Guide to Arbitration in Turkey

Arbitration Agreements: A Key to Swift and Efficient Dispute Resolution

Arbitration, often referred to as "tahkim" in Turkish legal terminology, is a crucial alternative dispute resolution method in Turkey. It offers significant advantages over traditional litigation, primarily due to its ability to provide faster resolution of disputes. Unlike state courts, which may take up to 3-4 years to resolve a case, arbitration offers a more expeditious path to justice.

However, it's essential to understand that the validity of arbitration agreements and the proper delineation of arbitrators' powers are of utmost importance. Inadequate agreements or improperly defined arbitrator authority can render the arbitration process invalid, leading to disputes that persist in the state court system.

I. Elements of an Arbitration Agreement for Arbitration in Turkey

1. Arbitration Intent

One of the primary elements of a valid arbitration agreement is the clear intent of the parties to submit their disputes to arbitration. Parties must mutually and unequivocally express their consent to arbitration. An exemplary arbitration agreement, as provided on the Istanbul Arbitration Centre (ISTAÇ) website, can serve as a standard for adequate arbitration clauses.

However, it's important to note that vague or ambiguous language can lead to disputes over the validity of arbitration agreements. For instance, in the context of maritime law, where abbreviations are commonly used, using a short form like "GA/Arb in London law to apply" was contested in court. The court ruled against this provision, emphasizing the need for precise and unambiguous language in arbitration agreements.

Furthermore, it's crucial to ensure that a single contract does not simultaneously specify arbitration and litigation as dispute resolution mechanisms. Combining both options in a contract can lead to ambiguity and, ultimately, invalidate the arbitration clause. Turkish courts often interpret such clauses as lacking a clear intent for arbitration, rendering them invalid.

2. Form of the Arbitration Agreement

Arbitration agreements are not subject to the same formal requirements as ordinary contracts. They follow a distinct regime, allowing for flexibility in their formation. According to Article 4 of the International Arbitration Law (MTK), arbitration agreements can be in writing or, in certain circumstances, may even be formed through electronic communication means, such as email, provided that the will of both parties is clearly expressed. If there is no explicit arbitration agreement, but one party initiates arbitration proceedings and the other party does not object, the arbitration process may be deemed valid.

3. Incorporation by Reference

Parties may incorporate arbitration agreements into contracts by reference. This is particularly common among professional associations, especially in commodity trading. If a party, who is a member of such an association, references the association's standard contract in their agreement with a third party, the arbitration clause within the standard contract may apply between the parties. Turkish law acknowledges this principle, stating that when there is a reference to a document containing an arbitration clause, the arbitration clause is also considered valid.

4. Language of the Arbitration Agreement

The issue of language can be complex in Turkish arbitration agreements, especially concerning whether the agreement is between Turkish entities or involves foreign parties. The law mandates the use of Turkish in economic enterprises in Turkey, which affects local arbitration agreements.

5. Capacity of the Parties

To ensure the validity of an arbitration agreement, it's essential to request and verify the authorization documents or signature circulars of the individuals who sign or communicate the agreement on behalf of a legal entity.

6. Arbitrability

Not all disputes are eligible for arbitration. In Turkey, the general rule is that parties can only choose arbitration for issues over which they have the freedom to contract. However, there are exceptions. Disputes related to real property rights located in Turkey are generally considered non-arbitrable. Additionally, recent court decisions suggest that once insolvency proceedings begin, arbitration is no longer an option for disputes involving claims under those proceedings.

7. Asymmetric Arbitration Agreements

Asymmetric arbitration agreements, where one party has broad arbitration initiation rights while the other's rights are limited, can present unique challenges. In some cases, the right to initiate arbitration may be granted solely to one party. For example, in a contract prepared by the General Directorate of Coastal Safety for maritime rescue operations, the right to initiate arbitration was exclusively given to the General Directorate. However, the rescued party, without arbitration initiation rights, had to resort to state courts. In such cases, Turkish courts may find such agreements invalid as they might infringe upon the principle of equal access to justice.

8. Choice of Arbitration Venue

Selecting the correct arbitration venue and institution is paramount. It's essential to confirm that the chosen institution indeed operates as a valid arbitration venue with a functioning arbitral tribunal. Failure to do so may lead to the invalidation of the arbitration clause.

An illustrative example involves the selection of the "International Commercial Arbitration Court of the Chamber of Commerce and Industry of the European Community" as the arbitration center. While at first glance this clause looks sufficient to select arbitration, there is one problem: such an institution does not exist. Consequently, when a Czech company initiated legal proceedings in Turkey, the Turkish courts, including the Court of Cassation and the Constitutional Court, ruled that the arbitration clause could not be enforced. Despite the hurdles in state court proceedings, the inability to proceed to arbitration due to the absence of a valid arbitration institution left the party without effective legal recourse.

II. Choice of Arbitration Venue, Governing Law and Scope of Arbitration Agreements

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2. Choice of Law Governing the Arbitration Agreement

Parties to an arbitration agreement may choose the law governing their agreement separately from the law governing the main contract, adding a layer of flexibility.

3. Scope of the Arbitration Agreement Concerning Individuals

The scope of the arbitration agreement can significantly impact debt collection efforts. For instance, if you are unable to collect a debt from a company, and the parent company is your target, you may argue that the arbitration clause in the parent company's contract extends to cover your dispute. However, this argument may not always hold up in court. Moreover, it's important to note that arbitration clauses generally do not extend to third-party beneficiaries or guarantors unless they explicitly consent to arbitration.

III. The Procedural Roadmap

1. The Procedural Schedule

The procedural schedule is a document that defines the scope and limits of the arbitrators' duties and powers, making it especially crucial for future challenges such as annulment proceedings. After receiving the arbitration request and response, the arbitral tribunal prepares this document, which outlines procedural issues and rules. The document is then shared with the parties (essentially a draft mission statement).

Parties are invited to review the mission statement and provide their comments. At this stage, both parties' legal representatives often engage in a negotiation process to reach consensus. This phase may also involve conciliation discussions.

It is important to note here that the procedural schedule includes the arbitration agreement. If there are objections to the validity of the arbitration agreement at this point, those objections should be noted in the procedural schedule. If there are no objections recorded in the procedural schedule, it can be used as evidence to challenge the arbitration agreement's invalidity in subsequent annulment or recognition/enforcement proceedings.

2. Arbitration Timeline & Venue

Under MTK, arbitration should be concluded within one year. However, for large-scale cases, this timeframe might prove insufficient. To mitigate this, proper clauses need to be included in the arbitration agreements during the initial drafting stage.

Specifying the arbitration venue in the mission statement is crucial. If parties later wish to change the arbitration venue, having it recorded in the mission statement facilitates the process. A change in the venue can be effected if both parties agree.

3. Procedural Timeline and Case Management Meeting

Procedural Timeline: The procedural timeline is a critical document that sets out all the steps in the arbitration process. It details activities such as obtaining expert reports, hearing witness testimonies, submitting pleadings, and more. Careful planning and the identification of experts and timeframes are essential at this stage.

Case Management Meeting: Before proceeding with the case, a face-to-face or teleconference meeting is held between the party representatives and the arbitrators. During this meeting, the final version of the procedural schedule and procedural timeline is agreed upon. Hence, maximum preparation is required for this meeting, with a deep understanding of the case facts.

For instance, discussions may focus on procedures related to requesting documents, such as the "document production" process.The arbitral tribunal may also request the attendance of the parties themselves, in addition to their legal representatives.

Settlement Scenario: In the event of an amicable settlement during these discussions, the parties may request that the agreement reached during the procedural schedule meetings be recorded as an arbitral award.

Emergency Arbitrator: In some cases, particularly when it comes to the consideration of interim measures, the application of emergency arbitrator provisions may be necessary. Notably, not all arbitration institutions provide for emergency arbitrator procedures.

IV. Conclusion

In conclusion, arbitration in Turkey, or "tahkim," stands as a vital pillar of alternative dispute resolution within the Turkish legal landscape. Its inherent advantages, particularly its expeditious nature compared to traditional litigation, make it a favored choice for resolving disputes swiftly and efficiently.

However, this guide underscores the paramount importance of meticulously crafted arbitration agreements that demonstrate a clear and unequivocal intent to submit disputes to arbitration. The choice of the proper venue, governing law, and the precise delineation of the arbitration agreement's scope are equally critical elements in ensuring the validity and enforceability of arbitration clauses.

Furthermore, a well-structured procedural roadmap, outlined through a comprehensive procedural schedule, is the key to effective dispute resolution. By paying careful attention to these facets of arbitration, parties in Turkey can navigate the intricate world of dispute resolution with confidence and competence, ultimately achieving fair and equitable outcomes.

Attorney **Ali Yurtsever**
Istanbul- Türkiye