ARBITRATION REPORT ON THE LEGAL INFRASTRUCTURES OF ECO COUNTRIES

INTRODUCTION

The transition to a market economy has almost been completed in most of the ECO Countries, and within the states uncompleted there are ongoing dynamic processes in their substance. This process is connected with the fundamental changes in the economic relationships within the states that emerged after establishing strong relationships with the global economy. However, it also presupposes substantive adjustments of the legal environment that concerns almost every aspect of day to day life, including the efficient arbitration application.

While saying this, foreign direct investment is widely regarded as one of the most important factor in economic development and integrating with the global economy. The investment climate of a country is determined by economic, political and legal factors. Among the legal factors, an impartial and effective system of dispute settlement is essential.

International commercial arbitration, in this respect, as one of the main tools to attract Foreign Direct Investment (FDI), is the process of resolving business disputes between or among transnational parties through the use of one or more arbitrators rather than through the courts. The non-judicial nature of arbitration makes it both attractive and effective for several reasons. There may be distrust of a foreign legal system on the part of one or more of the parties involved in the dispute. In addition, litigation in a foreign court can be time-consuming, complicated, and expensive.

Further, many international agreements, treaties, and conventions, like the Washington Convention on the Settlement of Investment Disputes (ICSID), the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the Geneva Convention, facilitate the use of arbitration as a method for resolving disputes. Other agreements address the enforcement of awards. As a result, there has been a tremendous increase in arbitration options in the last 50 years. Previously, there were a few countries with well-developed arbitration practices and sympathetic national laws. A decision rendered in a foreign court is potentially unenforceable. On the other hand, arbitral awards have a great degree of international recognition since more than 140 countries have agreed to abide by the terms of the New York Convention.

What is more, it is a well known fact that one of the main reasons why arbitration is preferred is its speedy nature. Therefore, having the relevant arbitration conventions fully incorporated into the national legislations is a very important step in order for an arbitral award to be recognised and enforced in another country. For this reason, it should be considered;

- whether the legislations are properly amended and
- the readiness of the judges for this type of awards

In addition to the above developments, many arbitration courts in some of the ECO countries have also been established. This development is a significant step to increase the investment attractiveness and to form an efficient dispute settlement system in the region complying with the international standards.

Besides this, efficient activities of the arbitration courts have become an important step to the practical implementation of such priorities of the national policy as the further intensification of the

market reforms, judicial and legal reforms, and of the principle "from the strong States to the strong societies".
Despite the developments in arbitration in the region, generally speaking it appears that arbitration culture within the ECO member states is not developed enough. There is not much awareness in the business communities, amongst the lawyers, academics and the state courts. In addition to this, the major factors, which might be considered as having a significant impact on the future development of arbitration within the legal framework of business in the ECO countries generally, include the following;

- traditional formalistic approach of the state courts in dealing with commercial disputes
- limited experience of state judges in application of new substantive rules regulating business activities based on private law
- lack of necessary of skills in adversarial court procedure within the judiciary
- lack of modern business experience of economic operators and the existence of undeveloped self-regulating mechanisms in the business community
- rapid growth of case load of commercial disputes in the state courts

While the situation is generally as above, the development of arbitration deserves special attention in the process of building up the legal infrastructure for business relationships. Therefore, an urgent awareness of arbitration within the member states needs to be realised through education, research, organising courses, seminars, conferences and exchange programmes, as well as and most importantly, the decision of the determined political powers within the ECO countries.

Furthermore, having signed and ratified the relevant international arbitration conventions is one of the indicators that a country has formed suitable legal mechanisms to effectively protect commercial and civil rights of foreign and domestic investors. Besides this, attempts for the development of arbitration in the ECO countries are reflective of the wider trends in the developing world and are thus encouraging. However, it is necessary to understand the problem of interaction between the states' attitude towards legal systems and arbitration, and the problem of harmony and uniformity of arbitration laws and practices. In general, when we look at the ECO countries, there are still many gaps in the laws regarding the implementation of secured measures and the execution of arbitral awards.

Therefore, it may be a wise move to adopt bilateral treaties amongst the ECO countries providing for more favourable grounds for recognition and enforcement of arbitral awards rendered in one of the ECO countries. This is also to minimise and clarify shortcomings and issues, such as interim measures, security for costs, independency of arbitrators, public policy, confidentiality, grounds for setting aside and recognition and enforcement processes. Therefore, in order not to discourage foreign (and local) businesses from opting for arbitration in the ECO region or for an occurrence of an unwelcome surprise once arbitration is underway, there needs to be a strong will in favour of arbitration within the highest political power of the ECO countries.

In respect to acknowledging the importance of FDI in developing countries, there is also another reality in the ECO countries. This is regarding the overwhelming size of Small and Medium Enterprises (SME). With the overall economy, therefore, having an efficient, effective and reliable dispute resolution system is also very important for enhanced trade and investment, particularly for the SMEs.

Finally, it can be said that there is no turning back for the ECO countries with respect to arbitration as this mechanism has increasingly become a vehicle of dialogue as well as a method for settlement of disputes in international commerce. Therefore, the ECO countries urgently need to establish a well developed legal structure for arbitration and take relevant measures to increase the familiarity with arbitration laws. In addition, the work on all sides should concentrate on making the system more effective while at the same time maintaining its attractions such as flexibility and diversity.

TURKEY

Arbitration is one of those; Turkey had to take serious steps for the development of its arbitration proceeding in order to eliminate foreign investors' fears and to make Turkey an international arbitration centre over the long term. Therefore, Turkey, within the last two decades, has made many improvements in its arbitration by being a signatory to the international arbitration conventions and the bilateral agreements, as well as changing its legislation accordingly.

The development has commenced with the signing of the ICSID in 1988, followed by the signing of the New York and the Geneva Conventions in 1991. This was followed with the amendment of the relevant articles in the Turkish Constitution in 1999 and the enactment of the International Arbitration Law No. 4686 ("IAL") in 2001, which, ad hoc in nature, is mostly based on UNCITRAL Model Law on International Commercial Arbitration and Swiss International Arbitration Law. Finally, this legal reform will be completed with the replacement of the Civil Procedural Code ("CPC") of 1927 in October 2011.

Arbitration, in the Turkish legislation, first appeared in the CPC in a way only to govern domestic arbitrations taking place in Turkey without any foreign element. Hence, there was a requirement for a new law on arbitration, accepted internationally, in order to compete in international trade. Therefore, enacting the IAL was a positive development and an important step to encourage foreign investment into Turkey.

With regards to foreign arbitral awards being enforced in Turkey, there were not any provisions existing for the recognition and enforcement of the foreign arbitral awards until the enactment of the International Private and Procedural Law (IPPL) in 1982, which was amended in 2007. Here, it is more appropriate to state that according to the main principle in respect of the application of the domestic laws and the international conventions, to which Turkey is a signatory country, the international conventions have precedence over the domestic laws according to Article 90 of the Turkish Constitution. Therefore, if an Arbitral Award is rendered in one of the signatory countries to the New York Convention or if the award is given in Turkey but under the authority of a foreign procedural law, then, instead of the provisions of the IPPL, the provisions of the New York Convention shall be applied.

Furthermore, the Union of Chambers and Commodity Exchanges of Turkey (TOBB), the highest level representative of the private enterprise community in Turkey, set forth its own Arbitration Rules in the early 1990s and renewed them in 2009, which were mainly inspired by the ICC Arbitration Rules. Likewise, the Istanbul and Izmir Chambers of Commerce also established arbitration centres with their own Arbitration Rules. These institutions play a substantial role in arbitration proceedings in the country, not just for foreign investments, but also increasingly for the SMEs.

IRAN

Iran, like Turkey, has recently made a lot of improvements in its arbitration by being a signatory to the international arbitration conventions and the bilateral agreements, as well as changing its legislation.

The first step in this process was the adoption of the Iranian International Commercial Arbitration Act (ICAA) in September 1997, which is based on the UNCITRAL Model Law Rules. The ICAA applies only to international arbitrations, narrowly defined as existing when "one party is not, at the time of the conclusion of the arbitration agreement, an Iranian national under Iranian law." Domestic arbitration is governed by the provisions of the Iranian Code of Civil Procedure 1937 (ICPC).

In addition, the ICAA contains major improvements with respect to the then existing ICPC provisions. While saying this, the ICAA, however, has a number of shortcomings. The most important one is its inapplicability to arbitrations held outside Iran or to foreign arbitral awards. Awards rendered outside the country, therefore, had to be enforced in Iran as foreign judgements under the burdensome and extensive control imposed by the article 169 of the Civil Judgements Act of 1977.

The above situation continued until the accession of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) in 2001. With the signing of the Convention, now awards rendered outside the country are enforceable in Iran under the provisions set out in the Convention.

However, Iran signed the New York Convention with the following reservations;
a) Iran shall apply the New York Convention only with regard to commercial disputes,
b) Iran shall apply the New York Convention on the basis of reciprocal conduct,

In addition to these reservations, article 139 of the Iranian Constitution must also be observed. This article stipulates that putting disputes that arise between foreigners and Iranian governmental entities to arbitration must be firstly approved by the parliament.

First two reservations do not seem to cause any problems, but according to the provision in the article 139, foreign investors, who wish to settle disputes arising out of contracts entered into with the Iranian State by arbitration, must therefore obtain the Iranian Parliament's approval. Having this type of a provision seems to be against the spirit and the principles of arbitration. Non-compliance renders any subsequent award unenforceable irrespective of the New York Convention. Enforcement of a foreign award which may conflict with any of the principles set by the highest Iranian authorities will remain unenforceable despite Iran's accession under the New York Convention.

In addition to this, Iran has not signed the Washington Convention on the Settlement of Investment Disputes (ICSID) yet.

PAKISTAN

The concept of arbitration has deep roots in Pakistan as the country being affected by the English common law for years. The main law relating to arbitration in Pakistan is the Arbitration Act, 1940.

Pakistan has also signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the Convention) in 2005 and the Washington Convention on the Settlement of Investment Disputes (ICSID) in 1966, as well as being a party to numerous investment treaties. In addition to this, Pakistan has promulgated ordinances regularly over the years in order to give legislative effect to the above Conventions with the intention of reducing the foreign investors' fear and the intervention of the courts.

The Arbitration Act 1940 is not based on the UNCITRAL Model Law and a bill for the enactment of a new consolidated arbitration law based on the UNCITRAL Model was laid before the National Assembly as a Government Bill on 27 April 2009, but has not yet been passed into law. The new Arbitration Act is intended to be a comprehensive statute covering both domestic and international arbitration and will implement Pakistan's obligations under both the ICSID Convention and New York Convention.

Furthermore, one main and a very important shortcoming with the current AA 1940 is not containing a provision dealing with confidentiality. It is also not clear whether the documents filed by the parties and deposition taken by the arbitrator may be kept confidential, bearing in mind the provisions of section 14 of the Arbitration Act. Section 14 requires the arbitrators to file the signed award along with the record of evidence in the court, which becomes part of the court's record. Since the court's record is easily accessible to the general public, anyone can obtain copies of the award and record of evidence filed by the arbitrators.

KAZAKHSTAN

Kazakhstan has acceded to three main international arbitration conventions of the New York and Geneva Conventions in 1995, and ICSID in 1992. It has also ratified four regional international conventions with the CIS countries. In addition to these accessions, the Law on International Commercial Arbitration (LICA) for the international, which is based on UNCITRAL Model Law and the Arbitration Courts Law for the domestic commercial disputes were introduced in 2004 in order to finally end the uncertainty and controversy concerning the right to recourse to arbitration and enforce arbitration awards.

With the signing the New York Convention, foreign arbitral awards are enforced in Kazakhstan on a reciprocal basis. The LCIA sets out grounds for refusal of recognition and enforcement in line with the New York Convention and the UNCITRAL Model Law. As such, enforcement of an award may be refused if the subject matter of the dispute is not permitted to be settled by arbitration under Kazakh law pursuant to the New York Convention and the LCIA. The Kazakh Procedural Code entitles the Kazakh courts to have subject-matter jurisdiction over a very broad range of disputes. Enforcement can also be refused if it would be contrary to public policy.

The Kazakh courts has recently refused to enforce an LCIA arbitral award, finding that it was contrary to Kazakh public policy as it did not apportion liability between the respondents (and instead awarded damages on a joint and several bases). The Kazakh Procedural Code requires that a court apportions liability between defendants in its judgments. Recently, Kazakhstan has expressed dissatisfaction with and resisted the payment of an ICSID award (US$125 million) rendered in August 2008 in favour of two Turkish telecom companies for the "creeping expropriation" of their investment in a Kazakh mobile phone operator.

AZERBAIJAN

Azerbaijan acceded to the New York Convention in 1999, ICSID in 1992 and the Geneva Convention in 2005. It has also ratified four regional international conventions with the CIS countries. In addition to these accessions, the Law on Foreign Investment in 1992, the Law on International Arbitration in 1999 and the Civil Procedure Code in 2000 regulate arbitration implementation within the country. The provisions of the these Azerbaijani laws generally follow closely and sometimes refer to the above mentioned conventions, as well as providing for the mechanism of enforcement of arbitral awards in Azerbaijan and specify the cases where such enforcement would be denied.

UZBEKISTAN

Uzbekistan acceded to the New York Convention with the reciprocal reservation and ICSID in 1995. It has also ratified four regional international conventions with the CIS countries and followed by bringing the Law on of the Arbitration Courts (LAC) into effect in 2007, which is in domestic nature. The major target of the LAC is to regulate relations in the sphere of establishment of courts of arbitration, their competence and arbitration procedure, composition of the courts of arbitration, costs related to resolution of disputes at the courts of arbitration, as well as describing general rules applicable to arbitration and arbitral awards. Besides this, there is not a legislation made in relation to the international arbitration.

Furthermore, the Chamber of Commerce and Industry (CCI) was entrusted with the broad mandate in development of the arbitration in the country and enforcement of the LAC. The Chamber established Arbitration Court and its local branches in different regions in 2007. In the following year, the United Nations Development Programme in partnership with the CCI, under the name of Business Forum Uzbekistan project, supported the development of arbitration and other alternative dispute resolution systems in Uzbekistan. The project supported institutional development of alternative methods of dispute resolution between economic entities, establishment and sustainable operation of arbitration development centre under the CCI.

KYRGYZSTAN, TAJIKISTAN AND TURKMENISTAN

These three countries have had the least arbitration development amongst the ECO countries until today. Kyrgyzstan signed the New York Convention with the reciprocal reservation and ICSID in 1995, as well as ratifying four regional international conventions with the CIS countries, but has not ratified the ICSID yet. Turkmenistan signed only the ICSID in 1992. Tajikistan has not acceded to any of the major arbitration conventions, yet, apart from signing the regional international conventions with the CIS countries. Also, Tajikistan is a party to several bilateral agreements that provide for arbitration of disputes. **These countries also do not have national arbitration laws.**

CONCLUSION

It is a well known fact that the strategic importance of international arbitration is obvious in our times. Its continual expansion in the last thirty years is really remarkable, as evidenced by the increasing number of cases with huge amounts involved in those countries with well developed arbitration centres. International conventions play an important role in setting the framework and scope of international commercial arbitration. International arbitration conventions are designed to make the national legislations of the contracting parties compatible with each other and to provide the eligibility and enforceability of arbitral awards.

The country analyses presented above indicate that most of the ECO countries, apart from the very few countries, have signed the main international arbitration conventions; however, the key question is the enforcement of arbitral awards. The main reason to create an arbitration mechanism is to develop better economic and commercial relations among each other and to render faster settlement of commercial conflicts; but,, without an established legal background in the member countries that substantiates the enforcement of arbitral award taken by the Arbitration Court, arbitration would be superfluous.

Since the establishment of a common legal background for an eligible and enforceable international arbitration falls beyond the power of ECO private sector, the foundation of an arbitration center among ECO member countries must be submitted to the agenda of ECO Summit and Council of Ministers (COM) meetings for consideration and approval at the highest level. The first thing to do within this context is to submit the issue to the ECO Secretariat.

It is clear that we are going through a natural period of transition in the formation of a new culture and, as expected, certain challenges will always be found. Nevertheless, such challenges can be successfully managed and this goal is definitely attainable as long as there is a strong will of the political powers of the ECO Countries.