014) 111 TBB Dergisi 288
56 Serdar Bezen, Recent Developments In International Commercial Arbitration In Turkey (Mealey Publications 2001) 16
This amendment explicitly enabled the application of international commercial arbitration procedure to the disputes resulted from concession contracts. Article 125 regulates the judicial review against the actions and acts of administration by stating the exclusive power of administrative courts on most administrative acts of the government. Through this amendment, it became possible to refer a concession agreement regarding public services to international arbitration if the dispute involves a foreign element. This provision particularly solved the problem but the concept of “foreign element” led to some interpretation problems because the notion of foreign element was not described in Turkish Law until the enactment of the Law No.4501 in 2000.

Lastly, the Article 155/2 of the Constitution regarding supervision of the Council of State on concession agreements was amended as indicated below:

“The High Administrative Court is authorized to adjudicate lawsuits, to opine within two months on the motions of the Prime Minister and Council of Ministers or on the concession specifications or contracts regarding public services, to examine drafted regulations, to settle administrative disputes and to carry out other acts designated by law.”

By this amendment, the role of the Council of State regarding examination and supervision of concession agreements is limited by merely an advisory opinion and took away the High Administrative Court’s power to make changes on concession agreements. Moreover, the provision indicated a limited time period for the High Administrative Court to submit its opinion on concession agreements in order to prevent any delay. The same point that the administrative courts have no jurisdiction over the concession agreements was also underlined by the Law No.4492. This law regarded the amendment of some Articles of the Supreme Administrative Court and the Administrative Procedural Law, which came into force in 1999.57

As mentioned above, the amendment of Article 125 of the Constitution, made it possible to refer a concession agreement regarding public services to international

57 Serdar Bezen, Recent Developments In International Commercial Arbitration In Turkey (Mealey Publications 2001) 15, 16
arbitration by stating in the contract whether the dispute involves a foreign element. This provision created a new interpretation problem because the notion of a foreign element was not defined in Turkish Law. In 2000, Law No. 4501 on Principles That Shall Be Complied with When There is Access to Arbitration for Disputes Arising from Concession Contracts was enacted and it settled the debates regarding the description of some concepts, such as the foreign element.

Pursuant to the first article of the Law No.4501, this law was enacted to determine the principles and procedures that parties should follow when they conclude a concession agreement, in order to refer the agreement to international arbitration. The second article contains the definitions of the arbitration, the international arbitration agreement and the foreign element. According to the Article 2/c of the Law No.4501, “the foreign element shall refer to circumstances under which [i] at least one of the parties, be it established or to be established, to a concession contract is to be considered foreign in accordance with the regulations on the encouragement of foreign capital, or [ii] the realization of the contract shall necessitate foreign capital, or conclusion of foreign loan or security agreements.”

Moreover, Article 3 delineates parties’ power and flexibility over the arbitral process and states that disputes arising from concession agreement that contain a foreign element shall be solved by arbitration in accordance with Turkish or foreign law seated in Turkey or a foreign country. Moreover, Article 3 enables one to refer arbitration to an international institution as well. Pursuant to the Article 4, parties may also add the arbitration clause to the concession agreement or conclude a separate agreement and select the language of arbitration, the composition of tribunal, service period, submission of evidence, procedure of a tribunal to collect evidence and other similar subjects like the applicable substantive law and the seat of arbitration. The Article 17/2 of the Turkish International Arbitration Code of 2001, which will be examined hereafter, repealed the Article 5 of the Law No.4501 that stipulates the awards are subject to the Court of Appeal’s review.
B. A General Overview to the Turkish International Arbitration Code in Comparison with the UNCITRAL Model Law

Turkey has a dual arbitration system: as previously mentioned, the Turkish Code of Civil Procedure governs domestic arbitration and the Turkish International Arbitration Code governs international arbitration providing there is a ‘foreign element’. Since this distinction has been made to protect international arbitration from restrictions that are imposed on domestic arbitration, the Turkish Code of Civil Procedure is not applicable to any dispute that has a foreign element.\(^{58}\) Even though the Turkish Code of Civil Procedure determines the procedure of arbitration between native conflicting parties, domestic arbitration is not common in Turkey because the concept of arbitration is mainly associated with international disputes. In 2011, the Turkish Code of Civil Procedure amended the provisions based on UNCITRAL Model Law.

The main source of international arbitration in Turkey is the Turkish International Arbitration Code No.4686. Hereinafter, the Turkish International Arbitration Code is referred to as the “TIAC”. The TIAC was designed based on the UNCITRAL Model Law and the Federal Statute on Private International Law of Switzerland and entered into force in 2001. The Turkish International Arbitration Code adopted most of the rules of UNCITRAL Model Law with some modifications. The TIAC adopted the major principles of the Model Law such as the equality of parties, the party autonomy, non-intervention by courts, and the impartiality and independence of the arbitrators.

Turkish International Arbitration Code aimed to provide a set of rules applicable to international arbitration proceedings, to improve the congruity of Turkish regulations with universal international arbitration rules and to promote Turkey to become an arbitration friendly country.\(^{59}\) According to the TIAC, all of the arbitrable commercial disputes can be settled through arbitration, the parties have control and flexibility over the proceeding, they are free to select the language of arbitration, arbitration procedure and rules. Moreover, the TIAC contains provisions to restrain the

\(^{58}\) Kemal Dayınlarlı, *HUMK'ta Düzelenen İç Tahkim* (Dayınlarlı Yayıncılık 1997) 13

intervention of the courts of state to the arbitral proceeding. However, parties can apply to the courts under some circumstances such as the enforcement of the arbitral agreements and the reassignment of the arbitrators.\textsuperscript{60}

The Turkish International Arbitration Code contains seven chapters. First chapter states the purpose and the scope of this law, the notion of foreign element and the competent court and the extent of court intervention. The second chapter contains provisions on the definition, form and objective of arbitration agreement. The third chapter deals with the appointment, challenge and responsibility of the arbitral tribunal and the termination of its duties as well as its competence. The fourth chapter promotes the rules of arbitration procedure. Recourse against the arbitral awards, the cost of arbitration, and the final provision are regulated respectively under the last three chapters.

Article 1 of the TIAC, which defines the purpose and scope of this law, states that the code is applicable to disputes with a foreign element whether the dispute has a commercial feature or not. The drafting committee deliberated to restrict the scope of application with commercial disputes by defining the term of commercial as a sub clause. However, they decided on giving a broad interpretation regarding the scope of application in practice. Notwithstanding, the provision excludes certain disputes out of the scope of application, such as the disputes related to the real rights relating immovable property located in Turkey and the disputes that are not subject to an alternative dispute settlement process such as disputes arising from family law or competition law. Since the real rights concerning immovable located in Turkey are within the scope of public policy, they are subject to the jurisdiction of the Turkish Courts. Furthermore, the Article 1/5 of the TIAC stated that the provisions of the international conventions ratified by Turkey are reserved as stipulated in the Article 1 of the TIAC and the Article 90 of the Turkish Constitution as well.

According to Article 1, the TIAC is applicable to a dispute that has a foreign element and where Turkey has been selected as the seat or place of arbitration. Additionally, even if Turkey has not been selected as the place of arbitration, the

\textsuperscript{60} Ziya Akıncı, Arbitration Law Of Turkey: Practice And Procedure (Juris 2011) 11,12
Turkish International Arbitration Code shall be still applicable if the parties or the arbitrator/s decide on the application of this law.

The Article 2 of the TIAC states the circumstances those constitute the foreign element as follows,

“1. If the parties to the arbitration agreement have their domiciles or habitual residences or places of business in different States;
2. if one of the following is situated outside the State in which the parties have their domiciles or habitual residences or places of business;
   a. the place of arbitration, which is determined in, or pursuant to, the arbitration agreement;
   b. or a place where a substantial part of the obligations arising from the underlying contract is performed or a place where the dispute has the closest connection;
3. if a shareholder of the company which is a party to the underlying contract that constitutes the basis for the arbitration agreement has brought foreign capital (into Turkey) in accordance with the laws concerning the encouragement of foreign capital or where a loan and/or guarantee agreement needs to be signed for the execution of the underlying contract;
4. if, in accordance with the underlying contract or with the underlying legal relationship, the movement of capital or of goods shall be made from one country to another.”

Once a dispute constitutes the foreign element under this provision, it can be deemed as international and the international dispute referred to arbitration can be governed by the TIAC. As can be seen, the existence of the foreign element shall be constituted according to the domicile or habitual residence of the parties, rather than the nationality of the parties. Therefore, if a party, who is a citizen of Turkey, has his domiciles or habitual residence in a different State, this situation shall be considered as a foreign element. In addition, in terms of corporations, the criterion to be predicated on is the places of business that is the place of the corporation’s headquarters.¹

¹ Hüseyin Ali Sadroleşrafi, "Türk Milletlararası Tahkim Kanunu'na İlişkin Düzenlemeler Ile Uygulamalar Hakkında Görüşler" (2005) 25 Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 322
Furthermore, as it is stated in Article 2/3, the existence of foreign capital, international security or an international loan shall constitute foreign element. For instance, if one of the shareholders of the company that is a party in arbitration agreement, has foreign capital or receives loan or security from abroad, that party member constitutes a foreign element within the dispute. Pursuant to the Law No.6224, a foreign investor may transfer capital by establishing a new company or branch of a foreign company in Turkey or share acquisitions of a company established in Turkey. In addition, the last condition that described in the Article 2/4 has been designated to allow a wide interpretation by stating that any international transaction of capital or goods based on a legal relationship shall involve the foreign element. 62

The Article 4 of the TIAC describes the arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.” As a principal, the consequences of the arbitration are only binding for the parties of the arbitration agreement. However, in practice, it is possible to transfer the contract or the benefits of contract to a third party without an obligatory consent of the other party in Turkish Law. At this point, the question is whether the third party is bound by the arbitration agreement. This problem is neither regulated under the TIAC nor clarified under the case law. However, general opinion on the matter tends to demonstrate that the arbitration agreement would be binding in case of succession.63 Moreover, under Turkish law, a State or a State entity can be a party to and agreement as long as the dispute is arbitrable under the TIAC.

According to Article 4, the arbitration agreement can be concluded for possible disputes that might arise from legal relationships between parties, as well as the disputes which have already arisen. The only restriction here is having an arbitration agreement based on an existing legal relationship. Moreover, parties may conclude an arbitration agreement to refer the dispute to arbitration even once the dispute is pending before the national court.64 According to Article 5 of the TIAC, if the parties agree to

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63 Ziya Akinci, Arbitration Law of Turkey: Practice and Procedure, JurisNet, LLC (July 1, 2011) p.49
64 Ziya Akinci, Milletlerarası Tahkim (Vedat Kitapçılık 2013) 71
arbitrate during the court proceedings, the case file shall be sent to the arbitral tribunal by the court.

The formation requirements of the arbitration agreement, which are described under the Article 4 of the TIAC is almost directly translated and adopted from the Article 7 of the UNCITRAL Model Law. As mentioned below, according to the Article 4, the arbitration agreement can be concluded in a form of a separate agreement or an arbitration clause shall be inserted into the main agreement. As a result, by giving an opportunity to conclude a separate arbitration agreement, the provision intended to prevent arbitration agreement from any claim regarding the invalidity of arbitration agreement based on that the main contract is not valid. Hence, the TIAC recognizes the principle of the autonomy of the arbitration agreement from the main contract. However, concluding a separate arbitration agreement and stating that the disputes between the parties will be referred to arbitration would not be valid. Also, it is possible to refer a non-contractual dispute to arbitration by concluding a separate arbitration agreement. Moreover, this provision clearly states that the arbitration agreement should be in a written form such as an exchange of letters, telegram or any other forms of telecommunication, which provide record of the exchange information or in a document form signed by the parties. Thus, the TIAC deemed the arbitration agreements concluded by the parties in an electronic format are valid, which led to many discussions with respect to possible problems regarding the law of evidence. However, the Electronic Signature Code enacted in 2004 and the electronic signature became equal to the hand written signature under Turkish Law.

Moreover, the Article 4/3 of the TIAC also provides a rule regarding the substantive validity of arbitration agreement by stating the validity of an arbitration agreement shall be determined by applicable chosen law. If the parties have not chosen the applicable law, the arbitration agreement may only be valid in accordance with Turkish Law. This provision has been designed based on the Article 178/2 of the Federal Statute on Private International Law of Switzerland. In addition, Article 4/4 of the TIAC which states that no objection can be made on the grounds that the underlying contract is invalid or that the arbitration agreement is related to a dispute,
which has not yet arisen is also adopted from the 178/3 of the Federal Statute on Private International Law of Switzerland.  

Furthermore, Article 6 of the TIAC, which regulates the interim measures of protection, is in concordance with the Article 17 of the UNCITRAL Model Law in terms of stating that parties may request interim measures for the protection of the subject matter of the dispute to state courts, before or during arbitral proceedings. However, the second sub section of the this article contains a provision that does not exist in the Model Law, which gives power to the arbitral tribunal to grant interim measures or interim attachments during the arbitral proceeding, which are not required to be enforced trough execution authorities or that bind third parties. Moreover, pursuant to the Article 10/A/3, if a party has not obtained an interim measure or an interim attachment from a court, the party shall commence arbitration within thirty days from the date of the measure or attachment. Otherwise, the interim measure or the interim attachment shall automatically be lifted. The Model Law has no such provision as well.

Per Article 7 of the TIAC, parties are free to select the composition of the arbitration tribunal in terms of determining the number of arbitrators and the definition of the rules to appoint arbitrators. If the parties do not select the number of arbitrators, it will be three and each of the parties shall appoint one arbitrator and the third arbitrator who is going to be the chairman of the tribunal shall be determined by the appointed arbitrators. Moreover, in the case where a party fails to appoint an arbitrator or the arbitrators fail to select the third arbitrator, the selection shall be made by the civil court the first instance upon the request of a party in thirty days.

Furthermore, According to the Article 7/B/2 of the TIAC, even though parties agreed on the procedure of appointment of the arbitrators, the civil court of first instance may still appoint an arbitrator by request of a party, when one of the following situations occurred:

65 Armağan Ebru Bozkurt Yüksel, "UNCITRAL ve UNCITRAL Model Kanunu'na Genel Bir Bakış" (2011) 2 TAAD 155, 156
66 Serdar Bezen, Recent Developments In International Commercial Arbitration In Turkey (Mealey Publications 2001) 20
1. If a party fails to act as required under such procedure;
2. If the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure;
3. If a third party, including an institution, that is empowered to appoint arbitrators fails to perform any function entrusted to it under such procedure.
In this case, it is court’s responsibility to ensure the impartiality and independency of the arbitrators. The decision of the civil court of first instance is final and binding.”

Article 7 of the Turkish International Arbitration Code regarding the composition of the arbitral tribunal is designed based on the Article 11-16 of the UNCITRAL Model Law. However there are some provisions those are not exist in the UNCITRAL Model Law. Firstly, The Article 7/a states that parties are free to determine the number of arbitrators but the number cannot be even. This provision that stipulates the number shall be odd does not exist in the Model Law. Moreover, if the parties cannot determine the number of the arbitrators, there will be three arbitrators according to this clause. Secondly, Article 7/b remarks that the legal person cannot be appointed as an arbitrator, only real persons can be. This provision also does not exist in the Model Law. In addition, Article 11 of the Model Law concerns that no one shall be precluded from acting as an arbitrator by reason of his nationality is not implemented to the Turkish International Arbitration Code.67 According to Turkish Law, there is no restriction regarding the nationality of the arbitrator but impartiality and the independence of the arbitrators is essential. The arbitrator’s nationality shall be different than the party that makes this appointment, as long as it was otherwise not agreed to by the parties.

Article 12 and 13 of the UNCITRAL Model law, which provides the grounds and procedure of challenging arbitrators, was adopted with some modification by the TIAC. The provision regarding the grounds of challenging arbitrators is transferred directly to the Turkish legislation. On the other hand, the procedure of challenging arbitrators under the TIAC is mostly similar to the Article 13 of the Model Law, but there are some differences. For instance, while the Model Law indicates the time limit to challenge an arbitrator as being fifteen days after awareness of the constitutions of

67 Armağan Ebru Bozkurt Yüksel, "UNCITRAL ve UNCITRAL Model Kanunu’na Genel Bir Bakış” (2011) 2 TAAD 156
the arbitral tribunal or becoming aware of the circumstance that may inspire a formal challenge, the TIAC indicates the time limit as thirty days.\(^{68}\) Moreover, Article 13/3 of the Model Law states that during the assessment of the challenge reasons by the competent court are pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and conclude an award. This provision is not transferred to the TIAC. In the case of rejection of the challenge, the party may apply to the civil court the first instance within thirty days after receiving the notice.

Per Article 8 of the TIAC, the parties are free to select the procedure of the arbitration and while determining this procedure, parties may refer to any law or international or institutional arbitration rules. If there is no such agreement between the parties, proceeding shall be conducting by the arbitral in accordance with the provisions of this legislation. Furthermore, the Article 10/B of the TIAC limited the arbitration proceeding to a one-year time limit, unless otherwise agreed by parties. The one-year time limit begins on the day of the appointment of a sole arbitrator or the date of a first meeting of the arbitral tribunal. Also, if the parties may not agree on the extension of time period, a party may request the competent court for extension.

Article 15 of the TIAC provides the rules and grounds on recourse against arbitral awards. This subject is also defined by the UNCITRAL Model Law since it is a extremely important issue in terms of the main objective of the Model Law which is harmonizing national laws on arbitration and reducing the national courts’ control over the arbitral process. Thus, the Model Law aimed to design one type of course of action for the drafting States under the light of the Article V of the New York Convention. Since, the Article 15 of the TIAC was designed based on the Article 34 of the Model Law and Article V of the New York Convention, it only provides recourse against the an arbitral award by an application to set aside an award under limited grounds of the arbitrability, procedure and the public policy and does not contain any possibility of appeal on the merits of the dispute.

According to the Article 15 of the TIAC, an arbitral award can be annulled only on the grounds of following circumstances:

\(^{68}\) Armağan Ebru Bozkurt Yüksel, "UNCITRAL ve UNCITRAL Model Kanunu’na Genel Bir Bakış" (2011) 2 TAAD 157
“1. If the party making the application proves that:

   a) a party of the arbitration agreement was under some incapacity or the agreement is not valid according to the applicable law selected by the parties or in the absence of such a choice according to the Turkish law;
   b) the composition of arbitral tribunal is not in accordance with the parties' agreement, or, in the absence of such a choice accordance to the applicable law;
   c) the arbitral award is not rendered within the given time period of arbitration;
   d) the arbitral tribunal unlawfully found itself competent or incompetent;
   e) the arbitral award is not concerning the subject matter of the arbitral agreement, or exceed the scope of the submission to arbitration;
   f) the arbitral proceedings are not in compliance with the parties' agreement or, in absence of such an agreement, with this Law provided that such non-compliance affected the substance of the award;
   g) the arbitral tribunal breached the rule of equality of the parties; or

2. where the court finds that, the subject matter of the dispute is not capable of settlement by arbitration under Turkish law or, the award is in conflict with the public policy."

The application for setting aside an award shall be made within thirty days after the parties received the notification of an award, or an additional award, or a decision on correction, or an interpretation. This time limit is determined in the Article 34/3 of the Model Law as three months after the applicant party received the award. The application for setting aside awards suspends the enforcement of the award. The judgment of the court is limited with the alleging annulment ground that the applicant party has relied on. Furthermore, the decision is given on the application for setting aside an award is subject to appellate procedure in terms of the relevant provisions of Code of Civil Procedure, but this review shall be only on the basis of the listed grounds for setting aside the award. Hence, the parties are not entitled to refer the judgment for reconsideration.

69 Armağan Ebru Bozkurt Yüksel, "UNCITRAL ve UNCITRAL Model Kanunu’na Genel Bir Bakış" (2011) 2 TAAD 161
C. Recognition and Enforcement of Foreign Arbitral Awards in Turkey

The recognition and enforcement of foreign arbitral awards regulated by the Turkish International Private and Procedural Law and the New York Convention, under Turkish judicial system. As mentioned earlier, Article 90 of the Turkish Constitution, international agreements become equal to national laws by ratification of the Turkish Grand National Assembly and the New York Convention were ratified by Turkey and entered into force by in 1991. The Articles between 60 and 62 of the Turkish International Private and Procedural Law regarding the recognition and enforcement of foreign arbitral awards are very similar to the provisions of the New York Convention. At this point, it is fair to say that Turkey achieved harmony via its new legislation with the New York Convention in terms of the recognition and enforcement of foreign arbitral awards.

In Turkey, two issues occurred concerning the enforcement of foreign arbitral awards, which regard the nationality of arbitral awards and the concept of public order. As examined above, until the enactment of the Turkish International Private and Procedural Law, foreign awards were enforced as if they were domestic awards under the Turkish Code of Civil Procedure. Since the foreign arbitral award is not defined in Turkish laws, it caused many different interpretations. First differentiating between foreign and domestic awards has been defined by the Court of Appeal as “the awards, which are delivered under the authority of foreign law” in 1949 and in 1951. Later on, in 1976, the Court of Appeal defined foreign award as “an award, which has delivered outside the territory of Turkey.” A few years later, the Court appeal changed its decision and stated that an award cannot be defined as a foreign award according to nationality of arbitrators or the place, where it has been rendered. As the Turkish Supreme Court indicated in its decision No. 2781-3555 in 1996, the definition of foreign arbitral award is important simply because the foreign and domestic awards are subject to different procedures under the Turkish legal system. The domestic arbitral awards are subject to the Article 536 of the Turkish Code of Civil Procedure and foreign arbitral awards are subject to Article 60 of the Turkish International Private and

70 Decision of the Supreme Court of Turkey, E/126, K/109, dated 7 November 1951
71 Decision of the 15th Civil Chamber of the Court of Appeals, N. 1617-1052, dated 10 March 1976
72 Serdar Bezen, Recent Developments In International Commercial Arbitration In Turkey (Mealey Publications 2001) 11-12
Procedural Law in order to be enforceable in Turkey. Yet, there is no specific definition of the foreign arbitral awards in the Turkish law.

The New York Convention is only applicable to the foreign arbitral awards and definition of the foreign arbitral award can be found under Article 1 as follows, “awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal” and “…arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” Hence, an arbitral award rendered as a result of an arbitral processes concluded in Turkey shall be considered as a domestic award and shall not be in the scope of this convention.

Turkey made two reservations while ratifying the New York Convention concerning the reciprocity and the commercial disputes. These reservations have been made according to the Article 1/3 of the New York Convention, which gives an opportunity to the contracting States to make reciprocity or/and commercial reservations. Turkey limited the scope of enforcement and recognition of foreign awards according to The New York Convention with awards that arise out of relationships that are determined as commercial under Turkish national law, regardless if they are contractual or not. Moreover, on the basis of reciprocity, Turkey shall recognize and enforce only the awards those rendered in other signatory states of the New York Convention.

According to the Article 3 of the New York Convention, “each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon...” This provision addresses the contracting States’ rules of procedure on the matter and according to Article 60 of the International Private and Procedural Code foreign arbitral awards that are final, executable or binding that the parties will be subject to enforcement. The request for enforcement shall be made by a petition, which is mutually designated by the parties in writing from the Court of First Instance or if there is no such an agreement, the competent court shall be the court at the domicile of the

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person in Turkey against whom the award is rendered, or in the absence of domicile, 
the person's place of habitual residence, and in the absence of the habitual residence, 
the court at the location of the property that may be subject to execution. If none of 
them exists in Turkey, we shall reach the outcome that the Turkish courts are 
incompetent on the matter but plea of jurisdiction shall be made at the first hearing.\textsuperscript{74}

Article 5 of the New York Convention and Article 62 of the TIPPL regulate the 
refusal grounds of recognition and enforcement of foreign arbitral awards. According 
to Article 5 of the New York Convention, recognition and enforcement of arbitral 
award \textit{may} be refused based on the refusal grounds those are specified in this article, 
upon the request of the party against whom it is invoked. This clause means even if one 
of the refusal grounds for recognition and enforcement of an award is proved to exist, 
the competent court, where in the recognition and enforcement sought is not obligated 
to refuse the enforcement. On the other hand, the Article 62 of the TIPPL the 
recognition and enforcement of a foreign arbitral award \textit{shall} be refused based on the 
grounds for dismissal, which are indicated in this article, upon the request. Hence, 
under the provisions of the TIPPL, the court is obligated to dismiss the recognition and 
enforcement of this arbitral award when one of the refusal grounds is proved. If the 
party is not requesting the refusal based on the violation of public order or existence of 
non-arbitrability of the dispute, the burden of proof belongs to the requesting party, 
under both of these regulations.\textsuperscript{75}

Article 5 of the New York Convention indicates seven refusal grounds for 
recognition and enforcement of foreign arbitral awards. These refusal grounds are 
exhaustive, which means recognition and enforcement of a foreign arbitral award can 
be dismissed only with these grounds. A foreign award falls under the scope of the 
New York Convention when there is a foreign arbitral award regarding a commercial 
dispute and arbitral proceeding conducted with a contracted State, the Article 5 of the 
New York Convention will be applied. Otherwise, the process of recognition and 
enforcement shall be governed by the Article 60, 61 and 62 of the TIPPL.

\textsuperscript{74} Cemal Şanlı, \textit{Uluslararası Ticari Akitlerin Hazırlanması Ve Uyuşmazlıkların Çözüm Yolları} (İstanbul Büyükşehir Belediyesi Hukuk Müşavirliği 1996) 273
According to the Article 60 of the TIPPL, the recognition and enforcement of a foreign award shall be dismissed by the court if one of the following situations proved to exists:

“a) An arbitration agreement is not executed or arbitration clause does not exist in the main agreement,
b) The arbitral award is contrary to public morality or public order,
c) It is not possible to settle the dispute subject to the arbitral award by way of arbitration under Turkish law,
c) One of the parties has not been duly represented before the arbitrators and has not expressly accepted the acts concluded thereafter,
d) The party against whom the enforcement of the arbitral award is requested has not been duly notified of the appointment of arbitrators or has been deprived of his/her right to make claim and defense,
e) The arbitration agreement or clause is invalid pursuant to the governing law designated by the parties, or in the absence thereof, pursuant to the law of the place where the arbitral award is rendered,
f) The appointment of the arbitrators or the procedure applied by the arbitrators violates the agreement of the parties, or in the absence thereof, the law of state where the arbitral award is rendered,
g) The arbitral award has been rendered on an issue that is not included in the arbitration agreement or arbitration clause or exceeds the limits of the agreement or the clause (only the exceeding part),
h) The arbitral award is not final, enforceable, or binding under the governing law or the governing procedure or the law of state where it was rendered or it is annulled by the competent authority in the place where the award is rendered.”

Article 60 of the TIPPL is not often used in Turkey because generally arbitration concerning commercial disputes and many countries are signatory to the New York Convention. Thus, in practice, typically the cases regarding the recognition and enforcement of a foreign arbitral award are based on the refusal grounds indicated in the Article 5 of New York Convention.
According to Article 5/1/a of the New York Convention, the recognition and enforcement of an foreign arbitral award may be refused if “the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” This provision emphasizes the subjective arbitrability and validity of arbitration agreement. As per this provision, the capacity of parties to conclude an arbitration agreement is subjected to the law applicable to them. Therewithal, the Article 9 of the International Private and Procedural Law state that the legal capacity of a person shall be governed by his/her national law. Moreover, regarding the formal validity of the arbitration agreement, the Article 4/2 of the Turkish International Arbitration Code and the Article 517 of the Turkish Code of Civil Procedure indicated that the arbitration agreement should be in written form in accordance with the Article 5/1 of the New York Convention.76 Another issue regarding to validity of an agreement is substantive validly, which be related to the claims of illegality, duress or fraud in the inducement of the agreement.

According to Article 5/1/b of the New York Convention, another ground for refusal of recognition and enforcement of a foreign arbitral award where “the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” This provision states that the recognition and enforcement of an award shall be dismissed where there is a breach of the right to a fair hearing for the party against whom the award is invoked, or because of the lack of notice or due process violations, or if that party was unable to present his case. If a party chooses not to take part in the arbitration, disputes he received the notice, there would be no ground for refusing the enforcement under this provision.77 The right to fair trail is regulated under the Article 36/2 of the Turkish Constitution.

76 Cemal Şanlı and Nuray Ekşi, Uluslararası Ticaret Hukuku (Arkan 2005) 282, 283
According to the Article 5/1/c of the New York Convention, recognition and enforcement of an award may be refused if “the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.” This provision emphasizes the principle that the jurisdiction of the arbitral tribunal is only to decide issues that parties agreed to refer to adjudication. This situation can happen either by rendering judgment on the dispute that does not fall within the parties’ submission to arbitration or by exceeding the scope of parties’ submission to arbitration. According to the national reports of Turkey, the Turkish courts are likely to dismiss the recognition and enforcement of an award in the case of an award grants a remedy where the arbitral agreement clearly excluded.

Pursuant to Article 5/1/d of the New York Convention recognition and enforcement of a foreign arbitral award can be dismissed if “the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.” According to this provision, a party deprived of its right to assign an arbitrator, or the composition of the arbitral tribunal, or the arbitral rules and procedure was not in accordance with the agreement between parties and with the law of the country where the arbitration seated, recognition and enforcement of the award may be refused upon the request of the party against whom its invoked. In the arbitration case between Osuuskunta METEX Andelslag and Türkiye Elektrik Kurumu Genel Müdürlüğü, the recognition and enforcement of a Swiss award was dismissed by a Turkish court of appeal because of that procedural rules agreed between parties has not been applied. According to the national reports of Turkey, the Turkish courts is likely to refuse the enforcement of an arbitral award when

80 Turkey: Court of Appeals, 15th Legal Division, 1 February 1996
81 ICCA’s guide to the Interpretation of the 1958 New York Convention, 94-100
the award rendered in accordance with a substantive body of law different than the one that parties agreed to be applicable law.\(^{82}\)

As per Article 5/1/e of the New York Convention, another refusal ground for recognition and enforcement of a foreign arbitral is where “the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” Accordingly, The Article 15 of the Turkish International Arbitration Code provides the rules and grounds on recourse against arbitral awards and states that the application for setting aside award stays the enforcement of the award.\(^{83}\)

In addition to these five refusal grounds, Article 5/2 of the New York Convention describes two more grounds to preserve public interest and order of the State in which the recognition and enforcement is sought as follows: “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

According to the prohibition of revision au fond principle, the national courts of the contracting States are not allowed to examine the merits of the award under the New York Convention, and national courts may only review the claim that the party against whom the award is invoked made to seek refusal of the recognition and enforcement of award based on the refusal grounds indicated on the Article 5/1. However, since the refusal grounds under Article 5/2 aim to protect public interest of the State in which the recognition and enforcement is sought, the court may rely upon them by an ex officio examination.

\(^{82}\) George A. Bermann, Recognition And Enforcement Of Foreign Arbitral Awards: The Application Of The New York Convention By National Courts 61

\(^{83}\) George A. Bermann, Recognition And Enforcement Of Foreign Arbitral Awards: The Application Of The New York Convention By National Courts 62
Article 5/2/b regards the subjective arbitrability that determines if the subject matter can be settled through arbitration. As examined above, the public law matters such as criminal cases, penal and tax disputes, the family law disputes such as divorce cases and some private law disputes like bankruptcy cases, labor and social law disputes, claims regarding the property right of real estate are non-arbitrable under most of the jurisdictions.84 The provision refers the question of subjective arbitrability to the law of the country where the application of recognition and enforcement is being made. In Turkey, according to Article 1/3 of the Turkish International Arbitration Code disputes related to the real rights relating immovable property located in Turkey are not arbitrable. Furthermore, under Turkish Law, the disputes arising from the family law, the administrate law, and the criminal law are also non-arbitrable and cannot be referred to arbitration. Because these issues are under the exclusive jurisdiction of Turkey and the arbitral awards concerning these matters shall not to be enforced in Turkey.

According to Article 5/2/a the court in the State which the recognition and enforcement is sought may refuse it if it finds any contrariety to the public policy of that country. However, in the New York Convention, there is no definition regarding to public policy or what constitutes the contrariety to public policy because the public policy has various descriptions in different jurisdictions. Generally, an award that is inconsistent with the fundamental principles of justice, validity and fairness, and decision-making process contains fraud, corruption or lack of integrity, is likely to be considered as contrary to public policy.85 In addition, the convention does not clarify the refusal of the recognition and enforcement, whether it is based on the principles of domestic public policy or the public policy principle, which is based on the international concept and narrower than the domestic policy.86 It is more likely to say that New York Convention refers the international public policy rather than the domestic public policy.

84 George A. Bermann, Recognition And Enforcement Of Foreign Arbitral Awards: The Application Of The New York Convention By National Courts 66
Article 62 of the TIPPL also stipulates that recognition and enforcement of a foreign arbitral award shall be refused if it is contrary to public policy and public morality. The concept of public order is not specifically defined in the Turkish laws as well. According to Article 48 of the Turkish Constitution, everyone has the freedom to conclude contracts and it is one of the fundamental rights. However, the concept of public order may limit this fundamental freedom of concluding contracts as well as playing an important role regarding the refusal of recognition and enforcement of foreign awards. The notion of the public is interpreted by domestic public policy by the Turkish Court of Appeal. The fact that the concept of public order is not defined in the Turkish laws, leads some broad interpretations and different decisions concerning the refusal of recognition and enforcement of foreign awards. Hence, it prevents Turkey from becoming a truly arbitration friendly country.  

For instance, Turkey criticized of being not an arbitration friendly country in 1976 because of the Turkish Court of Appeal’s decision regarding the Keban Dam. This decision was concerning the recognition of an ICC arbitral award that has been rendered on a dispute between Italian and French companies, which have established the Keban Dam in Turkey. The Turkish Court of Appeal refused the recognition of this award based on the contrariety to public policy because the ICC’s procedural scrutiny of draft award considered as an interference with the tribunal’s decision-making process, hence gone against its impartiality. In a sense, the Turkish Court of Appeal refused the recognition of this award based on the form of the award, not on the merits of the case. However, it is important to highlight that this decision has rendered before the ratification of the New York Convention. Subsequently, Turkish courts changed this attitude and agreed that the ICC’s procedural scrutiny does not constitute contrariety to the public policy.

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87 Nuray Ekşi, "Kararları Işığında Icc Hakem Kararlarının Türkiye’De Tanınması Ve Tenfizi" (2009) 67 Ankara Barosu Dergisi 54-74
88 Decision of the 15th Civil Chamber of the Court of Appeals, E. 1617, K. 1052, 1976, dated 10 March 1976
89 Mauro Rubino-Sammartano and Mauro Rubino-Sammartano, International Arbitration (Kluwer Law International 2001) 376
After the ratification of the international conventions, Turkish courts have not rendered many decisions to refuse the recognition of the foreign arbitral awards based on the public policy. However, there are some noteworthy decisions that have been given in recent years. In 2012, the General Assembly of the Court of Appeals stated that tax disputes related to Turkish tax matters should be dealt with by the national court and arbitral award rulings on Turkish tax matters violate the public policy. In the same decision, the Turkish General Assembly of the Court of Appeals described public policy as “the entire set of rules and institutions, which determines the foundation structure and protects the fundamental interests of the society from the political, social, economic, ethical and legal perspectives within a specific period of time.”

Two days later, the General Assembly of the Court of Appeals held an enforcement-friendly decision and remarked that an unreasoned decision rendered by a foreign court does not automatically constitute a breach of public policy, even though under Turkish Law, it is mandatory to give a reasoned judgment in a written form for national courts. In addition, the General Assembly of the Court of Appeals defined the public policy as “the set of rules, which protects the foundation structure and fundamental interests of the society” in this decision.

Another noteworthy decision of the Turkish Court of Appeal has been rendered in 2013 concerning a local court’s decision to dismiss the enforcement of a foreign arbitral award based on public policy. This case was regarding an arbitration proceeding that concluded under the rules of the Zurich Chamber of Commerce and Industry, and the arbitral tribunal ordered the prevailing party to bear the cost and expenses of the arbitral. Upon the request of the losing party for the partial enforcement of this decision, the local court refused the enforcement based on the contrariety to the public interest.

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94 Decision of the General Assembly of the Court of Appeals, E. 2010/1, K. 2012/1, dated 10 February 2012.
policy. Because according to Turkish Law the losing party shall pay the cost and expenses arising from court proceeding. However, the Court of Appeal overruled this decision by remarking that an arbitral award, which entitles the losing party to claim the cost and expenses of the arbitral proceeding, does not breach the public policy.96

Even though there are different interpretations regarding the public policy as demonstrated in the decisions of courts and doctrine, it is possible to indicate four issues, which are deemed to be contrary to public policy under Turkish law as follows:

- If a foreign award goes against the principle of equality and fairness, principle of independence, arbitrator impartiality, contrariety or right to be heard, it may be refused based on its contrary to public policy.

- On the basis of public policy, foreign arbitral awards, where there is an agreement between each party willing to waive the resort to legal remedies against such awards at a time when the right to seek remedies arises, are refused when they deviate from such a nation.

- The refusal of foreign awards may originate as a result of deviation from public policies. This could be where public morals are derogated from, for example, drug contracts, slavery, and trafficking, gambling or corruption.

- The enforcement of a foreign arbitral award may be dismissed on the ground of the violation of public policy where the it does not comply with a final decision of a Turkish court simply because two different judgments which contain contradictory provisions can impair legal security and stability, and essentially the public policy.97


CHAPTER V

CONCLUSION

As analyzed above, arbitration is a common and effective dispute resolution method for the disputes, which arise from the international commercial activities especially from the foreign investments. National economies’ integration to the global marketplace started after the globalization and performed through the international commercial and cross-border investment activities. The main problem at this point occurred out of the lack of uniformity of the economic integration in the countries, which led the uncertainty of applicable law and consequently, the conflicts of rights and obligations that parties have. Moreover, the issue regarding the international investments was the unattractiveness of the litigation process regarding the disputes arise from the foreign investments because of the mistrust to the national courts. These reasons led to the acceptance of international commercial arbitration as an effective alternative dispute resolution mechanism regarding solve the disputes arise from the international commercial and investment activities.

International arbitration is the a favored method for resolving international commercial disputes due to its features of the flexibility and party control, confidentiality, and enforceability. Parties who decided to refer the dispute to the arbitration have flexibility and a significant power on the control over the process that will be used to resolve their disputes through determining arrangements for selection of decision makers, the composition of the arbitral tribunal, the seat of arbitration, language of arbitration, applicable law and the procedural rules of the arbitration process. Moreover, parties decide on whether the arbitration will be administrated by an institution or will be ad-hoc arbitration. This kind of flexibility and party control over the process cannot be found in the litigation. In addition, the arbitration is a formal and binding process and the arbitral awards are enforceable. This point differentiates the arbitration from mediation since the mediation process is less formal and non-binding until parties reach an agreement. Therefore, international commercial arbitration has taken a primary role in the settlement of international commercial disputes.
The widespread acceptance of international commercial arbitration as the most effective method of dispute resolution by the commercial world, revealed the importance of establishing a harmonized legal framework especially regarding the recognition and enforcement of arbitral awards under national courts. A number of legislations were enacted, and several international conventions and agreements were signed to achieve this objective, but two crucially important steps have been taken by the formation of the New York Convention and the UNCITRAL Model Law. While the New York Convention managed to facilitate the recognition and enforcement of arbitration agreements and arbitral awards by establishing an international system to be adopted in national judiciaries, the UNCITRAL Model Law served an essential function in the establishment of uniform international arbitration laws with designing a model legislative code that can be adopted by enacted by the states.

The economic and trade liberalization in Turkey started in the 1980s by the adoption of outward-oriented strategies. In order to achieve the economic development, Turkey has enacted several legislations, ratified many international agreements and several conducted BITs. In parallel with these developments, Turkey has signed several major agreements and conventions on the international commercial arbitration, however, has not ratified till the beginning of the 1990s. Moreover, Turkey as new developing country needed to attract foreign investors to afford expensive energy and infrastructure projects. Turkey reached this aim and became an investor-friendly country by opening the way of the arbitration for the disputes arise from the concession agreements concerning public services between the state’s public entities and the private sector, through the Constitutional amendments in 1999. To sum up, it is possible to say that Turkey was far away from being an investor friendly country before the ratification of the international conventions and Constitutional amendments but within the efforts have been made in the 90s, Turkey became a more reliable investment country.

Furthermore, in order to become an arbitration friendly country, Turkey enacted the Turkish International Arbitration Law based on the UNCITRAL Model Law and secured the recognition and enforcement of foreign arbitral awards in Turkey by the ratification of the New York Convention and parallel provisions in the Turkish International Private and Procedural Code. Even though the Turkish International
Arbitration Law adopted the rules of UNCITRAL Model Law with some modifications, the major principles of the Model Law directly transferred to Turkish International Private and Procedural Code such as the equality of parties, the party autonomy, non-intervention by courts, and the impartiality and independence of the arbitrators. The Turkish International Arbitration Code is applicable to where a dispute has a foreign element and where Turkey has been selected as the seat or place of arbitration. The notion of the foreign element defined under the provisions of this code.

The recognition and enforcement of foreign arbitral awards regulated by the Turkish International Private and Procedural Law and the New York Convention, under Turkish judicial system. The related provisions of the Turkish International Private and Procedural Law limited with the foreign arbitral awards those are fall out of the scope of the New York Convention, based on Turkey’s two reservations, which have been made while ratifying the New York Convention concerning the reciprocity and the commercial disputes. The provisions of the Turkish International Private and Procedural Law concerning the enforcement of foreign arbitral awards are mainly similar with the provisions of the New York Convention. However, the main difference is, according to the wording of the Article 5 of New York Convention, if one of the refusal ground for recognition and enforcement of an award is proved to exist, the competent court, wherein the recognition and enforcement sought is not obligated to refuse the enforcement. However under the provisions of the International Private and Procedural Law, the court is obligated to dismiss the recognition and enforcement of this arbitral award when one of the refusal grounds is proved. If the party is not requesting the refusal based on the violation of public order or existence of non-arbitrability of the dispute, the burden of proof belongs to the requesting party, under both of these regulations.

As can be seen, Turkey achieved to harmonize its legislation with the universal arbitration roles and create an arbitral friendly environment. However, since there is no definition of the public policy under Turkish laws and the Turkish courts have not adopted a clarified way to apply public policy rules to the enforcement, the decisions vary from court to court based on the interpretation. Moreover, even though the New York Convention indicates the ‘international public policy’ in the Article 5, the Turkish courts tend to make broad interpretations based on the ‘domestic public policy’. This
situation leads some unexpected decisions concerning the recognition and enforcement of foreign arbitral awards in Turkey and prevents Turkey from becoming a truly arbitration friendly country.
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unerwarteten Entscheidungen bezüglich der Anerkennung und Vollstreckung ausländischer Schiedssprüche geführt.

Globalization has contributed to the integration of economic activities and the free flow of the trade cross-border investment activities, which has led to the increased application of alternative dispute settlement methods besides the litigation. The alternative dispute resolution methods enabled the elimination of possible conflicting views of rights and obligations attributable to the parties. The international commercial arbitration appeared as a favored method to solve international commercial disputes due to its practical advantages such as the flexibility and party control over the proceeding, confidentiality and the enforceability of the awards across national borders. As a result, within the acceptance of international commercial arbitration as an appropriate method for dispute resolution by the commercial world, the necessity of the harmonized legal framework especially regarding the recognition and enforcement of arbitral awards under national courts became essential. Many multinational agreements and conventions were signed to promote an enhanced and harmonized legal framework on the international commercial arbitration.

Parallel to these developments, Turkey also signed many major multinational agreements and enacted several legislations concerning the international commercial arbitration in accordance with the New York Convention and UNCITRAL Model Law to create an arbitral friendly environment. Moreover, Turkey succeeded to attract foreign investments and became an investor-friendly country by opening the way of the arbitration for the disputes arise from the concession agreements concerning public services between the state’s public entities and the private sector, through some legislative and constitutional amendments. In addition, the recognition and enforcement of foreign arbitral awards in Turkey are has secured by the ratification of the New York Convention and parallel provisions in the Turkish International Private and Procedural Law. However, the broad interpretation of the notion of public policy by the Turkish courts led to some unexpected decisions concerning the recognition and enforcement of foreign arbitral awards in Turkey.

In this study, after introducing the historical developments and major agreements of international commercial arbitration framework, the main characteristics and
advantages of the international commercial arbitration are discussed to demonstrate a
general understanding of the international commercial arbitration. In terms of the
international commercial arbitration in the judicial system of Turkey, the development
and the sources of international commercial arbitration are examined with focusing the
problematic issues of international commercial arbitration in Turkey and the
Constitutional amendments resulted out of these problems. Moreover, this study
provides a general overview of the Turkish International Arbitration Code in
comparison with the UNCITRAL model law. The recognition and enforcement of
foreign arbitral awards in Turkey are also covered with focusing on the interpretation
of ‘public policy’ according to the Turkish courts.