



GAR Live goes ahead amid protests in Istanbul

Douglas Thomson • Tuesday, 4 June 2013 (1 week ago)

The morning after Istanbul's lawyers showed support for civic protests by marching to Taksim Square, GAR Live Istanbul opened with a panel on Turkey's prospects for becoming an international arbitration seat. **Douglas Thomson** reports



Protesters in Istanbul's Taksim Square

The event is taking place at the Çırağan Palace hotel on the banks of the Bosphorus, only 3 kilometres from Taksim Square – the scene of four days of protests against Prime Minister Recep Tayyip Erdoğan. Delegates, speakers and GAR staff braved roadblocks and, in some cases, tear gas to make it to the conference venue.

The morning session, chaired by **Jean-Claude Najar** of **Artis Mallet-Prevost Colt & Mosle** in Paris and Istanbul, addressed the Turkish government's plan to open an arbitration centre in Istanbul, which is part of a wider proposal to transform the city into an international financial centre. A draft bill establishing the arbitration centre was submitted to the Turkish parliament in March and is still awaiting approval.

Fadlullah Cerrahoğlu, a Turkish practitioner and arbitrator at **Cerrahoğlu Law Firm** in Istanbul, discussed some of the bill's provisions. The centre is modelled on the German Institution of Arbitration and the **Czech Arbitration Court**.

Some have expressed concern that establishing the centre by statute rather than as a private initiative could make it harder to ensure its independence. **Cerrahoğlu** said there was no reason why the centre's impartiality should necessarily be undermined because of the statute.

However, he noted that the first version of the bill, which was prepared by a working group of practitioners, academics and business people in 2010, has undergone some revisions that could prove problematic. For example, the wording that the centre will have administrative and financial autonomy has been deleted from the draft bill. A more precise definition of the scope of arbitrable disputes has also been removed from the new version.

The legal personality of the centre as defined in the bill could also create "big problems", he noted. Turkey's law on associations allows authorities to seize

company records to protect public order and prevent crime. It remains unclear whether the centre would be immune from such actions.

Under the bill, the centre will have a general assembly of 23 members appointed by various authorities, including bar associations, the ministry of justice and various financial bodies. However, appointees will retain their existing positions, which could create conflict issues. Only five members of the assembly will be lawyers.

Eric Schwartz, a partner at King and Spalding in New York and Paris and a vice president and former secretary general of the ICC Court, also addressed Turkey's prospects as an arbitral seat. The country has a privileged geographical location, straddling Europe and the Middle East and providing a gateway to the Black Sea and former Soviet Union republics in Asia, he noted. In addition, it has a prosperous economy that has weathered the global financial crisis better than many of its European neighbours.

In addition, an Istanbul arbitration centre would not have much competition in the Middle East, with the exception of Dubai and Cairo. It stands to benefit from parties based in west Asia to seat their arbitrations away from the traditional European hubs.

Schwarz said a viable centre must have strong financial support for its "initial lean years" when cases will be few. Parties will not provide for arbitration at an institution if they have any doubts that it will still exist in a few years' time. The centre should also have a strong international showing on its board. He noted that the leaders of the LCIA, ICC, DIS and SIAC were all of a different nationality to their institution's home jurisdiction.

But Schwarz also advised "patience and perseverance", observing that it took 50 years for the caseload of the ICC International Court of Arbitration to multiply significantly. Even with a good arbitration law and institution in place, Schwarz said it will take longer before perceptions change and parties begin to provide for a Turkish seat in their arbitration agreements. He observed that even with a "significant increase" in Turkish parties using the ICC, Turkey was chosen as a seat for only two cases out of 900 that were administered in 2011.

Schwarz noted that, until recently, Turkey did not offer a hospitable environment for international commercial arbitration. In the 1980s, a number of judicial decisions had declared ICC arbitration contrary to public policy – following arguments by Syrian jurist **Antoine Kassis** that the ICC Court's policy of scrutinising awards in draft constituted interference with arbitrators' deliberations. It took "a lot of proselytising" with the judiciary to change those attitudes, he added.

Even now, there remain concerns about the reliability of the judiciary's attitude to arbitration as well as "peculiarities" in its 2001 International Arbitration Act. For example, the act imposes an extendable one-year time limit for resolving disputes. Turkish law also prohibits arbitrators from fixing their own fees outside of agreement between the parties, instead fixing a tariff, creating problems for ad hoc arbitrations under UNCITRAL rules.

Another panellist, **Ercüment Erdem** of Erdem and Erdem in Istanbul, explored some controversial decisions on enforcement of awards by Turkish courts, including a

2006 ruling that an arbitration agreement could not be amended by changes to a contract's terms of reference. Erdem said this ruling "does not reflect reality" and has been much criticised. Nevertheless, he maintains that the court does have a generally arbitration-friendly approach.

Veijo Heiskanen, a partner at Lalive in Geneva, reflected on the kind of disputes likely to emerge from Turkey in the future as its economy continues to thrive – including alternative energy, automotive, tourism and construction. He noted that Turkish companies hold the highest number of construction contracts in the world after China; and that sector accounts for 30 per cent of the country's GDP.

Heiskanen said that, while foreign investments and disputes are likely to increase, he believes a larger number of disputes will emanate from transactions involving Turkish companies engaged in business outside Turkey. Heiskanen observed that Turkish investment overseas is well protected, as the country has signed bilateral investment treaties with 80 countries in the developed and developing world – putting it in the top 10 countries in terms of number of BITs. Unlike the EU, Heiskanen said, the country has shown no intention of reducing the level of protection offered under treaties: "This is one area in which Turkey would be well advised not to take its cue from the European Union."

The Arab Spring has also increased Turkey's importance and influence as a model of democracy in the region, he suggested. Once the dust settles, he says, there will be some interesting prospects for investors in the region and Turkish companies are likely to jump in earlier than any others.

Panel chair **Jean-Claude Najjar**, who grew up in Istanbul, spoke about its transformation from a "sleepy town" of 2 million people in the 1960s, when it was a film location for the James Bond film *From Russia with Love*. Also used as a setting for the most recent Bond film, *Skyfall*, it now has a population of 20 million. Najjar quoted poet Tevfik Fikret's line that Istanbul is "a young virgin who has survived a thousand husbands." The current upheaval will not diminish the city's greatness, he said.

Istanbul and several other cities in Turkey have witnessed dramatic scenes in the past few days. The protests began with a small-scale demonstration against the redevelopment of Gezi Park in Taksim Square but escalated after police used tear gas and water cannons to disperse the protesters, a move widely criticised as heavy-handed. Many more have taken to the streets to protest over concerns that the Erdoğan government is becoming increasingly authoritarian. The protests have seen two fatalities, 1,700 arrests and a 10 per cent drop in the Istanbul stock exchange.

Although Erdoğan has labelled the protesters extremists, many news reports have emphasised their urban middle class component. Younger delegates at the GAR Live event said they had joined other members of the Istanbul bar association last night in a march to Taksim Square. GAR understands that the Istanbul office of at least one major international law firm saw most of its associates attend the protests today.

GAR Live Istanbul was sponsored by Curtis Mallet-Prevost Colt & Mosle and Cosar Avukatlik Burosu. GAR will report further on the event in the coming days. More GAR Live events are planned this year for New York, Hong Kong, Paris and Sydney.

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