



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Turkey: International Arbitration (4th edition)

This country-specific Q&A provides an overview of the legal framework and key issues surrounding international arbitration law in Turkey.

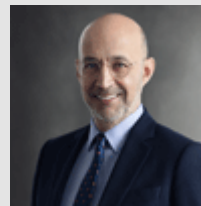
This Q&A is part of the global guide to International Arbitration.

For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/international-arbitration-4th-edition/>

Paksoy

Country Author: Paksoy

The Legal 500



Mr Serdar Paksoy, Founding and Senior Partner

spaksoy@paksoy.av.tr

The Legal 500



Ms Simel Sarıalioğlu, Counsel

ssarialioglu@paksoy.av.tr




Mr Dođuhan Uygun, Senior Associate

iduygun@paksoy.av.tr

1. **What legislation applies to arbitration in your country? Are there any mandatory laws?**

There are two pieces of main legislation which apply to arbitration in Turkey: The International Arbitration Law No. 4686 (the “IAL”) for the arbitrations that includes foreign element and the Code of Civil Procedure No. 6100 (the “CCP”) for the domestic



arbitral proceedings.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Turkey is a signatory to the New York Convention since 1991. Reciprocity and commercial nature of the dispute are two reservations Turkey has with regard to the Convention.

3. What other arbitration-related treaties and conventions is your country a party to?

The ICSID Convention and the European Convention on International Commercial Arbitration are two others. To date Turkey has signed 99 bilateral investment treaties and 76 of them are still in force.

Furthermore, Turkey is a party to the European Convention on International Commercial Arbitration dated 1961.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

The IAL is based on the UNCITRAL Model Law. There are no significant differences between the two.

5. **Are there any impending plans to reform the arbitration laws in your country?**

No such plans currently exist.

6. **What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?**

The Istanbul Arbitration Centre, or ISTAC as it is known shortly, and the Istanbul Chamber of Commerce Arbitration Center, or ITOTAM, are two main internationally known arbitral institutions in Turkey. ISTAC is a new institution established in 2015. Its rules are in line with rules of international arbitration institutions. ITOTAM Arbitration Rules have also been modelled after international rules as recently amended in December 2017. Other than these two institutions, TOBB, the Union of Chambers and Commodity Exchanges, has an arbitral institution mostly used by businesses in cities other than Istanbul.

7. **What are the validity requirements for an arbitration agreement under the laws of your country?**

An arbitration agreement has to be in writing to be valid and enforceable. An agreement to arbitrate can either be in a separate contract or be embedded in a clause in a commercial contract between the parties.

8. **Are arbitration clauses considered separable from the main contract?**

Yes. The concept of severability is addressed under Article 4 of the IAL which provides that the arbitration agreement not to be contested on the basis that the arbitration

agreement concerns a dispute which had not yet arisen or the main contract is not valid.

9. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

Multi-party and/or multi-contract arbitrations are common between domestic and foreign parties. There is nothing particular to note.

10. In what instances can third parties or non-signatories be bound by an arbitration agreement?

In principle, a third party cannot be bound by an arbitration agreement without its consent. There is also no regulation or case law available under Turkish law regarding the extension of an arbitration agreement to non-signatory third parties. In this respect, third parties can only be bound by the arbitration agreement under specific circumstances such as legal succession by inheritance or assignment.

On the other hand, the Court of Appeal has differing approaches to the issue depending on the nature of the underlying dispute and contractual relationship. According to the Court of Appeal's previous decisions, while non-signatories can be bound by an award in the instances of succession, acquisition of property, assignment of claims, transfer of negotiable instruments, transfer of bills of lading, and succession of insurer; the extension to non-signatories is refused in the instances of representation and full third-party beneficiary contracts.

11. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

The parties are free to decide on the law applicable to the substance. If the parties do

not designate any applicable law to the substance, the arbitral tribunal applies the laws of the State, which has the closest connection with the dispute.

12. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Under Turkish law, parties can freely agree to arbitrate any dispute as long as the subject matter of the dispute are at parties' free disposal. It is explicitly stipulated that the disputes related to real rights concerning immovables and to disputes that are not within the parties' disposal are non-arbitrable.

13. In your country, are there any restrictions in the appointment of arbitrators?

According to the CCP, if the parties agree on a panel of arbitrators, at least one of the members of the tribunal should be a law graduate with a minimum of 5-year experience in his field. There is no such restriction for arbitrations governed by the IAL. Judges and public prosecutors are not allowed to sit as arbitrator.

14. Are there any default requirements as to the selection of a tribunal?

Party autonomy is applicable for the designation of the tribunal, so unless the parties designate the number of arbitrators, the arbitral tribunal will compose of three arbitrators. If a sole arbitrator is to be chosen and the parties cannot reach consensus on the appointment, the court will choose the arbitrator upon the request by one of the parties. In case of a panel of three arbitrators each party nominates one arbitrator and the two party nominated arbitrators choose the presiding arbitrator.

If one of the parties fails to choose an arbitrator or the parties are unable to reach an

agreement for appointment of the tribunal in line with their arbitration agreement, upon application of one of the parties, the appointment of the arbitral tribunal shall be made by the Court of First Instance.

15. **Can the local courts intervene in the selection of arbitrators? If so, how?**

The courts can appoint arbitrator(s) if one of the parties fails to do so or the two party-appointed arbitrators cannot agree on the president.

16. **Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?**

The appointment of an arbitrator can be challenged if (i) the arbitrator does not meet the qualifications determined by the parties, (ii) there is a ground for refusal as designated under the arbitration procedure agreed by the parties, and (iii) the circumstances rightfully cast doubt on the impartiality of the arbitrator. The challenge request should be made to arbitral tribunal (and the counter party should be informed as well) within 30 days from the day the challenging party finds out about the circumstance which gave rise to challenge. If the tribunal rejects the challenge request, the challenging party may apply to the court of first instance.

17. **What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?**

If an arbitrator's mandate ends prematurely for whatever reason, a substitute arbitrator is selected by the procedure which were applicable to the appointment of its predecessor. Also the term of the arbitration does not freeze during the replacement of an arbitrator.

18. **Are arbitrators immune from liability?**

Yes, arbitrators are immune from liability. However, if a designated arbitrator fails to perform his duties without any just reason, s/he should compensate the loss of the parties for such failure.

19. **Is the principle of competence-competence recognised in your country?**

The principle of competence-competence is recognised in legislation and case law as well.

20. **What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?**

Courts are receptive to objections raised to challenge their competence if there is a valid arbitration agreement or clause between the parties.

21. **How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?**

Arbitral proceedings commence on the date on which a request for the appointment of arbitrators or a notification of selection of an arbitrator is made, unless otherwise agreed by the parties.

There are no limitation periods or time bars for commencing arbitration, but of course parties' claims may be barred by substantive laws which govern the statute of limitations related for certain claims.

It should be noted that, if a party is obtained a preliminary injunction/attachment prior to the arbitration, the arbitration proceeding should be commenced within two weeks from the issuance of the injunction if the arbitration is subject to the CCP and within 30 days if the arbitration is subject to IAL.

22. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

Pursuant to the Turkish International Private Law No. 5718 (the "TPIL"), a state or a state entity cannot benefit from sovereign immunity in legal disputes arising out of private law relations between states and private legal persons. Accordingly, if a state agrees to arbitration, it is considered as a waiver of any objection based on the state immunity and the relevant state may not invoke its sovereign immunity to challenge the jurisdiction of the arbitral tribunal.

23. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

If a respondent fails to participate the arbitration, the arbitral tribunal shall continue the proceedings and the respondent shall not be deemed to accept of the claimant's allegations. In addition to this, parties' non-participation at hearings or evidence production phase without showing any just reason, would not prevent the tribunal proceed on the arbitral process and render the award according to the already existing evidence. Local courts cannot compel parties to arbitration.

24. **Can local courts order third parties to participate in arbitration proceedings in your country?**

As stated above, local courts cannot compel third parties to participate in arbitration proceedings under Turkish law.

25. **What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?**

Preliminary injunction and attachment can be sought from the local courts prior constitution of the tribunal or during the arbitral proceeding.

26. **Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?**

In line with parties' freedom to determine rules and/or laws governing arbitration procedure, parties are able to tailor evidence production and submission stages by determining the procedure and timeline for submitting and gathering evidence. Parties may further execute an evidence agreement to determine which particular evidence shall be submitted for evidencing the particular facts. The arbitral tribunal may seek assistance from local courts in gathering evidence where it is necessary, e.g. to obtain information from local authorities, etc.

Arbitrators are empowered to appoint experts witnesses if they deem necessary. The tribunal can also decide to conduct on site examination.

Local courts cannot compel witnesses to appear before the arbitral tribunal.

27. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

In terms of counsels, they have to conduct their duties with care, accuracy and integrity. Counsels are bound to comply with the provisions of the provisions of the Attorneyship Law and professional rules provided by the Union of Bar Associations of Turkey. Some of these professional rules include avoiding to represent parties with conflicting interests, protecting the client's right diligently, being in arm's length when communicating to potential and/or acting witnesses, being discreet about the information that has been entrusted to them and/or obtained while performing their duties.

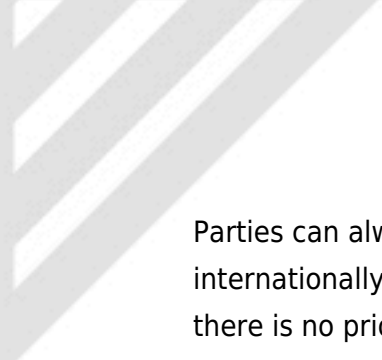
There is no set of rules or law indicating professional standards for arbitrators save for rules on the impartiality and independence of arbitrators. Accordingly, arbitrators are obliged to disclose any circumstances and or issues, which may impair their impartiality and independence.

28. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

There are no rules with respect to the confidentiality of arbitration proceedings. The parties who wish to choose Turkey as the seat of arbitration are advised to sign a confidentiality agreement or add a clause to that effect in their agreements.

29. How are the costs of arbitration proceedings estimated and allocated?

Unless otherwise decided by the parties, the costs of proceedings shall be borne by the losing party. In the event that parties relief sought are partially accepted the tribunal shall distribute the costs in proportionate with the rate of success of each party.



Parties can always freely determine the fees to be paid to the arbitrators or refer to internationally accepted rules or institutional arbitration rules for such determination. If there is no prior agreement, the fees are determined based on the yearly published fee tariff issued by the Ministry of Justice.

30. **Can pre- and post-award interest be included on the principal claim and costs incurred?**

The arbitral tribunal may include interest onto the principal claim and costs incurred upon request of the parties and of course if and to the extent that the respective substantive law provides for entitlement for interests.

31. **What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?**

The New York Convention and the TPIL regulate the legal requirements for recognition and enforcement of an award. The applicant party must submit an original or certified copy of both the arbitration agreement and the finalized award together with their Turkish translations certified by an official or sworn translator or by a diplomatic or consular agent.

According to the IAL, an award must contain legal grounds and reasoning upon which the tribunal built the final decision. In respect of enforcement of foreign arbitral awards, there is no such express rule under the TPIL and there is no case law within this scope. However, in recent years, the General Assembly of the Court of Appeal on the Unification of Judgments decided that a German court decision, which did not contain a reasoning, could be enforced in Turkey. Thus, it is debatable in the market that such precedent can also be applicable for enforcement of foreign arbitral awards by analogy.

32. **What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?**

Recognition and enforcement procedures are subject to three-instance court proceedings as (i) the court of first instance, (ii) Regional Appellate Court (and (iii) the Court of Appeal. Based on our experience, depending on the workload of the relevant court enforcement cases before the court of first instance may last between 8 to 18 months. After this first stage, the enforcement decision is subject to two tiered appeal examination firstly before Regional Appellate Court and then before the Court of Appeal as the second and last level. Each appeal level approximately lasts 6 to 12 months.

Ex parte proceedings are not allowed.

33. **Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?**

Domestic awards are only subject to the set aside proceeding. Thus, there is no enforcement stage for domestic awards under Turkish law, including the awards that concerning foreign parties or element but rendered in Turkey.

34. **Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts?**

With the exception of limited instances such as punitive damages, anti-suit or anti-arbitration injunctions, which are not allowed under Turkish Law, there are no limits imposed on the available remedies.

35. **Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?**

There is no appeal procedure for foreign or domestic arbitral awards, the only recourse after having an arbitral award is to commence a setting-aside proceeding. The grounds and procedure for setting aside proceedings are stated under the relevant sections outlined in the IAL and the CCP.

36. **Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?**

Under Turkish law, parties may not waive any rights of challenge to an award due to the general principle which prohibits waiver of a right that has not been or matured yet.

Article 15 of the IAL regulates that the parties may, in part or in full, renounce their right to initiate an action for setting aside the award provided that the parties are domiciled abroad.

37. **To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?**

Please see above answer to question 22.

38. **In what instances can third parties or non-signatories be bound**

by an award? To what extent might a third party challenge the recognition of an award?

There is no regulation or case law available under Turkish law regarding the extension of an arbitration award to non-signatory third parties. In principle, a valid and enforceable arbitration award can only bind the parties to the arbitration. Non-signatory third parties might only be bound by an arbitration award in case of a legal succession by inheritance or assignment, yet even in such instances, enforceability of an award against third parties is debated amongst the scholars.

39. Have courts in your jurisdiction considered third party funding in connection with arbitration proceedings recently?

Turkish law does not provide any specific regulations regarding third party funding. Hence, third-party funding is neither prohibited nor regulated under Turkish law, and it has been gaining more interest over the past few years. There are no publicly available court decisions pertaining to third party funding.

40. Is emergency arbitrator relief available in your country? Is this frequently used?

Neither IAL nor CCP has specific provisions regarding the use of emergency arbitrators. There is no publicly available data with respect to the number of requests handled by emergency arbitrators where allowed by institutional rules.

41. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

There is no regulation as to expedited arbitration proceedings under IAL or CCP.

Both ISTAC and ITOTAM allow expedited proceedings; the threshold is claims below TRY 300,000 (approx. EUR 48,000) for ISTAC and claims below TRY 200,000 (approx. EUR 32,000) for ITOTAM. There is no publicly available data on the use of expedited rules.

42. **Have measures been taken by arbitral institutions in your country to promote transparency in arbitration?**

No.

43. **Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?**

The importance of diversity in the selection of arbitrators has long been a topic of discussion in major arbitration events in Turkey, yet there is no formal manifestation to this end. On a closer look to the approach of the institutions leading by example, co-president of ICC Turkey Arbitration Commission, the first ever secretary-general of ISTAC and the current secretary-general of ITOTAM are all female.

44. **Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?**

We are not aware of any publicly available decision dealing with the matter. However, in a recent decision by the Regional Appellate Court in relation to recognition and enforcement claim of an ICC Award with a foreign element, the court stated that an annulment claim and ensuing enforcement request for the same arbitral award may proceed in parallel while the annulment claim is pending. The Court further stated that it is at the discretion of the enforcement court to decide whether to reject enforcement of the award in the face of pending annulment claim against it. Although this particular issue was not raised in the dispute at hand, but mentioned as an example, such a

liberal approach by the Court is encouraging.

45. Is corruption an issue that is regularly raised in your jurisdiction? What standard do local courts apply for proving of corruption?

From a criminal law perspective, corruption includes crimes of embezzlement, extortion, influence peddling, bribery etc. Although not falling under a definition of a crime, certain actions may constitute corruption, as they may be against ethical principles.

Based on the above, we have not come across any decision touching upon the corruption issues in an arbitration, when we browse through publicly available decisions of the Court of Appeal.

46. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

No.

47. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending



decisions?

No.