

# ARBITRATION IN TURKEY

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# 1. Historical background and legislative framework

## 1.1 Introduction

1.1.1 The main piece of legislation governing international arbitration in Turkey is the International Arbitration Law No 4686 (**Turkish Arbitration Law**). The Turkish Arbitration Law entered into force in 2001 and was modeled on the Model Law (1985)<sup>1</sup> and the international arbitration section of the Swiss Federal Private International Law of 1987. The Turkish Arbitration Law governs arbitrations that are seated in Turkey and involve a foreign element. Even if the seat of arbitration is not Turkey, the parties can contractually subject the arbitration to the Turkish Arbitration Law, provided the dispute has a foreign element.<sup>2</sup>

## 1.2 Domestic arbitration

1.2.1 The Turkish Code of Civil Procedural Law No 6100 (**CPL No 6100**) which came into effect on 1 October 2011, deals with domestic arbitrations between local parties where no foreign elements are involved. The arbitration section of CPL No 6100 resolved long-standing conflicts between the Turkish Arbitration Law and the arbitration section of the now-defunct Civil Procedure Law of 1927. CPL No 6100 aligned itself with both the Turkish Arbitration Law and the Model Law (1985).<sup>3</sup> The arbitration section regulates domestic arbitral proceedings and the enforcement of domestic awards with a view to encouraging domestic arbitration in Turkey.

## 1.3 Foreign arbitration

1.3.1 In addition to the foregoing legislation, the recognition and enforcement of foreign awards is regulated separately under the Law on International Private Law and Procedure (**Law No 5718**). Law No 5718 entered into force in 2007 and replaced the International Private Law and Procedure No 2675 which had been in force since 1982.

1.3.2 The main difficulty associated with arbitration in Turkey is that international and domestic arbitration and the enforcement of awards are all addressed under separate conflicting legal frameworks. This problem has recently been addressed by the legislature through the drafting of domestic arbitral procedures and enforcement mechanisms which are compatible with the provisions of the Turkish Arbitration Law and Law No 5718.

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<sup>1</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>2</sup> See section 2.1 below.

<sup>3</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

## 2. Scope of application and general provisions of the Turkish Arbitration Law

### 2.1 Subject matter

2.1.1 The Turkish Arbitration Law is applicable to disputes that have a foreign element where the seat of arbitration is in Turkey or where the parties mutually agree or the arbitrators decide to apply Turkish Arbitration Law. The following circumstances will constitute a foreign element under the Turkish Arbitration Law:

- if the usual residence, domicile or place of business of any party to the arbitration agreement is located outside Turkey;
- if the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country other than the seat of the arbitration designated in the arbitration agreement or determined on the basis of this agreement;
- if the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country other than the place where the majority of the obligations under the main agreement will be performed or the place where the subject of the dispute is primarily related to;
- if at least one of the shareholders of a company that is a party to the main agreement containing the arbitration clause has injected foreign capital into the company under applicable foreign investment legislation or when a loan or a guarantee agreement is executed in order to bring foreign investment to Turkey for performance of the relevant agreement; and
- the main agreement or legal relationship constituting the basis of the arbitration agreement permits the flow of capital or goods from one country to another.<sup>4</sup>

### 2.2 Structure of the law

2.2.1 The Turkish Arbitration Law consists of seven chapters:

- Chapter I: general provisions;
- Chapter II: the arbitration agreement;
- Chapter III: the establishment, liability, challenge and authorities of arbitral tribunals;
- Chapter IV: the arbitral proceedings;
- Chapter V: legal remedies against awards;
- Chapter VI: arbitration costs; and
- Chapter VII: final provisions.

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<sup>4</sup> Turkish Arbitration Law, art 2.

## 2.3 General principles

2.3.1 The Turkish Arbitration Law is based on the Model Law (1985).<sup>5</sup> Consequently, the general principles enshrined in the Model Law (1985)<sup>6</sup> constitute the general principles of arbitration in Turkey under the Turkish Arbitration Law.

### *Equality of parties*

2.3.2 Parties have equal rights and competence in arbitral proceedings and both parties must be given the opportunity to submit their claims and defences in full.<sup>7</sup> An award may be set aside if the arbitrator or the arbitral tribunal does not respect this principle.<sup>8</sup>

### *Party autonomy*

2.3.3 Turkish law encourages the autonomy of the parties. In the spirit of this principle, many of the provisions of the Turkish Arbitration Law are caveated by the sentence “unless otherwise agreed between the parties”.<sup>9</sup>

### *Non-intervention by courts*

2.3.4 Courts may only intervene in the arbitral proceedings if they are entitled to do so in accordance with the Turkish Arbitration Law which limits the intervention of the courts in arbitral proceedings to specific circumstances.<sup>10</sup>

### *Impartiality and independence of the arbitrators*

2.3.5 The parties, or in circumstances where the parties fail to agree on arbitrators, a court, must pay due regard to the need to appoint independent and impartial arbitrators. Justifiable doubts on the impartiality or independence of an arbitrator may constitute legal grounds for challenging his/her appointment.<sup>11</sup>

## 3. The arbitration agreement

### 3.1 Definitions

3.1.1 The Turkish Arbitration Law defines the arbitration agreement as an agreement executed by the parties to settle all or any, present or future disputes arising

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<sup>5</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>6</sup> *Ibid.*

<sup>7</sup> Turkish Arbitration Law, art 8.

<sup>8</sup> *Ibid.* See also section 9 below.

<sup>9</sup> See, e.g. Turkish Arbitration Law, art 6, 7, 10, 12, 14 and 16.

<sup>10</sup> Turkish Arbitration Law, art 3. See sections 8 and 9 below.

<sup>11</sup> Turkish Arbitration Law, art 7.

between them out of an existing legal relationship through arbitration, regardless of whether such disputes arise from an agreement.<sup>12</sup> The arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.<sup>13</sup> If the main agreement makes reference to a different document that includes an arbitration agreement, such reference will be acknowledged as a valid arbitration agreement by incorporation.<sup>14</sup>

### **3.2 Formal requirements**

3.2.1 The arbitration agreement must be made in writing<sup>15</sup> and must either be signed by the parties or included in an exchange of letters, telegrams or any other means of telecommunication that provides a record of the agreement. Alternatively, this requirement is also satisfied when a party refers to an arbitration agreement in court (i.e. challenges the court's jurisdiction due to an arbitration agreement) and the respondent does not object.

### **3.3 Special tests and requirements of the jurisdiction**

3.3.1 The Turkish Arbitration Law is not applicable to disputes regarding ownership or property rights over real property located in Turkey or to disputes that are not subject to discretionary settlement between the parties such as disputes arising from family or competition law.<sup>16</sup>

### **3.4 Separability**

3.4.1 Under Turkish Arbitration Law the arbitration clause will be effective even if it is alleged that the main agreement is null and void or that the arbitration agreement relates to a dispute that has not arisen yet.<sup>17</sup>

### **3.5 Legal consequences of a binding arbitration agreement**

3.5.1 Upon commencement of proceedings before a court a respondent is entitled to raise an objection that the dispute is to be resolved by arbitration.<sup>18</sup> Settlement of a dispute regarding the validity of an arbitration agreement will depend on whether a court case has been filed despite the arbitration clause or whether a request for arbitration has been filed.

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<sup>12</sup> *Ibid*, art 4.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*, art 1.

<sup>17</sup> *Ibid*, art 4.

<sup>18</sup> *Ibid*, art 5.



- 3.5.2 Once the request for arbitration has been filed the arbitrators are entitled to determine their own jurisdiction by deciding on the validity of the agreement to arbitrate.
- 3.5.3 In the absence of a pending arbitration, and where a court case is filed instead, the respondent may invoke the agreement to arbitrate and the claimant, in turn, may argue that the agreement to arbitrate is invalid. In this case, the resolution of the dispute is subject to the provisions of the CPL No 6100 which regulates preliminary objections.<sup>19</sup> The court would decide on the validity of the agreement to arbitrate. Where the agreement to arbitrate is found to be invalid or unenforceable, the case will be heard by the court on the merits. Where the agreement to arbitrate is found to be valid, the court would uphold the objection and dismiss the lawsuit on procedural grounds. The court will not specifically order that the dispute be resolved through arbitration as it is up to the parties to decide whether to arbitrate. However, the court's dismissal would mean that the dispute may only be resolved through arbitration, unless the parties agree otherwise.

## 4. Composition of the arbitral tribunal

### 4.1 The constitution of the arbitral tribunal

- 4.1.1 The parties are free to determine the number of arbitrators. However, the number of arbitrators must be an odd number.<sup>20</sup> Failing such determination, the number of arbitrators will be three.<sup>21</sup>
- 4.1.2 Only natural persons may be appointed as arbitrators.<sup>22</sup> If the parties are unable to agree on the appointment of a sole arbitrator, he or she will be appointed, upon the request of a party, by the competent court of first instance.<sup>23</sup> In an arbitration consisting of three arbitrators, unless otherwise agreed by the parties, each party will appoint one arbitrator, and those two arbitrators will appoint a third who will act as the chair. If a party fails to appoint its arbitrator within the 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on a third arbitrator within 30 days of their appointment, the appointment will be

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, art 7.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

made, upon the request of a party, by the competent court of first instance.<sup>24</sup> The court will appoint a chair who has expertise in the subject-matter of the dispute.<sup>25</sup>

- 4.1.3 Where, under an appointment procedure agreed upon by the parties:
- a party fails to act as required under such procedure;
  - the parties, or two arbitrators, are unable to reach an agreement; or
  - a third party, including an institution, fails to perform any function entrusted to it under such procedure,
- the competent court of first instance will appoint the arbitrator or the arbitral tribunal. The decision rendered by the court will be final and binding.<sup>26</sup>

## 4.2 The procedure for challenging and substituting arbitrators

- 4.2.1 The parties may determine the procedure for challenging arbitrators. The default position is that the challenging party is required to submit its challenge in writing within 30 days of the appointment of the arbitrator or the arbitral tribunal or within 30 days of becoming aware of a reason for challenging an arbitrator. If the challenging party's request is rejected by the arbitral tribunal, that party may file a supplementary objection at the competent court of first instance. The decision of the court is final and binding.<sup>27</sup>
- 4.2.2 The acceptable grounds for challenging an arbitrator are that the arbitrator lacks the features that were agreed on by the parties or that reasonable suspicions exist as to the arbitrator's impartiality.<sup>28</sup>
- 4.2.3 A new arbitrator must be appointed to replace the challenged arbitrator. The term of the arbitral proceedings, if limited, will not be extended where a replacement has taken place.<sup>29</sup> The appointment of the replacement arbitrator will be subject to the same procedure as that used for the appointment of the original arbitrators.<sup>30</sup>

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<sup>24</sup> *Ibid.*

<sup>25</sup> Decision of 14th Civil Chamber of Court of Appeals, No 2010/11426 E., 2010/13965 K, dated 14 December 2010.

<sup>26</sup> Turkish Arbitration Law, art 7.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

### 4.3 Responsibility of arbitrators

4.3.1 Once an arbitrator accepts his/her appointment, he/she cannot refrain from duly performing his/her duties without a justifiable cause. If the arbitrator so refrains, he/she will be obliged to compensate the parties for any damages they incur.<sup>31</sup>

### 4.4 Arbitration fees

4.4.1 The parties may determine the fee of the arbitrator or arbitral tribunal by making reference to established international rules or institutional arbitral rules on arbitral fees. If not agreed by the parties, the fees of the arbitrators will be determined by the arbitrators and the parties, taking into consideration the amount in dispute, the nature of the dispute and the duration of the arbitration.<sup>32</sup>

4.4.2 In the absence of an agreement between the parties and the arbitrators, or a provision in the arbitration agreement dealing with fees, the fees will be fixed as per the fee tariff prepared by the Chamber of the Turkish Union of Arbitrators and Experts approved by the Ministry of Justice.<sup>33</sup> According to the Regulation of Fee Tariffs of International Arbitration dated 9 March 2011, the fee to be paid to the arbitrator(s) is calculated in accordance with the amount in dispute and the number of arbitrators as follows:<sup>34</sup>

Value Dispute (in Turkish Lira)	Arbitrator Fees	
	Sole Arbitrator	3 or More Arbitrators
0 to 500,000	5%	8%
500,000.01–1,000,000	4%	5%
1,000,000.01–2,000,000	3%	4%
2,000,000.01–5,000,000	2%	3%
5,000,000.01 and over	1%	2%

4.4.3 Expenses incurred by the arbitrators during the arbitral proceedings, such as travel and accommodation costs, shall be claimed separately from the arbitrator fees.<sup>35</sup> At its sole discretion, the arbitral tribunal may request that the claimant deposit an

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, art 16.

<sup>33</sup> Turkish Arbitration Law, art 16 and Regulation of Fee Tariffs of International Arbitration, art 1.

<sup>34</sup> Regulation of Fee Tariffs of International Arbitration, art 11.

<sup>35</sup> Turkish Arbitration Law, art 16.

advance payment at the beginning of the proceedings to cover such expenses, should its claim be unsuccessful. The losing party normally bears all of the arbitral costs including the fees of the arbitrator. If both parties are partially successful in their claims and defences, the arbitrators may hold them liable to each pay a proportion of the costs.<sup>36</sup>

4.4.4 Unless the parties agree otherwise, the fee payable to the chair will be ten percent more than those payable to co-arbitrators.<sup>37</sup>

4.4.5 No additional fees will be payable to the arbitrators for the correction, interpretation or completion of an award.<sup>38</sup>

## 4.5 Arbitrator immunity

4.5.1 There is no provision in the Turkish Arbitration Law relating to the immunity of arbitrators.

# 5. Jurisdiction of the arbitral tribunal

## 5.1 Competence to rule on jurisdiction

5.1.1 The arbitral tribunal may rule on its own jurisdiction, including any objections raised regarding the existence or validity of the arbitration agreement.<sup>39</sup>

5.1.2 A plea that the arbitral tribunal does not have jurisdiction must be raised in, or prior to, the submission of the statement of defence.<sup>40</sup> A party is not precluded from raising such plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. The arbitral tribunal will rule on the above-mentioned plea as a preliminary question and, if it should decide that it has jurisdiction, it will resume the arbitral proceedings.<sup>41</sup> Such a decision by the arbitral tribunal cannot be appealed to the courts.

## 5.2 Power to order interim measures

5.2.1 Upon request by one of the parties, the arbitral tribunal may issue a preliminary injunction or attachment during the arbitral proceedings. Since it is possible that the other party might incur damages as a result of a preliminary injunction or

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, art 7.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

attachment the Turkish Arbitration Law permits the arbitral tribunal to demand an appropriate guarantee or security from the requesting party prior to rendering a preliminary injunction or attachment.<sup>42</sup>

- 5.2.2 The Turkish Arbitration Law limits the arbitral tribunal's authority to order a preliminary injunction or attachment by prohibiting it from issuing preliminary injunctions or attachments that are solely enforceable by governmental authorities. For example, real property owned by the respondent may not be seized based on a preliminary attachment ordered by an arbitral tribunal because the seizure of real property requires the involvement of execution officers. Similarly, the arbitral tribunal may not order the customs authority to prevent the respondent from taking its assets out of the country.
- 5.2.3 The arbitral tribunal is prohibited from issuing preliminary injunctions or attachments which are binding on third parties. This is because a third party may not have participated in the arbitral proceedings and therefore could not have properly objected to the decision rendered by the arbitral tribunal.<sup>43</sup>
- 5.2.4 If one of the parties refuses to comply with a preliminary injunction or attachment rendered by the arbitral tribunal, the other party may request the assistance of the competent court which may enforce the arbitral tribunal's decision by issuing a preliminary injunction or attachment. If necessary, the competent court may authorise another court to issue the injunction or attachment as rogatory should geographical concerns warrant this.<sup>44</sup>

## 6. Conduct of proceedings

### 6.1 Commencement of arbitration

- 6.1.1 Unless otherwise agreed by the parties, the arbitral proceedings will commence on the date on which:
- the application is made to the court of first instance or to the relevant person or institution which is entitled to appoint the arbitrator as per the arbitration agreement;
  - the claimant appoints its arbitrator and requests that the other party appoints an arbitrator (when the arbitrators are to be appointed mutually by the parties);
- or

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<sup>42</sup> *Ibid.*, art 6.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

— where the identity of the arbitrator(s) is already set out in the arbitration agreement, the request to resolve the dispute via arbitration is received by one of the parties.<sup>45</sup>

6.1.2 If a party has obtained a preliminary injunction or attachment from a domestic court with respect to a subject matter that falls under an arbitration agreement, the respective party must initiate arbitral proceedings within 30 days of obtaining such a preliminary injunction or attachment, or the preliminary injunction or attachment will be automatically null and void.<sup>46</sup>

## **6.2 General procedural principles**

6.2.1 The arbitral tribunal will render its award pursuant to the provisions of the arbitration agreement executed between the parties and the applicable law chosen by the parties to govern the proceedings.<sup>47</sup>

## **6.3 Seat, place of hearings and language of arbitration**

6.3.1 The seat of arbitration will be determined by the parties or, in the absence of agreement, by an arbitral institution agreed upon by the parties.<sup>48</sup> If the parties cannot agree, the arbitral tribunal will determine the seat of arbitration, having regard to the circumstances of the case.<sup>49</sup>

6.3.2 The arbitrator or arbitral tribunal is entitled to convene or to hold a hearing at a place other than the seat of arbitration. In such a case, the arbitrator or the arbitral tribunal must notify the parties in advance of such place.<sup>50</sup>

6.3.3 The parties are free to agree on the language in which the arbitral proceedings will be conducted, provided that this language is a language spoken in any of the foreign countries recognised by the Republic of Turkey.<sup>51</sup> If the parties have not agreed on the language, the arbitrators will determine the language(s) of arbitration.<sup>52</sup> Unless otherwise expressed in the agreement of the parties or in a relevant interim decision rendered by the arbitrators, the language(s) of the arbitral proceedings will be used in:

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<sup>45</sup> *Ibid.*, art 10.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, art 8.

<sup>48</sup> *Ibid.*, art 9.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, art 10.

<sup>52</sup> *Ibid.*

- the written submissions and statements of the parties;
- hearings;
- any interim awards issued by the arbitrator or arbitral tribunal;
- the final award; and
- all written documents and correspondence brought before the arbitrator or the arbitral tribunal.<sup>53</sup>

6.3.4 The arbitral tribunal may request that the documents on which the parties' claims are based should be submitted and presented together with their translations in the language(s) of arbitration.<sup>54</sup>

#### **6.4 Oral hearings and written proceedings**

6.4.1 The arbitral tribunal will decide whether the arbitral proceedings should be conducted solely on the basis of the documentation provided or include oral hearings.<sup>55</sup> However, unless the parties have agreed not to hold a hearing, the arbitrator or arbitral tribunal is obliged to hold a hearing at an appropriate stage of the proceedings upon the request of any of the parties.

6.4.2 The parties must receive sufficient advance notice in relation to any expert review or any other meeting or hearing to be conducted by the arbitral tribunal and must be informed of the consequences of failing to attend to such hearings.<sup>56</sup>

6.4.3 Petitions, information and other documents submitted to the arbitral tribunal should be communicated to each of the parties.<sup>57</sup>

#### **6.5 Default by one of the parties**

6.5.1 If any of the parties to the arbitral proceedings loses its capacity as a party to the arbitration, e.g. by the death of a party, the arbitrators will postpone the arbitral proceedings and serve a notice to that party's successors to resume the process, if they so wish.

6.5.2 If a notice is not served within six months or if any of the absent parties that have been served fail to explicitly notify the other party or the arbitral tribunal that it will continue the arbitral proceedings, then the proceedings will be terminated.<sup>58</sup>

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, art 11.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, art 11B.

- 6.5.3 The following will occur if any of the parties fails to participate in the arbitral proceedings:
- if the claimant fails to communicate his statement of claim to the respondent within the timeframe stipulated by the arbitrators (or as agreed by the parties) without justification, the arbitral tribunal will terminate the proceedings;
  - if the statement of claim does not meet the procedural requirements such as the inclusion of the names of the parties, the name of counsel for the parties, the arbitration agreement/clause, the legal relationship/agreement out of which the dispute arises, the facts upon which the claims are based, or the subject-matter of the dispute, and such omissions are not remedied within the timeframe stipulated by the arbitrator or arbitral tribunal, the proceedings will be terminated;
  - if the respondent fails to communicate his statement of defence, the proceedings will continue without treating such failure in itself as an admission of the claimant's allegations; and
  - if any party fails to attend a hearing or produce documentary evidence, the arbitrator or the arbitral tribunal may continue the proceedings and make any award based on the evidence before it.<sup>59</sup>

## 6.6 Appointment of experts

- 6.6.1 The arbitrators may:
- appoint one or more experts to report to it on specific issues to be determined by the arbitrator or the arbitral tribunal;
  - require a party to give any relevant information to the expert or to produce or provide access to any relevant documents, goods or other property for his/her inspection; and
  - decide to conduct a site visit where they deem necessary.<sup>60</sup>
- 6.6.2 Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert will, after the delivery of his/her written or oral report, participate in a hearing.<sup>61</sup> At this hearing, the parties are entitled to question the expert and to present their own expert witnesses to testify on the points at issue.

## 6.7 Confidentiality

- 6.7.1 Although there is no explicit provision in the Turkish Arbitration Law regarding confidentiality, the principle of confidentiality is recognised in arbitral proceedings. Therefore, as a general principle of Turkish law arbitration is confidential.

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<sup>59</sup> *Ibid.*, art 11.

<sup>60</sup> *Ibid.*, art 12.

<sup>61</sup> *Ibid.*



## 6.8 Court assistance in taking evidence

- 6.8.1 The arbitral tribunal may seek assistance of the competent Turkish court of first instance for the collection of evidence, regardless of whether it is a domestic or international arbitration, to the extent that such international arbitration is subject to the Turkish Arbitration Law. In these cases, the relevant court shall apply the provisions of CPL No 6100 in conducting its fact and evidence gathering function.

# 7. Making of the award and termination of proceedings

## 7.1 Choice of law

- 7.1.1 The arbitrator or arbitral tribunal will decide on the merits of the dispute in accordance with the applicable law chosen by the parties as relevant to the substance of the dispute. In interpreting and completing the contractual provision in dispute, commercial practices and usages of trade will be taken into account. Any designation of law or legal system of a given state will be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of law rules.
- 7.1.2 If the parties have not agreed on the applicable law then the arbitral tribunal will determine the applicable law by reference to the law of the country that has the closest connection to the dispute in the arbitral tribunal's view.<sup>62</sup>

## 7.2 Timing, form, content and notification of award

- 7.2.1 Unless otherwise agreed between the parties, the arbitrators shall render the award on the substance of the dispute within one year from the date on which the sole arbitrator was appointed; or in cases where an arbitral tribunal is constituted, from the date on which the minutes of the first meeting of the arbitral tribunal were issued.<sup>63</sup> The term of the arbitral proceedings may be extended by the mutual agreement of the parties, or, if the parties fail to agree, by a competent court of first instance upon the application of either party. If the court does not grant the extension, the arbitral proceedings will be terminated upon the expiration of the statutory arbitration term. The decision rendered by the court of first instance is final and binding.<sup>64</sup>
- 7.2.2 The parties may agree that the decision of the arbitral tribunal must be unanimous.<sup>65</sup>

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, art 10.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, art 13.

- 7.2.3 The arbitral tribunal may render a partial award unless otherwise agreed by the parties.
- 7.2.4 Awards must include the following information:
- names, surnames, titles and addresses of the parties or of their representatives, if any;
  - legal grounds and reasons upon which the award is based and if compensation is claimed, the amount of compensation awarded;
  - seat of arbitration and date of the award;
  - name(s) and surname(s) of the sole arbitrator or the members of the arbitral tribunal rendering the award along with their signatures or dissents; and
  - a statement that an application may be filed requesting that the award be set aside.<sup>66</sup>

### **7.3 Settlement**

- 7.3.1 If the parties settle the dispute during the arbitral proceedings, the arbitrator or the arbitral tribunal will terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an award on agreed terms.<sup>67</sup>

### **7.4 Power to award interest and cost**

- 7.4.1 An award must take into account the expenses of the arbitration.<sup>68</sup> Arbitration expenses cover the arbitrator fees and all other legal expenses of the arbitral tribunal (e.g. travel and accommodation costs of arbitrators, expert witness fees, costs of any site visits and attorney fees of the successful party). Under Turkish law, costs incurred by parties themselves are normally to be borne by them.
- 7.4.2 There is no provision in the Turkish Arbitration Law that precludes the arbitral tribunal from awarding interest.

### **7.5 Termination of the proceedings**

- 7.5.1 The arbitral proceedings will be terminated by a final award or by an order of the arbitral tribunal:
- when the claimant withdraws his claim, unless the respondent objects and the arbitrator or arbitral tribunal recognises his/her legitimate interest in obtaining a final settlement of the dispute;
  - if the parties agree on the termination of the proceedings;

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<sup>66</sup> *Ibid*, art 14.

<sup>67</sup> *Ibid*, art 12.

<sup>68</sup> *Ibid*, art 16.

- if the arbitrator or arbitral tribunal is of the opinion that the continuation of the proceedings is unnecessary or impossible due to other reasons;
- if the request for the extension of the arbitration term is dismissed by the competent court of first instance;
- if the arbitral tribunal fails to render a unanimous award where the parties requested that the decision be unanimous;
- if the arbitration is stayed due to loss of capacity by a party to the arbitration;<sup>69</sup> and
- if no advance payment for fees and expenses was deposited despite the arbitral tribunal's specific instruction.<sup>70</sup>

7.5.2 The powers of the arbitral tribunal will be annulled upon the termination of the arbitration.

## **7.6 Effect of the award**

7.6.1 Unless an application is made to set aside the award, or if such application is made and dismissed by the competent court of first instance, any party may acquire a document from the court of first instance indicating that the award rendered is final and binding.<sup>71</sup> This applies to arbitrations which are subject to Turkish Arbitration Law. Otherwise, the enforcement of foreign awards is subject to the New York Convention<sup>72</sup> to which Turkey is a signatory.

## **7.7 Correction, clarification and issue of supplemental award**

7.7.1 Either party may request the arbitral tribunal to correct the award within 30 days if there are any errors in its computation or any clerical, typographical or other errors of a similar nature. Either party may request that the arbitral tribunal give an interpretation of the award, either in whole or in part. After consulting the other party, if the arbitral tribunal considers the request to be justified, the correction shall be made or the award shall be interpreted within 30 days of receipt of such request by the arbitral tribunal.<sup>73</sup> The arbitral tribunal may also correct the above-mentioned errors of its own volition within 30 days of the award date.

7.7.2 Furthermore, either party may request the issuance of a complementary award on any matter which has been alleged during the arbitral proceedings but which has not been covered by the award, provided that the other party is informed of such

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<sup>69</sup> See section 6.5.1 above.

<sup>70</sup> Turkish Arbitration Law, art 13.

<sup>71</sup> *Ibid*, art 15.

<sup>72</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>73</sup> Turkish Arbitration Law, art 14.

request. Such a request may be made within 30 days following the service of the award.<sup>74</sup> If the arbitral tribunal deems that such request is justified, it may issue the complementary award within 60 days.

- 7.7.3 Awards relating to the correction and interpretation of the original award, including complementary awards, are considered to form part of the original award.

## 8. Role of the courts

### 8.1 Jurisdiction of the courts

8.1.1 The court of first instance where the respondent's usual residence, domicile or place of business is located will have jurisdiction over the dispute in the circumstances stipulated in the Turkish Arbitration Law.<sup>75</sup> If the respondent's usual residence, domicile or place of business is located outside Turkey, the Istanbul Civil Court of First Instance will have jurisdiction.

8.1.2 The court may only intervene in a dispute referred to arbitration to the extent permitted by the provisions of the Turkish Arbitration Law.

### 8.2 Stay of court proceedings

8.2.1 If the parties agree to refer the dispute to arbitration pending a court case on the same subject-matter, the court must stay the court proceedings and refer the parties to arbitration.<sup>76</sup>

### 8.3 Preliminary rulings on jurisdiction

8.3.1 If court proceedings are initiated regarding a dispute which is the subject of an arbitration agreement, the non-initiating party may raise an objection with the court on the grounds that the parties had agreed to submit the dispute to arbitration. If the objection is accepted, the court will dismiss the proceedings on procedural grounds.<sup>77</sup>

### 8.4 Interim protective measures

8.4.1 If a party requests that the court impose a preliminary injunction or provisional attachment prior to, or during the arbitral proceedings, this will not constitute a breach of the arbitration agreement.<sup>78</sup>

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, art 3.

<sup>76</sup> *Ibid.*, art 5.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, art 6.

- 8.4.2 If a party fails to enforce the preliminary injunction or provisional attachment rendered by the arbitrator or arbitral tribunal, the other party may request that the competent court issue an order for the preliminary injunction or provisional attachment.<sup>79</sup>
- 8.4.3 The parties may file a request for interim protective measures in accordance with CPL No 6100 and the Turkish Execution and Bankruptcy Law at any stage of the proceedings.<sup>80</sup>

## 8.5 Obtaining evidence and other court assistance

- 8.5.1 The arbitrator or arbitral tribunal may seek the assistance of the court of first instance to collect evidence.

# 9. Challenging and appealing an award through the courts

## 9.1 Jurisdiction of the courts

- 9.1.1 The court of first instance, where the respondent's usual residence, domicile or place of business is located will have jurisdiction to hear an application for setting aside an award.<sup>81</sup> If the respondent's usual residence, domicile or place of business is located outside of Turkey, the Istanbul Civil Court of First Instance will have jurisdiction to hear such an application.

## 9.2 Applications to set aside an award

- 9.2.1 The Turkish Arbitration Law excludes the possibility of any appeal on the merits of the dispute.<sup>82</sup> It only provides for the setting aside of an award under the limited grounds of procedure, arbitrability and public policy.
- 9.2.2 An arbitral award may be set aside by the court if:
- a party to the arbitration agreement lacks the necessary competence;
  - the arbitration agreement is invalid under the applicable law or, if the applicable law is not agreed by the parties, under the law of Turkey;
  - the arbitrator or the arbitral tribunal was not appointed in accordance with the procedure agreed between the parties or in accordance with the Turkish Arbitration Law;

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, arts 3 and 50.

<sup>82</sup> Turkish Arbitration Law, art 15, which is based on the same principles as the New York Convention, art V (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).

- the award was not rendered within the agreed or statutory term for arbitration;
- the arbitrator or the arbitral tribunal did not have jurisdiction to hear the dispute;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, the award contains decisions on matters beyond the scope of the submission to arbitration or the arbitrator or the arbitral tribunal has exceeded its competence;
- the arbitral proceedings were not carried out in accordance with the procedures agreed between the parties or, failing such agreement, in accordance with the procedures of the Turkish Arbitration Law and this failure had an impact on the merits of the award;
- the principle of equality of the parties was not respected;
- the subject-matter of the dispute is not capable of settlement by arbitration under Turkish law; or
- the award is in conflict with Turkish public policy.<sup>83</sup>

9.2.3 An action for setting aside the award should be filed before the competent court of first instance within 30 days from delivery of the award or, as case may be, within 30 days of the correction, interpretation or complementary award.<sup>84</sup> The court will give priority to this action and conclude it promptly.

9.2.4 Pursuant to the Turkish Arbitration Law, the parties may partially or fully waive their right to file an action to set aside the award.<sup>85</sup> However, parties residing abroad may only fully waive their right to file a setting aside action by an express declaration in writing or as provided by the arbitration agreement.<sup>86</sup>

### 9.3 Appeals

9.3.1 The parties are entitled to appeal a decision to set aside an award in line with the provisions of the CPL No 6100. An appeal is limited to the legal grounds applicable to the setting aside of the award.<sup>87</sup>

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

## 10. Recognition and enforcement of awards

### 10.1 Awards

10.1.1 Foreign and domestic arbitral awards are subject to different regimes under Turkish law and as such the definition of “foreign arbitral award” is vitally important.

### 10.2 Domestic awards

10.2.1 Domestic awards issued in the territory of Turkey are rendered as a result of arbitral proceedings conducted in accordance with applicable provisions of the CPL No 6100. These awards can be set aside.<sup>88</sup>

10.2.2 A review of the request will be carried out on file and will not suspend the execution of the award unless the applicant pays a security deposit. Either of the parties is entitled to appeal against the award issued through a cancellation action.<sup>89</sup>

### 10.3 Foreign awards

10.3.1 The provisions of the New York Convention<sup>90</sup> have the same force in Turkey as Turkish statutory provisions, and are treated as part of the domestic legal system. In terms of enforcing foreign arbitral awards, Turkish law gives precedence to the application of the New York Convention<sup>91</sup> over Law No 5718. If the award is rendered in the territory of a state other than the Turkish Republic and if the award is not deemed a domestic award under Turkish law, the New York Convention<sup>92</sup> applies.

10.3.2 Turkey enacted the New York Convention<sup>93</sup> with two reservations which means that the enforcement of foreign awards will be subject to the New York Convention<sup>94</sup> if (i) the award was rendered in another signatory state, and (ii) the relevant dispute is defined as commercial under the Turkish Commercial Code.<sup>95</sup> If these requirements are not fulfilled the recognition and enforcement of foreign awards will be governed by the Law No 5718.

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<sup>88</sup> CPL No 6100, art 439.

<sup>89</sup> Turkish Arbitration Law, art 16.

<sup>90</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Turkey limited the enforcement of foreign awards to awards of a commercial nature by reserving its rights under art I (3) of the New York Convention (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).

10.3.3 Law No 5718 and the New York Convention<sup>96</sup> provide similar grounds for refusal of the recognition and enforcement of an award with one distinction. Pursuant to Article V(1) of the New York Convention<sup>97</sup>, enforcement of an award *may* be refused if the party against whom the award is invoked proves the existence of any grounds for refusal of enforcement. By contrast, Law No 5718 provides that enforcement of an award *shall* be refused if the party against whom the award is invoked proves the existence of any grounds for such refusal. Therefore, while under the New York Convention<sup>98</sup> it is at the discretion of the enforcing court to decide whether the award will be enforced, under the Law No 5718, the enforcing court is obliged to refuse enforcement if one of the refusal grounds is proven. Under both the New York Convention<sup>99</sup> and Law No 5718, the burden of proof lies with the party arguing for refusal of enforcement. However, where questions of the violation of public policy or non-arbitrability arise, the enforcing court may consider these two grounds on its own volition.

10.3.4 The grounds for refusal of enforcement of foreign awards under Law No 5718 are as follows:

- the award is not yet binding, has been set aside or suspended by a court;
- the subject matter of the dispute is not arbitrable; or
- the award is a violation of public policy.<sup>100</sup>

10.3.5 Violation of public policy is a ground for refusing recognition or enforcement of foreign awards.<sup>101</sup> The New York Convention<sup>102</sup> stipulates that recognition or enforcement of an award may be refused if “recognition or enforcement of the award would be contrary to the public policy of the country where recognition and enforcement are sought.” Law No 5718 stipulates that recognition or enforcement shall be refused “if the award is contrary to the public order or public morality.”

10.3.6 Public policy is often regarded as a vague concept and is interpreted by the Turkish courts on a *sui generis* basis. The Turkish courts face a dilemma between the goal of protecting the state’s authority to refuse enforcement of awards which contravene domestic values in terms of public policy and, on the other hand, the

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<sup>96</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Law No 5718, art 61.

<sup>101</sup> See Law No 5718, art 62.1(b) and New York Convention, arts V(1) and (2) (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).

<sup>102</sup> CMS Guide to Arbitration, vol II, appendix 1.1.



desire to respect the finality of foreign awards (the *révision au fond* prohibition). In this respect, Law No 5718 stipulates that only explicit violations of public policy can be considered grounds for refusing enforcement, including:

- lack of due process;
- invalidity of the arbitration agreement under the law of the country to which the parties have subjected it;
- improper arbitral procedure or composition of the arbitral tribunal;
- inarbitrability of the subject matter; or
- the non-existence of reciprocity.<sup>103</sup>

10.3.7 The Law No 5718 refers to the principle of reciprocity in the recognition and enforcement of foreign awards, meaning that the enforcement of awards will be recognised in Turkey provided that they were granted in a country:

- which is party to a reciprocity agreement, whereby it undertook to enforce and recognise arbitral awards made in Turkey; or
- which is obliged to recognise and enforce arbitral awards made in Turkey pursuant to its domestic laws or the established practice of its courts.<sup>104</sup>

## 11. Special provisions and considerations

### 11.1 Non-arbitrable subject matter

11.1.1 The Turkish principle that restricts arbitrability is that of the parties' free disposal of their rights, i.e. if the parties are not entitled to freely settle a dispute or to decide on its fate, such subject matter is non-arbitrable.

### 11.2 Consumers

11.2.1 There are no specific prohibitions under the CPL No 6100 that restrict consumers from entering into arbitration agreements.

### 11.3 Employment law

11.3.1 In view of the mandatory nature of employment law and the provisions of the Labor Law No 4857, employees are not entitled to enter into arbitration agreements with respect to their salaries, notice periods, severance payments or paid annual leave. There are mandatory arbitration procedures regarding the resolution of some collective labor disputes.<sup>105</sup>

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<sup>103</sup> Law No 5718, art 61.

<sup>104</sup> Turkey brought the requirement of reciprocity by reserving its right under art I(3) of the New York Convention (for the New York Convention see CMS Guide to Arbitration, vol II, appendix 1.1).

<sup>105</sup> Art 52, *et seq.* of Law No 2822 of 5 May 1983 published in the Official Gazette No 18040 on 7 May 1983.

## 12. Concluding thoughts and themes

- 12.1.1 The last decade has been an exceptional era for Turkey. Foreign investment has dramatically increased, loans have been extended by foreign banks and numerous new projects have been undertaken. Privatisations have enabled prominent international service providers to operate in many sectors including telecommunications, gas and electricity. The developments in the finance sector and Turkey's integration with the European Union have led to the adoption of a variety of legislation to facilitate and encourage investors and foreign investment in Turkey. The Turkish Arbitration Law came into force 2001 and aimed to develop and promote Turkey as a hub for international arbitration. In 2003 the Direct Foreign Investment Law<sup>106</sup> stipulated that foreign and domestic investments should be treated equally and removed barriers to international competition. In 2007, the replacement of International Private Law and Procedure No 2675 by the Law No 5718 was seen as an opportunity to ensure a speedy and inexpensive procedure for the recognition and enforcement of foreign awards that previously had commonly been put off by the "public interest" test.
- 12.1.2 In 2010 there were a total of 76 arbitration referrals from Turkey to the ICC and Turkish parties acted as claimants in 31 arbitrations.<sup>107</sup> In the remaining 45 disputes, Turkish parties were respondents. These figures demonstrate the Turkish businesses' trust in the ICC Rules<sup>108</sup> and arbitration in general. Turkey's reputation as a reliable forum for the settlement of international disputes depends heavily on how it can further promote the implementation of the Turkish Arbitration Law and the speedy enforcement of foreign awards by Turkish courts under Law No 5718.

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<sup>106</sup> Law No 4875 of 5 June 2003, published in the Official Gazette No 25141 on 17 June 2003.

<sup>107</sup> ICC National Committee in Turkey.

<sup>108</sup> CMS Guide to Arbitration, vol II, appendix 3.7.

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