

# The Republic of Turkey in Arbitration<sup>1</sup>

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## I. Introduction

In order to make understand the title of this presentation, we would like to start with some considerations made by an Arbitral Tribunal, established under the ICC Rules of Arbitration, which had to decide in a case with a Turkish company as investor and Claimant, and the Turkish State as Respondent. The legal precondition was the fact that in the year 2000, the Turkish legislature had subjected concession agreements to private law.<sup>3</sup>

“Finally, the Tribunal would like to make some remarks about this kind of cases where the relationships between public law and private law are nearly entirely constructed not on the basis of explicit statutory regulations but on theories of law. It is natural that judges as well as parties have to argue in line with “majority opinions” or “minority opinions”. This brings the Tribunal into the comfortable position to weigh such opinions, if adequate in the light of national court decisions, and come to its own conclusions, strictly following the logics of facts and law. It must be emphasized that the Tribunal, when doing this, is not bound by majority opinions or by national court decisions. In the field of arbitration, the Tribunal is entitled, allowed and urged to follow the rationality of an equitable and just interpretation of norms and – in the same way – of an equitable and just reconciliation of the facts with such norms. It is true, that the theory of the infection of private law relationships by administrative acts, in the framework of the theory of the “acte détachable” in French law, is charming and that it makes things easier for the sake of the authority of public

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<sup>1</sup> Published as: States in Arbitration – The Turkish Experience, in Kaya u.a. (Hrsg.), Prof. Dr. Haluk Ülgen’e Armağan, Istanbul 2007, Bd. 2, S. 2011 – 2028.

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<sup>3</sup> The award has been rendered by a Tribunal chaired by the author.

law as the law of sovereignty. On the other hand, it cannot be denied that national and international developments have led to a new balance between public law and private law as a method of regulating the relationships between the State and the citizen. The majority of this Tribunal shares the opinion that, if once the State has committed itself to an engagement with a citizen – who may be a natural or a legal person – it is charged with the responsibility to comply with such commitment. The ancient theory of “subordination”, which is an essential and constructive element of the theory of the acte détachable, of the majority cited by the dissenting opinion, is dissipated when the State expressly escapes from the applicability of administrative law in favour of the application of private law on its legal relationships with its citizens. The majority of this Tribunal considers a concept as unacceptable, where one hand of the State authorities should be entitled to deprive a citizen from what the other hand had given out to him. As long as the fate of private law relationships is still dependent on unpredictable, one-sided acts of the State, who is a contracting party, the subjection of the legal relationship between State and citizen under private law remains without any sense.”

And to end with this introduction, we shall just cite one sentence from a decision of the Turkish Constitutional Court:

“Being trustworthy is one of the fundamental characteristics of a state governed by the rule of law”<sup>4</sup>

## **II. Turkish Arbitration Law – Historical Review**

The Turkish practice in arbitration traces back to the Twenties of the Twentieth Century, where on the one hand Turkey enacted its Turkish Code of Civil Procedure based on the model of Neuchâtel, and on the other hand concluded bilateral agreements with Austria<sup>5</sup> and Italy<sup>6</sup> establishing international arbitration as a method of alternative settlement of

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<sup>4</sup> Constitutional Court, 13 February 2002, E. 2001/293, K. 2002/28, Resmi Gazete (Official Journal – RG) No. 24730 of 18 April 2002.

<sup>5</sup> Agreement between Austria and Turkey, providing for mutual legal assistance, RG No. 1864 of 4 August 1931.

<sup>6</sup> Agreement between Italy and Turkey, providing for mutual legal assistance, RG No. 1133 of 3 March 1929.

disputes. Especially the agreement with Austria since that time has created a certain practice of international arbitration, recognized by the Turkish jurisprudence. In this context, the Turkish Court of Cassation, in 1949, recognized foreign arbitral awards as binding under the regulations of the Turkish Code of Civil Procedure (Articles 516 – 536).<sup>7</sup> Shortly later, the Court brought some limitations to the recognition of foreign arbitral awards. According to a decision of 7 November 1951, foreign awards were only to be recognized if Turkish law had been applied<sup>8</sup>, notwithstanding the nationality of the arbitrators or the place of arbitration. This jurisprudence was founded on the assumption that the application of Turkish law makes an award national and therefore has to be recognized in order to be enforced under the Turkish civil procedure and enforcement regulations.<sup>9</sup> This jurisprudence produced a deadlock against international arbitration, except such arbitrations which were caused under the agreements with Italy or Austria. According to the doctrine these international agreements obtain the quality of Turkish law after due ratification<sup>10</sup>.

In 1976, the Court of Cassation stated by another decision<sup>11</sup> that an award which was rendered under application of Turkish procedure law in a foreign country has to be qualified as foreign award and therefore, was not recognizable in Turkey. Additionally, the Court held that under the ICC Rules of Arbitration the arbitrators were not independent in the constitutional sense.<sup>12</sup> This jurisprudence was abandoned in 1985.<sup>13</sup>

In 1982, the Turkish Parliament promulgated Law No. 2675 on International Private Law and International Civil Procedure (International Private Law and Civil Procedure Act).<sup>14</sup>

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<sup>7</sup> Great Chamber, Civil Law Division, 5 Jan 1930 (E. 1930/247); Chamber of Commercial Law, 28 June 1948, 1948/E. 2614, K. 1948/2931.

<sup>8</sup> Great Chamber, Civil Law Division, E. 1951/126, K. 1951/109, *Tatbikatta Yargıtay Kararları* (Decision of the Court of Cassation in Practice) 1952, Nr. 34, S. 890 ff.; Chamber of Commercial Law, 21 Jan. 1952, E. 1951/6330, K. 1952/407; 18 Feb. 1954, E. 1954/487, K. 1954/930; 21 May 1954, E. 1954/3397, K. 1954/4190..

<sup>9</sup> Cf. Nomer, Ergin, *Die Vollstreckung ausländischer Schiedssprüche nach türkischem Recht* (The enforcement of foreign arbitration awards according to Turkish Law), *DIS-Mitteilungen* 1/91, p. 11 et seq (12).

<sup>10</sup> Cf. Rumpf, Christian, *Das türkische Verfassungssystem* (The Turkish Constitutional System), Wiesbaden 1996, p 276 et seq

<sup>11</sup> 15th Chamber, Civil Law Division, 10 March 1976, E. 1976/1617, K. 1976/1052, *İlmî ve Kazaî İçtihatlar Dergisi* (Journal of Jurisprudence and Legal Sciences) 1977, No. 202.

<sup>12</sup> Cf. Koral, Rabi: *Hakemliğin Milliyeti ve Yargıtay XV. Hukuk Dairesinin 1976 (tarihli) Kararının Eleştirisi* (The Nationality of Arbitration and a Review of the 1976 Decision of the 15th Chamber of the Court of Cassation), *Hifzi Timur'un Anısına Armağan* (In memoriam Timur 1979), p 469 et seq.; Nomer, *DIS-Mitteilungen* 1/91 p. 15.

<sup>13</sup> Court of Cassation, 14<sup>th</sup> Chamber, judgment dated 21 May 1985, E. 471, K. 3690.

<sup>14</sup> RG No. 17701 of 22 May 1982. Cf. Krüger, Hilmar, *Das türkische IPR-Gesetz von 1982* (The Turkish International Private Law Act), *IPRax* 1982, p 252 et seq. Rumpf, Christian, *Einführung in das türkische Recht* (Introduction to Turkish Law),

For the first time international arbitration was accepted by statutory law and foreign awards were to be recognized by Turkish courts. This law already reflected the main principles of the New York Convention of 1958. During the next months, a new International Private Law and Civil Procedure Act is expected to be passed by the National Assembly which is likely.

A few years later, Turkey joined ICSID<sup>15</sup>, with a reservation made to Article 64 of the ICSID Convention and in favour of exclusive jurisdiction provisions of the Turkish Civil Procedure Code. Such provisions especially apply on cases related to real estate issues. The only case registered since then was a case filed by Motorola in 2004 and settled a few months later on the request of both parties to the satisfaction of Motorola.<sup>16</sup>

Another three years later, in 1991, Turkey ratified the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards<sup>17</sup> as well as the European Convention on International Commercial Arbitration, done at Geneva, 21 April 1961<sup>18</sup>. These Conventions have, according to Article 90 para. 5 of the Turkish Constitution, the force of statutory law and, according to Article 1 of the International Private Law and International Civil Procedure Act, prevail this act.

The next steps were further reforms in constitutional and statutory law.

In 1999, the Turkish Constitution was amended in favour of international arbitration.<sup>19</sup> It started with an addition to the header of Article 47 which was related to “Nationalization” and now allows the State to take measures for privatization of public services and works. At the end of the first paragraph of Article 125, which guarantees judicial review to administrative regulations of any kind, the term

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Münich 2004, p. 81 et seq.; Nomer, Ergin/Şanlı, Cemal, Devletler Hususi Hukuku, (International Private Law) 13<sup>th</sup> edition, İstanbul 2003; Çelikel, Aysel, Milletlerarası Özel Hukuk (International Private Law), 6<sup>th</sup> edition, İstanbul 2000; Ansay, Tuğrul/Wallace, Don, Introduction to Turkish Law, 4<sup>th</sup> edition, Deventer 1996.

<sup>15</sup> Law No. 3453, RG No. 20011 of 6 December 1988.

<sup>16</sup> Hürriyet Gazetesi, 28 October 2005 „Motorola 500 milyon doları aldı, Türkiye ile barıştı”.

<sup>17</sup> Ratification by Law No. 3731, RG No. 20887 of 21 May 1991, in force since 30 September 1992. In accordance with Article 1, para. 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 from legal relationships, whether contractual or not, which are considered as commercial under its national law. For the discussion on the notion of “foreign arbitral award” see e.g. Nomer, Ergin/Ekşi, Nuray /Gelgel, Günseli: Milletlerarası Tahkim (International Arbitration), İstanbul 2000, p 96 et seq.

<sup>18</sup> RG No. 21000, 23.9.1991.

<sup>19</sup> Law No. 4446, RG No. 23786 of 14 August 1999.

“National or international arbitration may be suggested to settle the disputes which arise from conditions and contracts under which concessions are granted concerning public services. Only those disputes involving foreign elements can be solved by international arbitration“

was added. Most important, the jurisdiction of the Council of State, the Supreme Administrative Court, was restrained in favour of international arbitration on public service concession agreements in cases where the State and the investor had stipulated international arbitration clauses in their agreements. However, the Council remained an authority to comment on such agreements, but not to take binding decisions on their validity or interpretation.

The next step on the statutory level was Law No. 4501 of 21 January 2000<sup>20</sup>. This statute law was expressly shaped for international arbitration in cases related to agreements between investors and the Turkish State. It even provides the application of private law principles on public works agreements with the State. This law contains, in its Article 5, a specific provision on international arbitration which is not to be discussed here, since it has been overruled by the International Arbitration Act of 2001 (*Milletlerarası Tahkim Kanunu*)<sup>21</sup>. This law is based on the UNCITRAL Model Law and provides the basis for such arbitrations which on one hand are national and on the other hand bear a foreign element. The law also applies on disputes which arise from agreements with the State in public services where the parties have agreed on an arbitration clause. The precondition for the application of this law, however, is the place of arbitration being located in Turkey (Article 1).

A foreign element is given, according to Article 2, if:

- at least one of the Parties is located in a foreign country
- a shareholder of a company, party to the arbitration, has brought foreign capital in order to make an investment related to the dispute

<sup>20</sup> RG No. 23941 of 21 January 2000, Law Regarding Principles Applicable In The Case Of Referral To Arbitration For Resolution Of Disputes Arising Out Of Public Service Concession Specifications And Contracts.

<sup>21</sup> Law No. 4686, RG No. 24453 of 5 July 2001. For more information see Rumpf, Christian, *Internationale Schiedsgerichtsbarkeit in der Türkei*, RIW (Recht der Internationalen Wirtschaft) 2002, p 843 et seq.; Çavuşoğlu, Ahmet Erdinç, *Turkish Arbitration Law in the Light of Recent Legislation*, ICC Bulletin 13 No. 2 (2002), p 31 et seq.

- the agreement in dispute provides for the transborder transfer of capital or goods

This is the setting where arbitration in Turkey or related to Turkey takes place:

- National arbitration according to the Turkish Civil Procedure Code
- Arbitration with international impact under the International Arbitration Act
- International Arbitration, aside from the Turkish Civil Procedure Code and the International Arbitration Act, where the awards are subject to recognition and exequatur-procedures under the International Private Law and International Civil Procedure Act and the New York Convention of 1958.

In all these settings, the Turkish State may appear as a Party in arbitration.

### III. The State as Contractor

Before we continue with the procedural position of the State, we should have a short glance on the questions which are related to the Turkish system of substantial private and administrative law.

Any action taken by an administrative body has to be regarded as administrative act. In order to fulfil his duties an administrative body may also award an agreement. And not every such agreement must be classified under “administrative agreement”, just because an administrative body is a party to this agreement. The government or the public legal entities in Turkey can also provide legal services through executing private contracts. While a private contract is subject to the principles of substantial private law (law of obligations, law of contract etc.), an administrative contract has to be classified under the scope of public law (administrative law), which is conferred to administrative courts. The characteristics of administrative contracts are defined as being concluded to render a public service by – at least on one side – a public authority under preservation of the principle of “subordination” of the other party if it is a private natural or legal person<sup>22</sup>. A contract can therefore be defined as “administrative”, only if it is related to the per-

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<sup>22</sup> Günday, Metin, *İdare Hukuku (Administrative Law)*, 7<sup>th</sup> edition, Ankara 2003, p 167; Gözübüyük, Şeref, *Yönetmelik Yargısı (Administrative Procedural Law)*, 17<sup>th</sup> edition, Ankara 2003, p 78; Constitutional Court, 09 December 1994, E. 1994/43, K. 1994/42-2 and 28 June 1995, E. 1994/71, K. 1994/23; Council of State, 10th Chamber, 29 April 1993, E. 1991/1, K. 1993/1752.

formance of public services and if some exceeding competences are granted to the public authority.

Certain “administrative” contracts are excluded from the administrative jurisdiction by law. After the amendments made by Law No. 4446<sup>23</sup> in the Constitution and by Law No 4492<sup>24</sup> in the Laws on the Council of State<sup>25</sup> and on Administrative Judicial Procedures<sup>26</sup> the disputes involving foreign elements, which arise from international concession contracts relating to public services may be settled by means of international arbitration. The settlement of such disputes is thereby excluded from the administrative jurisdiction<sup>27</sup>.

Provided that it is specified in the law, it is possible to have public services carried out via contracts of private law concluded between the administration and private companies. According to Article 7 of Law No. 4501 Build-Operate-Transfer (BOT), Build-Operate (BO) and Build Lease contracts constitute the examples of such public-private partnership projects in Turkey.

#### **IV. The State as a Party**

##### **1. The State as Respondent in the Turkish Legal System**

###### **a) General Observations**

There are two categories of suits in the Turkish administrative courts system: the “annulment suit” (*iptal davası*, in French: *recours pour l’excès de pouvoir*) and “the suit of full dispute” (*tam yargı davası*, in French: *recours en plein contentieux*). The choice of one of these types is relevant for the choice of the right defendant. As annulment suits aim to the annihilation of the administrative act itself, they are to be directed against the body which has rendered and to execute the respective act. The suit of full dispute, however, aims at the adjustment and recovery of the whole situation, including, if necessary, annulment and compensation of injury and damages. This kind of remedy has to be sought from such authority which is in the legal position to provide such remedy.

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<sup>23</sup> RG No. 23786 of 14 August 1999.

<sup>24</sup> RG No. 23913 of 18 December 1999.

<sup>25</sup> Law No. 2575, RG No. 17580 of 20 January 1982.

<sup>26</sup> Law No. 2577, RG No. 17580 of 20 January 1982.

<sup>27</sup> *Gözübüyük* p. 98.

The choice of the defendant has on the first sight nothing to do with legal personality, since Turkish law distinguishes between the right to stand in court proceedings and the legal personality.

### **b) The Structure of the Turkish Administration**

The Turkish administrative structure is threefold. First, there are the administrative bodies connected to the central administration, the prime ministry and the ministries on the top and their local branches in provinces and districts. These bodies may be sued before administrative courts, but behind all of them stands the State with its original legal personality. Secondly, there are local government entities, such as municipalities and province governments who have quite limited authority regarding local public services, though they can take decisions such as the construction of local roads and the planning of housing and industrial areas. Thirdly, there are a number of independent authorities, each of them provided with legal personality, such as the universities<sup>28</sup> and the Radio and Television Supreme Council. A specific category of independent authorities comprises the Capital Markets Board, the Competition Authority, the Banking Regulation and Supervision Agency, the Telecommunication Authority and the Energy Markets Regulation Agency. These agencies were established few years ago to take up tasks and competences which had formerly been addicted to ministries, especially the Ministry of Industry and Commerce and the Ministry of Public Works. These agencies have thenceforward not been subject to the direct supervision of the central or a local government.<sup>29</sup> However, their acts are qualified as administrative acts and therefore subject to judicial review at the administrative courts.<sup>30</sup>

Since the administrative structure seems to be quite complicated, the law provides for help to the prospective claimant. According to Article 15 of the Administrative Court Procedure Act, in case of faulty denomination of the respondent authority, the court has to correct such fault *ex officio* and notify the suit to the accurate respondent.<sup>31</sup> In other words, the Turkish legal system starts from the idea that behind all public action remains the State. The Turkish Court of Cassation has extended this assumption to such State

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<sup>28</sup> *Gözübüyük* p 377: claims to be directed against the Rectorate of the University.

<sup>29</sup> *Günday* p 494.

<sup>30</sup> *Günday* p 498.

<sup>31</sup> *Gözübüyük* p 375.

entities which have been, in the process of privatization, incorporated as private companies.<sup>32</sup>

As this Turkish regulation has a procedural character, it will be difficult to apply it on arbitration proceedings which are not subject to Turkish procedural law. However, this is not the place to discuss whether this provision may open to arbitral tribunals the way to considerations as to if in similar cases, jurisdiction may be assumed even when the wrong administrative body of the State has been denominated as Respondent.

## **2. The Turkish State as Respondent in Practice**

Following the reforms in the near past, Turkey has been involved in numerous arbitration cases dealing mostly with concession agreements and State-Investor relationships, especially in the areas of telecommunications, energy and construction. It must be stated that there is no significant behaviour in the negative which would disqualify Turkish authorities as Respondents not willing to comply with final awards rendered in international arbitration. As a rule of thumb, objections brought by Turkish authorities against requests for arbitration are not different from those which we observe in private-to-private cases. The most common objection is that of jurisdiction which we are used to see in numerous arbitration cases.

The Turkish State is represented either by law firms with more or less experience in international arbitration, or by public attorneys at law. Public attorneys at law are employed by the Turkish State and called “hazine avukatları” – „treasury attorneys“. They belong to the staff of civil servants, which has primarily implications on the costs. As to the quality of this kind of party representatives, we have met surprising examples of good and effective work. On the other hand, one will often find names of Turkish law firms with international reputation as well as less known law firms of smaller size. However, there seems to be some reluctance against appointing Swiss or other non-Turkish law firms, probably for costs reasons. However, it may be less surprising that both kinds of party representatives often show professional behaviour which seems to be heavily shaped by methods and manners which reflect the professional experience before Turkish courts. Thus, one may observe Turkish representatives reserving true or virtual sub-

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<sup>32</sup> 9<sup>th</sup> Chamber, Civil Law Division, 17 January 1995, E. 1994/16140, K. 1995/67.

stantial or procedural rights, making objections against procedural orders, commenting such orders to uncommon extent and so forth. However, this is nothing to be discussed in detail, because it is quite natural to see lawyers trying to make less mistakes as possible on a field where there is still some lack of experience. And an arbitrator should restrain himself or herself from qualifying the representatives' behaviour as "boring".

Really boring, however, is the fact that Turkish State party representatives from time to time are not able to urge their client to stick to the regulations of the ICC Rules of Arbitration as to the advance payments on the costs. The idea behind this is the legal situation in Turkey where the full charge of making advance payments is borne by the Claimant. However, this situation is different from that of a private-to-private case, where the Claimant may nourish some doubts about the willingness as well as about the capability of the Respondent to pay the expenses at the end of the day. Nonetheless, if Claimant itself has difficulties to make payments on fees and expenses, this practice of certain Turkish authorities is in effect creating some uncertainty and might even lead to what the ICC Rules should prevent: limitation of access to law and justice.

## **V. After the Award**

### **1. Notification**

In practice, notification is submitted through a courier to the address of the State authority which was shown as a party in the proceedings. This is not a notification through the national enforcement authorities which, under international public law, may claim to have exclusive power to give effect so such notification as a kind of sovereign act. However, with signature under the arbitration clause, the State waives its right to rely on this power and to some extent on its sovereignty. Turkish authorities therefore are used to raise no objection against this kind of notification.

### **2. Payment**

In recent practice, no case is known where the Turkish State, after the coming in force of an award, did not make the payment as set out in the award. In a recent case the author of this contribution was mandated by a German company to enforce an award against the Ministry of Public Works. In the first oral hearing before the Turkish court the Ministry presented a receipt which gave evidence that payment had been made before the

filing of the case. It turned out that the bookkeeping department of the company had not given notice to the legal department of the same company as to the payment having been made on the first demand. In other words, the Ministry had actually paid within two weeks time after the first request and there was no need to initiate any enforcement procedure.

In another case in the practice of the author chairing an arbitral tribunal, the representatives of the Claimant who had been awarded an important amount of money, had suffered difficulties to get payment from the Turkish State. The reasons seem to have been neither of a legal nor of a technical, but of an emotional nature. The Claimant had been involved in some tricky operations of the majority shareholder a couple of years ago where the State had suffered some loss of reputation and money. In this case, however, the Claimant recovered payment with the help of a British court which seized important assets of the Turkish State in England, not covered by state immunity principles.

### **3. Enforcement**

#### **a) Exequatur or Recognition**

If the State doesn't pay, there is a necessity for some remedy to enforce the award. Neither national nor international arbitral awards are directly enforceable in Turkey. An arbitration award needs to be "declared as enforceable" from a Turkish court of first instance. To be declared as enforceable, the award must have become *res judicata* under the law to which the parties have subjected it or the law of the country where the award was made. In the arbitration agreement the parties may specify the court to which application for enforcement must be made. If they have not done so, the court of competent jurisdiction will be the court at the place of residence in Turkey of the party against which the award is rendered or, failing this, the court at the place where the property upon which the award is to be enforced is located.

Enforcement is subject to exequatur proceedings which are regulated in Article 44 of the International Private Law and Civil Procedure Act. This provision refers to Articles 38 (a), 39, 40 and 41 of the same law, relating to the enforcement of foreign judgements, which are also applicable to foreign arbitral awards. According to these provisions, the court may accept or reject the application, fully or in part. If accepted, the award is enforced as

a Turkish arbitral award. If an appeal is lodged against the court's decision, enforcement will be suspended. Enforcement may be refused on grounds similar to those listed in the New York Convention.

Exequatur has to be distinguished from recognition. The latter means that a court decision or award constitutes only compelling evidence for a legal fact or situation, whereas exequatur means title for enforcement against the Respondent. Under Turkish law, only exequatur proceedings are to be applied on awards.

### **b) Recourse to the Administrative Courts**

Litigation on contractual disputes is deemed to be a specific type of the "suit of full dispute". The reason for this is the mere fact that the annulment of the administrative act underlying a contract between State and a private person would not lead to the result desired. However, one must be aware that a claim filed against a State authority is precluded by the award itself to the extent where the principle of *res iudicata* is to be observed.

Such a claim may only be directed against an administrative act which consists in refusing to make the payment on the award. The only reason for blaming the State authority before an administrative court is that of "faute du service" – misbehavior of civil servants in duty who are in breach of the arbitration agreement when refusing to obey the orders made in the award.

There are some doubts if the discussion on the nature of the arbitration agreement is really relevant in this context. In the doctrine there are mainly two positions. One position focuses on the arbitration agreement as a contract under private law about a procedural relationship.<sup>33</sup> Another position relies on the procedural character of the arbitration clause. In any event, an arbitration clause, under the Turkish legal conditions of our times, is not an administrative contract.

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<sup>33</sup> See e.g. *Habscheid*, Walter, Die Rechtsnatur des Schiedsvertrags und ihre Auswirkungen (The nature of the arbitration agreement and their effects), KTS 1995, p 36; *Kalpsüz*, Turgut, İnşaat Sözleşmelerinde Tahkimin Genel Esasları (The General Principles of Arbitration in the Field of Construction Contracts), in: İnşaat sözleşmeleri, Yönetici, İşletmeci, Mühendis ve Hukukçular İçin Ortak Seminer (Seminar on Construction Contracts for Managers, Business Economists, Engineers and Lawyers), Ankara 1996, p 361.

This being said, the question if a claim to the administrative courts can be filed depends on this qualification. If we recall the introductory note right at the beginning of this contribution, we must state that when a State authority concludes an agreement with a private company, such contract has to be qualified as subject to private law. However, the decision of the administration to do so, might rely on a power given by public law and therefore may be qualified as an administrative act. This, again, depends on a further question which has to be answered in a way that should be familiar to a German scholar. If the aim of the administration is to act in a subordination relationship, executing sovereign rights, there will be no doubt that such act and accordingly the agreement is a purely administrative one (1). But if the aim is an economic one, where the State puts itself in the position of a private actor on the stage of commerce, there is no discussion about a contract being qualified as subject under private law in the face of general principles<sup>34</sup> (2). The Turkish system where concession agreements are, despite of their having a public character, subject to private law by the will of the legislator, creates a third category which, however, may also be considered belonging to category (2).

In the first case, jurisdiction of administrative courts may be given. In the second case, one might take the position that the State may not be sued in the administrative courts. The alternative would be the suit filed to a commercial court.

These considerations, however, do not resolve the problem of how to handle misbehaviour which consists of refusing payment on a binding award. The resolution will be obtained by twofold considerations under private law as well as under public law.

When the State subjects itself under international arbitration, it chooses a model for alternative dispute resolution. There is no question that in so far it subjects itself, under the condition of the conclusion of a private law agreement, to another kind of settlement of disputes. However, this must not lead to the result that the State escapes from compelling obligations under public law. In any case, the State remains bound to its own constitution as far as main principles are concerned that altogether construe the Principle of the Rule of Law. One of these principles is laid down in Article 138 para. 4 of the Turkish Constitution which states:

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<sup>34</sup> Court of Jurisdictional Disputes, 21 June 1999, E. 1999/8, K. 1999/17, RG No, 23823, 21 September 1999.

“Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.”

It must be admitted that an arbitral tribunal is not a court. But on the other hand Article 125 para. 1 of the Constitution treats international arbitration as an exception to the principle that justice is rendered by courts. In view of further provisions which protect the individual against arbitrariness (Article 10: equal treatment, no discrimination) and guarantee the access to justice (Article 36), the State remains charged with the duty to grant justice and stick to judicial decisions. This comprises also decisions of arbitral tribunals. The only objection which the State as a party to arbitration may raise are those of failing compliance with public order principles and other principles which would allow any other party to defend itself against the enforcement of an award. The State who is, without regard to the private or administrative character of the individual act, bound to its constitution, would act in breach of its constitution if it did not execute an arbitral award. This constitutes the argument according to which the refusal of the execution of an award beyond the procedures provided for the contestation of an award – i.e. annulment procedures such as given under the Swiss International Private Law Act or any other remedy at the place of arbitration – establishes a breach of Turkish public law and is therefore to be sued in the administrative courts for injury and damages (suit of full dispute).<sup>35</sup> This argument is backed or even constituted by the argument that an arbitral award, according to Turkish jurisprudence, has the character of a final court decision (“kesin hüküm”).<sup>36</sup> The enforcement will therefore be effected under Article 28 para. 2 of the Administrative Courts Procedure Act according to the “general principles”. In other words, the bailiff will show up at the place where the decision for execution of the award should be taken.<sup>37</sup> Indeed, the enforcement office has the power to take any measure, except garnishment of property (Article 82 para. 1 of the Enforcement and

<sup>35</sup> *Altay*, Evren, *İdari Yargı Kararlarının Uygulanmamasından Doğan Uyuşmazlıklar* (Disputes arising from Non-Compliance with Administrative Court Decisions), Ankara 2004, p 337. Slightly different: Council of State, 5<sup>th</sup> Chamber, 24 April 1996, E. 4152, K. 1717; 21 July 1997, E. 2686, K. 91.

<sup>36</sup> Plenary Assembly of the Court of Cassation, 23 October 1972, E. 2, K. 12, RG No. 14395 of 18 December 1972. *Kuru, Baki*, *Hukuk Muhakemeleri Usulü* (Civil Procedure) (six volumes), Istanbul 2001, p 6092; *Pekcanitez/Atalay/Özekes*, *Medeni Usul Hukuku/İcra ve İflâs Hukuku*, (Procedural Law, Enforcement of Debts and Bankruptcy Law), Ankara 2001, p 590.

<sup>37</sup> *Gözübüyük* p 336; *Altay* p 84.

Bankruptcy Act).<sup>38</sup> On the other hand, income of the State which has its source in private law agreements, such as house rents, may be garnished.<sup>39</sup>

Additionally, delay in the execution of an arbitral award causes the obligation to pay legal interests (Article 28 para. 6 of the Administrative Court Procedure Act).<sup>40</sup> As a result, the network of obligations of the administration under Turkish public law does not provide for any escape of the State who has to abide with its duties and obligations under the rule of law.

### c) Civil Servant's Liability for Non-Compliance with Awards

The question as to what effect the bailiff appears in the office of the administration can be answered in a very simple manner: if the civil servant to whom the bailiff addresses himself does not comply with the execution order, he has to be aware of painful consequences.

Actually, civil servants may not be sued personally in the administrative courts. Any claim must be directed against the administration<sup>41</sup>. According to Articles 12 and 13 of the Public Servants Act<sup>42</sup>, the liability of the State prevails the liability of the civil servant. This regulation is in conformity with Article 129 para. 4 of the Turkish Constitution which expressly states that

“Actions for damages arising from faults committed by public servants and other public employees in the exercise of their duties shall be brought against the administration only in accordance with the procedure and conditions prescribed by law, and subject to recourse to them.”

As a matter of fact, this provision does not expressly exclude the filing a claim directly against the civil servant. In this respect, Article 13 of the Public Servants Act goes further and precludes the suing of civil servants by referring to the administration as addressee of such claims. However, Art. 12 para. 2 of the Public Servants Act provides that where

<sup>38</sup> Properties of very few public authorities, such as the Social Security Agency, may be garnished: *Gözübüyük* p 465; *Altay*, p 85.

<sup>39</sup> *Kuru, Baki/ Arslan, Ramazan/ Yılmaz, Ejder: İcra ve İflas Hukuku, (Enforcement and Bankruptcy Law Course Book), Ankara 2002, p 290.*

<sup>40</sup> *Altay* p 83.

<sup>41</sup> *Gözübüyük* p 82.

<sup>42</sup> Law No. 657, RG No. 12056 of 23 July 1965, last amendment in 2001.

the administration suffers damages the administration may take recourse to the civil servant. This sanction seems to work in the Turkish practice.

## **VI. Conclusions**

- Turkey has accepted international arbitration. The recognition and execution of international or foreign awards have been given a legal foundation by the International Private Law and Civil Procedure Act of 1982 and the ratification of the New York Convention in 1991. Since 1988 Turkey is a member of ICSID.
- In 1999 and the following years, Turkey amended its Constitution and legislation. Concession contracts were subject to private law, international arbitration clauses became quite common in Turkish State-Investor relationships.
- The execution of foreign awards under either the International Private Law and Civil Procedure Act or the New York Convention – Turkish courts are used to base their decisions on both of them<sup>43</sup> – do not cause severe problems.
- The Turkish authorities are used to make payments on final awards.

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<sup>43</sup> Court of Cassation, 15th Chamber, Civil Law Division, 22 February 2001, E. 2001/654, K. 2001/1010.