



# THE ROLE OF THE PLACE OF ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION PROCEEDING; TURKEY AS A PLACE OF ARBITRATION

Belma BULUT\*

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\* LL.M. (University of Manchester), LL.B (Marmara University), Lawyer (Turkey), Member of Istanbul Bar Association.

## ABSTRACT

*In recent years, arbitration proceeding has become a common dispute resolution method, particularly in the field of international commercial disputes. One of the reasons is that the parties want to resolve their dispute in privacy and obtain an enforceable award as soon as possible. The parties' tendency to apply arbitration proceeding has forced the states to review their arbitration law and procedural law. In this way the countries want to make their states an attractive place for the arbitral proceeding.*

*As it will be seen in the following parts, the place of arbitration has a vital role over the arbitral proceeding. It has some effects over the legal issues, such as the determination of the arbitrators, enforcement of the awards, and it also has an impact over the practical issues such as accommodation, visa issues. Because of those crucial effects of the place of arbitration, the parties have to be sure that they have chosen the best suitable place as the place of arbitration. In order to set light to the parties and practitioners, in this article, the role of the place of arbitration will be explained and Turkey will be evaluated as a place of arbitration.*

**Keywords:** *Role of the place of arbitration, applicable laws, Turkish International Arbitration Act, role of the national courts, recognition and enforcement of arbitral award.*

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## 1. INTRODUCTION

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Arbitration is one of the dispute resolution methods which conducted by a neutral third party in accordance with the arbitration agreement. Applying arbitration proceeding has many advantages though it also includes some disadvantages.<sup>[1]</sup> The main advantages are party autonomy, neutrality, confidentiality, enforceability of the awards under the New York Convention<sup>[2]</sup> and limited grounds for challenging of awards.

Arbitration proceeding is governed pursuant to the parties' agreement and applicable laws. The parties are free to create or choose (by referring any institutional rules) their own rules within the limit of the mandatory rules of the relevant laws. The aim of the arbitral proceeding is to obtain an award which is final, binding and enforceable. In order to provide a valid award, arbitration agreement should be drafted effectively. There is no common requirement about the elements of the arbitration agreement. However, at least it should include some basic elements such as the place of arbitration, the law governing to the arbitration agreement, the law governing to the substantive matters, the language of the arbitration.<sup>[3]</sup>

The parties are free to choose the place of arbitration. A place might be found attractive and efficient because of its procedural laws or its geographical location, costs, and distance to the parties or arbitrators. With the latest developments of arbitration law, the arbitration proceeding has become more preferable for the parties as a dispute resolution method. It has a direct effect upon the economy of the country in where the arbitration takes place. Therefore, in recent years many countries have changed their procedural rules in order to attract the parties. Likewise, Turkey has followed the same tendency. The new Turkish International Arbitration Act (TIAA)<sup>[4]</sup> has been adopted in 2001. The TIAA was enacted on the basis of the Model Law; thus, it includes modern arbitration rules.

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[1] For further reading A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet Maxwell, 4th Edition, 2004), p.22

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards-1958. New York Convention has a wide acceptance; more than 140 countries have ratified it. Therefore, recognition and enforcement of an arbitral award will be easier than a judgement of a national court. For further reading about recognition and enforcement of arbitral award A. Redfern, M. Hunter n (1), p.439

[3] The ICC recommends that such essential elements should be indicated in the contract.

[4] International Arbitration Act No. 4686 of June 21, 2001. For more information about the provisions of the TIAA, A. Yesilirmak, *The Turkish International Arbitration Law of 2001*, *Journal of International Arbitration* 19(2): 171-177, 2002

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## 2. THE PLACE OF ARBITRATION

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The seat (place) of arbitration is the juridical place of arbitration.<sup>[5]</sup> It should be a neutral place which has no connection between the parties. In this way, the parties will have equal representation and opportunities; no one takes advantages of playing at home. By contrast, in the litigation process, generally, the claimants have to apply to the court of place of residence or place of business of the defendants. In such cases, the systems of law, language, procedures of that place will be familiar to the defendants while they might be unfamiliar to the claimants. Hence, the parties need to make sure that they have chosen the place of arbitration. The place of arbitration can be chosen by the parties directly or indirectly otherwise it shall be determined by the arbitral tribunal.<sup>[6]</sup> If the determination is made by the arbitral tribunal, the tribunal should choose a neutral place.

If the legal place of arbitration is not convenient for the parties, arbitrators or witnesses hearings or meetings may be held in another place.<sup>[7]</sup> The legal place of arbitration may be expensive, or it may be distant for everyone. However, in such situations although hearings and meetings are held another place the legal place of arbitration will not change.

As a result, the place of arbitration is considerable both legal and practical reasons. It may have a crucial effect over the following matters: 1) the applicable laws; 2) the role of national courts; 3) the effect of recognition and enforcement of an arbitral award under the New York Convention; and 4) practical reasons.

### 2.1. The Applicable Laws

In international commercial arbitration proceeding, there might be different systems of law and legal rules.<sup>[8]</sup> The parties are free to choose the relevant applicable laws pursuant to their wishes. The law governing to the arbitration itself and the law governing to the arbitration agreement might be related to the place of arbitration. The effect of the place of arbitration arises when the parties fail to choose such laws.

Firstly, the law governing to the arbitration itself: International arbitration proceeding is conducted under the concept of dualism. That means the procedure is governed in accordance with the rules which are created or adopted by the parties and the law governing to the arbitration itself. The procedural law sets the

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[5] English Arbitration Act 1996 s. 3.

[6] Article 9 of the TIAA. That provision is adopted directly from Article 20 of the Model Law. Similarly, English Arbitration act 1996 s.3. According to Article 14(1) of the ICC Rules, the place of arbitration shall be fixed by the Court unless agreed upon by the parties. In article 16(1) of the LCIA Rules, if the parties have failed, the seat of arbitration shall be London unless another place is more appropriate. As it seen, both national laws and international rules give power (and duty) to the arbitral tribunal to designate the place of arbitration.

[7] Article 9 of the TIAA, Article 20(2) of the Model Law.

[8] The relevant applicable laws are the law governing to the arbitration agreement, the law governing to the arbitration itself, the law governing to the substantive matters, the law governing to the capacity of the parties and the law governing to recognition and enforcement of the award. For detailed reading, A. Redfern, M. Hunter n (1) p.76.

boundaries. That means, although, the parties have party autonomy they must act within the limit of the mandatory rules of the procedural law (*lex arbitri*). The procedural law may not include modern rules and it may be ultra-restrictive. Therefore, the parties should go to forum shopping and find the best suitable place for arbitral proceeding.

The procedural law is generally the law of the place of arbitration. When the parties determine the place of arbitration they also determine the law governing to the arbitration itself. For instance, Article 1 of the TIAA indicates that in which situations the TIAA will be applied. There are two situations; 1) there must be a foreign element and the place of arbitration must be in Turkey, 2) if the TIAA has been chosen as a procedural law even if the place of arbitration is not in Turkey.

However, this general situation does not occur in all cases. Even though, the parties choose a place as a seat of arbitration they might choose a different country's law as a procedural law. The parties may find the seat of arbitration is less expensive and more convenient under the circumstances, and they may find the procedural law of the other country is more efficient and familiar. Such choices might cause more complexity and delaying. In situations like this, both the law of the place of arbitration and the law that is chosen as a procedural law must be considered.<sup>[9]</sup>

The procedural law also deals with whether the issue is being capable to arbitrate or not. In most jurisdictions, disputes that stem from the criminal law or family law are not being capable to arbitrate. However, there is no common execution. The application of arbitrability changes from state to state, because of public policy issues of the states. According to Article 1(4) of the TIAA, disputes that are related to real rights on immovable or that are not subject to the will of the parties are not being capable to arbitrate.

The issue of arbitrability has a crucial role over the validity of enforceability of arbitral awards. Article 15 (A) (2) (a) of the TIAA, the award may be set aside if the subject matter of the dispute is not capable of settlement by arbitration under the Turkish Law.<sup>[10]</sup> According to Article V (1) (e) of the New York Convention, recognition and enforcement of the award may be refused if the award is set aside under the law of which, that the award is made. Consequently, all these matters are related to the place of arbitration, thus, the parties should be careful when they choose the place of arbitration.

On the other hand, in international arbitration both the law of the place of arbitration and the law of the place of recognition and enforcement of the award has an influence over the proceeding. Therefore, delocalisation theory was born in order to prevent to the effect of the place of arbitration.<sup>[11]</sup> This theory ignores the law of the place of arbitration and merely gives effect to the law of the place

[9] A. Redfern, M. Hunter n (1) p.87

[10] Similarly, Article 34 (2) (b) (i) of the Model Law.

[11] For further reading, A. Redfern, M. Hunter n (1) p.89; J. Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 ICLQ 358, (1981)

of recognition and enforcement of the award. It is based on the party autonomy and aims to provide uniformity.

The delocalisation theory was followed in Belgium, and it affected to the attractiveness of Belgium as a place of arbitration. Even though, the parties have party autonomy during the process they might need support and assist of a national court.<sup>[12]</sup> Thus, it seems impossible to ignore the effect of the law of the place of arbitration. For this reason, Belgium gave up the delocalisation theory.

Secondly, the law governing to the arbitration agreement: The law governing to the arbitration agreement deals with the issues of the validity of the arbitration agreement and the scope of the arbitration agreement. The parties are free to choose the law governing to the arbitration agreement. If the parties fail to choose the law governing to the arbitration agreement, the law of the place of arbitration will be applied. According to Article 4 and Article 15 (A) (1) (a) of the TIAA, the validity of the arbitration agreement is determined pursuant to the law which has been chosen by the parties. If the parties fail, Turkish law will be the law governing to the arbitration agreement.<sup>[13]</sup>

## 2.2. The Role of National Courts

In international arbitration, the process is conducted independently. The parties can create their own rules and the arbitral tribunal can fill the gaps. The arbitral tribunal has a power to decide on its own jurisdiction. That means issues are related to the validity of the arbitration agreement or the scope of power of the arbitral tribunal will be dealt with by the arbitral tribunal. In this way, any early intervention of national courts is prevented.

The mandate of the arbitral tribunal over its own jurisdiction is recognised in Article 16 of the Model Law and Article 7 (H) of the TIAL.<sup>[14]</sup> According to Article 7 (H) of the TIAL, arbitrator or arbitral tribunal has a mandate to decide its own jurisdiction. Although, Article 16 of the Model Law and Article 7 (H) of the TIAA seem similar there is a crucial difference between them. According to Article 16 (3) of the Model Law, against the decision of the arbitral tribunal, the aggrieved party can apply to the competent court within 30 days. By contrast, in the TIAA, the aggrieved party must wait until the final award is made. In a case,<sup>[15]</sup> Yargıtay (the

[12] See below part 2.2, the role of national courts.

[13] Similarly, Article 34 (2) (a) of the Model Law. A. Redfern, M. Hunter n (1) p.124. If there is an arbitration clause, in some jurisdictions, the law governing to the substantive matter will also be governed to the arbitration agreement. In these countries, the law of the place of arbitration is not taken into account. However, in other jurisdictions, the law of the place of arbitration is the relevant law and it is applied. Article 4 of the TIAA expressly indicates that if the parties fail to choose the law governing to the arbitration agreement Turkish law will be the applicable law.

[14] Similarly, English Arbitration Act 1996 s.30(1) arbitral tribunal has power to make a decision on its power. According to the English Arbitration Act s.30(2), like Model Law, that decision may be challenged. However, it can be said that challenging procedures are generally used as delaying tactics.

[15] File info: Yargıtay 15. Hukuk Dairesi E.2007/2145, K.2007/4389, T.27.06.2007

Supreme Court) held that the parties cannot apply to national courts in the sense of the jurisdiction of the arbitral tribunal. If a party wants to object the jurisdiction of the arbitral tribunal, firstly he/she must apply to the arbitral tribunal. If the arbitral tribunal decides that it has the power, the aggrieved party cannot request to the court against that decision. The aggrieved party can recourse to the court after the final award is made under the Article 15 (A)(1)(a) or 15 (A)(1)(d) of the TIAL. As it seen, the TIAA prevents any early intervention and thus, the parties cannot introduce any delaying tactics. On the other hand, the absence of the right to apply to the national courts against the decision of the arbitral tribunal might cause time-consuming and unreasonable expenses.

Belgian experience has proved that although the arbitration proceeding is governed independently, during the process national courts assistance and support may be needed. The national court must have both jurisdiction and power. The court of the place of arbitration generally has jurisdiction.<sup>[16]</sup> According to the TIAA, if the arbitration takes place in Turkey, the competent Turkish court will assist and support to the arbitral proceeding. The competent court is Asliye Hukuk Mahkemesi of the place of business or place of residence or the defendant in Turkey.<sup>[17]</sup> If the defendant does not have the place of business or place of residence in Turkey, Istanbul Asliye Hukuk Mahkemesi will be the competent court.<sup>[18]</sup>

According to the Model law, national courts shall not interfere to the arbitration proceedings unless the Model Law allows intervention.<sup>[19]</sup> Under some certain circumstances, the intervention of the national courts may be needed. Firstly, national courts have roles in order to ensure the enforcement of the arbitration agreement under Article 5 of the TIAA. Even though there is an arbitration agreement, if the claimant applies to a national court and the defendant objects to this application the national court must refer the parties to the arbitration proceeding. In a case,<sup>[20]</sup> Yargıtay held that disputes are mainly resolved by the national court. However, if there is an arbitration agreement between the parties it binds the parties. Hence, the parties must apply to the arbitration proceeding.<sup>[21]</sup> Also, both Article II (3)

[16] If the procedural law is not the law of the place of arbitration, the court of the place of arbitration might be reluctant to apply another countries' procedural law. In such cases, the competent court might not be the court of the place of arbitration. For instance, if the place of arbitration is X country and the parties choose Y country's law as a procedural law the court of X may be reluctant to apply Y's procedural law. Therefore, the competent court might be the courts of Y country.

[17] Article 3 of the TIAA.

[18] *ibid.*

[19] Similarly, English Arbitration Act 1996 s.1 (c). It is indicated that the court should not intervene the arbitration proceeding. However, there are some exceptions such as English Arbitration Act 1996 s.12 (power of court to extend time for beginning arbitral proceedings), s.24 (power of court to remove arbitrator), s.44 (power of support to the arbitral proceedings)

[20] File info: Yargıtay 19. Hukuk Dairesi, E.2003/2654, K.2004/2603, T,11.03.2004

[21] *ibid.*

of the New York Convention and Article 8 of the Model Law render the same power to the national courts.

Secondly, in arbitration proceedings the arbitrators are appointed by the parties. However, under Article 7 (B) (2) and 7 (B) (3) of the TIAA, if the parties fail the arbitrators will be chosen by the competent national courts.<sup>[22]</sup> Additionally, if there is a vacancy in the arbitral tribunal the vacancy will be filled by the same appointment method.<sup>[23]</sup> That means if the previous arbitrator has appointed by the national court a substitute arbitrator will also be appointed by the national court.

Thirdly, the arbitral tribunal does not have any coercive power upon the third parties. The arbitral tribunal cannot make any order or injunction in order to force the third parties to do something. The courts' intervention generally arises when any evidence is on the hand of a third party or when the witnesses are not reluctant to attend the hearings. In such cases, the support or assistance of the competent national courts is inevitable.<sup>[24]</sup>

Fourthly, arbitral tribunal may have a power relating to the interim measures. This mandate stems from the law of the place of arbitration. In both Model Law and the TIAA, the arbitral tribunal has a mandate to grant interim measures.<sup>[25]</sup> However, there are certain differences between Article 17 of the Model Law and Article 6 of the TIAA. <sup>[26]</sup> Firstly, in Article 6 of the TIAA, the arbitral tribunal is empowered to render any interim measures or attachments. On the other hand, in Article 17 of the Model Law does not include attachments; it just mentions interim measures. Secondly, in the TIAA the power of the arbitral tribunal is not restricted on the ground of the subject matter of the dispute. Notwithstanding, in the Model Law, the arbitral tribunal grants interim measures in respect of the subject matter of the dispute. The question is in the TIAA, although, the arbitral tribunal has a power to grant interim measures or attachments, the decision of the arbitral tribunal cannot be enforced by the courts or official authority.<sup>[27]</sup> Most of interim measures and attachments cannot be enforced directly; hence national courts' assistance is required. Additionally, according to the Model Law and the TIAA, the arbitral tribunal cannot grant interim measures upon the third parties. In this regard,

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[22] Article 11 (3) and 11 (4) of the Model Law. If the parties have applied to ad hoc arbitration the court intervention is inevitable. However, if there is an institutional arbitration the arbitrator will be chosen by the institution. According to Article 5 of the LCIA Rules if the parties have failed the LCIA Court shall appoint the arbitral tribunal. Similarly, Article 8 of the ICC Rules provides that if the parties fail to nominate the arbitrator will be nominated by the ICC Court. Similarly, English Arbitration Act 1996 s.18 (3).

[23] Article 7 (G) of the TIAA, Article 15 of the Model Law.

[24] Article 12 (B) of the TIAA, Article 27 of the Model Law.

[25] Article 17 of the Model Law, Article 6 of the TIAL. Similarly, Article 23 (1) of the ICC Rules, Article 25 (1) of the LCIA Rules.

[26] For further reading, N. Deren-Yildirim, UNCITRAL Model Kanunu ve Milletlerarası Tahkim Kanunu Cercevesinde Milletlerarası Tahkimin Esaslı Sorunları, (Alkim Yayinevi, 2004), p. 79

[27] Ibid, p.82, Article 6/II last sentence of the TIAA.



although the power of the arbitral tribunal is recognised in the TIAA that power is limited. In such circumstances, the sole remedy is to apply to the competent court.

Fifthly, the establishment of the arbitral tribunal may take a long time. In order to the preservation of evidence and property interim measures may be needed. In case of such urgent circumstances if the arbitral tribunal has not been established the parties can apply to competent national court. Article 6 of the TIAA provides that the parties can apply to a court before or during the arbitral proceedings. Applying a national court does not mean a waiver of the arbitration agreement.<sup>[28]</sup>

Finally, at the end of the proceeding the aggrieved party may recourse to the court of the place of arbitration in order to set aside the arbitral award. One of the objectives of the arbitration proceeding is to obtain a final and enforceable award. If the award is set aside in the place of arbitration, it may not be recognised or enforced in any other states.<sup>[29]</sup> Article 15 of the TIAA indicates that in which circumstances the award may be set aside.<sup>[30]</sup> The aggrieved party can only challenge an arbitral award on the basis of this provision. The grounds for challenging are limited with this provision. According to this provision the competent court shall handle such applications primarily and expeditiously. The grounds for challenging an arbitral award are change from country to country. Thus, the parties need to make sure that they have checked to the procedural law of the place of arbitration.

### **2.3. The Effect of Recognition and Enforcement of an Arbitral Award under the New York Convention**

One of the most significant aims of the commencing an arbitral proceeding is to obtain an enforceable award under the New York Convention. In international commercial arbitration, there is usually no connection between the parties and the place of arbitration. On the other hand, the place of recognition and enforcement of arbitral awards has a connection with the parties. The award is usually recognised and enforced in the country where the losing party has its assets. In this context, the place of arbitration and the place of recognition and enforcement of arbitral awards are usually different places. Why the place of arbitration is crucial in the sense of recognition and enforcement of an arbitral award? Article I (1) of the New York Convention indicates that in which conditions the Convention shall be applied; 1) if the award is made in the territory of a State other than the State of recognition and enforcement of the award, 2) if the State of recognition and enforcement of the award does not consider that the award is domestic. Namely, the Convention is applied to foreign arbitral awards, and the place of arbitration determines whether the arbitral award is foreign or domestic.

[28] Similarly, Article 9 of Model Law, Article 23 (2) of the ICC Rules, Article 25 (3) of the LCIA Rules.

[29] However, if the award is set aside on the ground of the public policy of the place of arbitration it might be recognised and enforced in any other state. Even if, the issue against public policy of the place of arbitration it may not be against public policy of another state.

[30] Similarly, Article 34 of the Model Law.

Under Article I (3) of the New York Convention, contracting States can limit the application of the Convention on the grounds of reciprocity and the definition of commercial relationship. According to the reciprocity reservation, if the place of arbitration is not a contracting State the Convention will not be applied. In order to prevent such risks, the parties need to make sure that the place of arbitration is a party of the Convention. The Convention is applied to commercial relationship whether contractual or not. What is the commercial relationship? The Convention allows the contracting States to define the commercial relationship under their national laws.<sup>[31]</sup> Turkey ratified the Convention with these two reservations in 1991.<sup>[32]</sup> In this regard, the place of arbitration shall be a party of the Convention if the arbitral awards are recognised and enforced in Turkey; otherwise, the Convention will not be applied. Also, the commercial nature of the dispute will be determined in respect of Turkish law.

Article V of the New York Convention indicates that in which circumstances, the recognition and enforcement of the award may be refused. In the light of this provision, the place of arbitration may be relevant in the process of recognition and enforcement.<sup>[33]</sup>

Firstly, the recognition and enforcement of an arbitral award may be refused if the arbitration agreement is not valid under the law chosen by the parties or the law of the place of arbitration.<sup>[34]</sup> If the parties fail to make a choice, the law of the place of arbitration will be applied.

Secondly, the recognition and enforcement of an arbitral award may be refused if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties.<sup>[35]</sup> If the parties are failing such agreement the law of the country, where the arbitration takes place is taken into account.<sup>[36]</sup>

Finally, the recognition and enforcement of an arbitral award may be refused if the award has been set aside or suspended the country in which, or under the law of which the award was made.<sup>[37]</sup> However, although an arbitral award is set aside in the country of the place of arbitration it might be recognised and enforced in another country.<sup>[38]</sup> This particularly arises where the award is set aside on the ground of the public policy of the place of arbitration.

[31] Article I (3) of the New York Convention.

[32] Article 2 of the law no. 3731.

[33] For further reading, F. De Ly, *The Place of Arbitration in the Conflict of Laws of International Arbitration: an Exercise in Arbitral Planning*, 12:1 *Nw. J. Int'l. & Bus.* 48, (1992)

[34] Article V (1) (a) of the New York Convention. Similarly, Article 36 (1) (a) (i) of the Model Law.

[35] Article V (1) (d) of the New York Convention. Similarly, Article 36 (1) (a) (iv) of the Model Law.

[36] *ibid.*

[37] Article V (1) (e) of the New York Convention. Similarly, Article 36 (1) (a) (v) of the Model Law.

[38] For instance in case *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F Supp 907 (DDC 1996) although the award was set aside in Egypt (the place of arbitration) it was

#### 2.4. Practical Reasons

Aside from legal reasons, when the parties choose the place of arbitration they should consider practical matters. The place of arbitration should be convenient for the parties, the arbitrators and witnesses. Costs of the place of arbitration should be reasonable. Distance of the place of arbitration should be suitable for the parties, the arbitrators, witnesses and experts. Otherwise, travelling to a distant place may be time consuming and may cause additional expenses. Transportation systems, availability of accommodations, communications services and visa issues should be taken into account when the place of arbitration is determined.

In this regard, Turkey can be treated as a convenient place for international arbitration particularly in its territory. Its location is suitable for international arbitration including Europe, Asia, and the Middle East. Also, the costs of accommodation, transportation, communication might be more advantageous than other arbitration centres.

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### 3. CONCLUSION

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The place of arbitration has a vital role in international arbitration proceedings. If the parties want to apply arbitration proceeding, they should determine the place of arbitration by taking into account both legal and practical issues. In order to become an attractive place for international arbitration, Turkey has adopted a new international arbitration act on the basis of Model. With developments of arbitration law, many lawyers have commenced to specialise in this field. As a result, it can be said that Turkey will emerge as an arbitration centre particularly, for Europe and Asia in the near future.

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enforced in the US.

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