

## VIENNA: The Austrian-Turkish relationship

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A conference organised by the Austrian Arbitration Association on 2 December considered the increased economic activity between Austria and Turkey and the rise in business disputes this has yielded. **Jarred Pinkston**, of Dorda Brugger Jordis in Vienna, reports.

The economic relationship between Turkey and Austria is much stronger and deeper than one would initially imagine. **Alexander Petsche**, of Baker & McKenzie in Vienna, said that in 2011 Austria saw its trade with Turkey increase by an unprecedented 40 per cent. Austria had exports of approximately €1 billion to Turkey and at the same time received imports from Turkey of approximately €900 million. Surprisingly, Austria was the biggest foreign direct investor in Turkey in volume in 2010. Petsche said there were many Austrian companies currently active in Turkey – for example Do & Co (a popular wine store and restaurant chain), which is dual-listed in Austria and Turkey.



Jarred Pinkston

Turkey's ambassador to Austria, **Ayse Sezgin**, said that the number of Austrian companies doing business in Turkey was around 550. Turkey's level of business has not just been rising in relation to Austria but across the board – it saw economic growth of 9 per cent in 2010 last year. As a result Turkey's credit rating has gone up three times since 2009. Turkey is taking affirmative steps to ensure that these positive developments continue, he said. One clear cause of the improving business climate has been Turkey's revisions of its laws in its desire to join the EU. One clear legal change of direct relevance to the conference is the overhaul of the Turkish Arbitration Act in 2001. Turkey has recognised that with continued economic growth comes the need for a reliable means of resolving cross-border disputes, said Sezgin. As such it is committed to making international arbitration a reliable means of resolving cross-border disputes.

**Fadlullah Cerrahoğlu** of Cerrahoğlu Law in Istanbul, a practitioner with more than 20 years' experience, gave an insight into the mindset of Turkish clients. Why do they turn to international arbitration? Simply because a foreign counterparty has insisted on international arbitration as the means of resolving future disputes, he concluded. Historically Turkish parties have not embraced international arbitration on their own initiative and have not always had a firm grasp of what it entails. For example, many Turkish parties did not fully comprehend that they were waiving their right to go to court and, instead of relying on recommended arbitration clauses, still attempted to draft

their own clauses from scratch, which invariably entails headaches that could have been avoided.

But Cerrahoğlu observed that with Turkey's continued economic growth and increased engagement with the wider world economy, Turkish parties have become more sophisticated with regard to the ins and outs of international arbitration; although cultural differences do remain.

In particular Turkish business relationships are more grounded in personal relationships than many other countries, he said. Turkish clients seeking legal counsel are looking for an "old friend" and often wish to share their life stories before proceeding to the business at hand. Cerrahoğlu has often observed the relationships between Turkish clients and foreign counsel deteriorate when foreign counsel ignore the importance of building and maintaining strong personal relationships.

He also observed that Turkish clients are often not satisfied with obtaining just one legal opinion and will secretly obtain a second, third and fourth opinion from other lawyers; if there are discrepancies, they will confront the first lawyer with the other opinions. This obviously creates problems for primary counsel and is far from efficient. Even more problematic is when a client believes they "know it all" and expect counsel to handle the arbitration exactly as the client would.

However, he noted that Turkish clients tend to defer to their counsel when selecting arbitrators. In addition, there are very few damages experts in Turkey and the few qualified ones are generally the big accounting firms, which often gives rise to conflict problems. As a result, Turkish parties often have to rely on damages experts from outside Turkey.

Another area of clear cultural difference is in the context of the arbitral hearing. Turkish clients can be "hot blooded", Cerrahoğlu suggested, and overanalyse the arbitrators' every behavioural tic. They tend to believe that, if they lose, it can only be because the arbitrators were in some way biased. But he said he had never had a client walk out of a hearing and not believe they were going to win.

Witnesses are another problem area, he noted. Turkey has no history of witness preparation and Turkish fact witnesses can find giving testimony uncomfortable. Witnesses often do not completely disclose all information to their own counsel and surprises can arise when they are subject to effective cross-examination – to the chagrin of their own counsel. In addition, it is not unusual for Turkish fact witnesses to be quite eager to offer legal conclusions when giving testimony.

**Bennar Balkaya**, of Balkaya & Balkaya Attorneys at Law in Istanbul, discussed the rules on various issues regarding costs. Under the Turkish Code of Civil Procedure the general practice is that unless the parties have agreed on an arbitrator fee structure (for example by agreeing on an administering arbitral institution), the parties and arbitrators shall "jointly" agree on a fee structure by considering the relevant circumstances. If no agreement is reached then the Turkish fee tariff, created by the Turkish ministry of justice, shall apply. Under the fee tariff, the arbitrators receive a percentage of the amount in dispute (the higher

the amount, the smaller the percentage).

Turkey has a separate and distinct international arbitration code that is similar to the domestic code with regard to arbitrators' fees. However, one clear difference is that under the domestic scheme both parties must share the cost of the advance payment and expenses, while under the international scheme the claimant must pay.

With regard to attorneys' fees, costs follow the event (ie, the loser pays). The arbitrators determine the attorneys' fees awarded by applying the Minimum Attorneys' Fee Tariff schedule. The fees are awarded to the attorney representing the prevailing party directly but this does not affect the payment of fees on the contractual level between the prevailing party and their attorney. This means that parties and attorneys' can agree on a higher level of compensation than that contained in the fee tariff and attorneys may effectively be paid twice.

Turkey, as a growing middle-income country at a geographical and cultural crossroads, has a unique history with arbitration under bilateral investment treaties. **Ziya Akinci**, a partner at Akinci Law Office in Istanbul and a member of the ICC court, explained how Turkey – a signatory to more than 80 BITs – has been the respondent in eight investor-state cases. At the same time, Turkish investors have filed eight arbitrations as claimants – against Kyrgyzstan, Azerbaijan, Kazakhstan, Georgia, Turkmenistan (twice), Pakistan and Jordan. This evenness between the investor and state sides reflects the nature of Turkey's economy, which draws in much direct foreign investment from more developed countries but at the same time invests a great deal in less developed countries. Of the eight claims in which Turkey has been respondent, five were related to the assets of the Uzan Group and were rejected. Of the remaining three, only PSEG v Turkey concluded with an ostensibly negative award for Turkey. That tribunal found that Turkey did not treat the investor fairly and equitably. However, upon a closer reading, this case reached a "good result for Turkey" because the investor's claims of expropriation and harm to a productive asset were denied and the investor only recovered compensation for its actual investment.