Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino

Second Edition

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Challenging and Enforcing Arbitration Awards*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and more in-depth books and reviews. We also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature earlier than others. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes – and soon evidence and investor-state disputes – in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the original group of editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

Alas, as we were about to go to press, we were stunned by the unexpected demise of one of those editors, Emmanuel Gaillard. This news was as big a shock as I can recall. Emmanuel was one of three or four names who define international arbitration in the modern era. It was a delight to know him, and a source of huge satisfaction that he respected GAR, and it is hard to imagine professional life without him. Our sympathies go to his family and beloved colleagues, who I have no doubt will keep at least some of the magic alive.

David Samuels

London
April 2021

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Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial – leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 166 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 163.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2020, *Global Arbitration Review*'s daily news reports contained hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2021, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Uganda fails to knock out rail-claim award
- Iranian state entity fails to overturn billion-euro award
- US Supreme Court rejects Petrobras bribery appeal
- Spanish court sets high bar for award scrutiny
- Swiss award against Glencore upheld on third attempt
- Tajik state airline escapes Lithuanian award
- Dutch court refuses to stay Yukos awards
- Undisclosed expert ties prove fatal to ICSID award
- Brazilian airline's award enforced in Cayman Islands
- ICC arbitrators targeted in Kenyan mobile dispute

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, in summer 2017, I raised the possibility of doing a book on the subject with David Samuels (Global Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in early April. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said almost 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide begins with a particularly welcome and inciteful foreword by Alan Redfern, recognised worldwide as one of the most thoughtful and experienced practitioners in our field. The guide is then structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this second edition, the 14 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and the special case of ICSID awards.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 26 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 51 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

London
April 2021

Part II

Challenging and Enforcing Arbitration Awards: Jurisdictional Know-How

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Turkey

Asena Aytuğ Keser and Direnç Bada[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form?

Article 14(A) of the Turkish International Arbitration Law (TIAL) provides that an award must include:

- the names, surnames, titles and addresses of the parties, their representatives and lawyers;
- the legal grounds upon which the award is based, and, if there is a claim for compensation, the amount of compensation;
- the place of arbitration and the date of the award;
- the name, signature, and a dissenting opinion, if any, of the arbitral tribunal; and
- a notice informing the parties that an action to set aside the award could be filed.

The above also applies in terms of domestic awards that are regulated under article 436(1) of the Civil Procedural Law (CPL). Article 436(1) also requires the award to include the rights and obligations attributed to the parties and the costs of arbitration.

1 Asena Aytuğ Keser and Direnç Bada are senior associates at Gün + Partners.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award? Are there provisions governing retractation or revision of an award? Under which circumstances may an award be retracted or revised (for fraud or other reasons)?

According to article 14(B) of the TIAL, each party can apply to the arbitral tribunal for correction of the errors of fact or calculation or for interpretation of an award partially or in full, within 30 days of the notification of the award (two weeks for domestic arbitration). The tribunal has 30 days to correct or interpret the award as of the date of the request (one month for domestic arbitration). The tribunal could also make such corrections ex officio within 30 days of the date of the award (two weeks for domestic arbitration).

Each party is also entitled to request a supplementary award for the matters raised during the proceedings, but were not decided on, within 30 days (one month for domestic arbitration) of the notification of the award. The tribunal has 60 days (one month for domestic arbitration) to issue the supplementary award if it deems the request rightful. For domestic arbitration, the arbitral tribunal can extend this period once, for a further month. There is not any way of revising or retracting the award. The only recourse that the parties can enjoy is to file an action for setting aside the award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? What are the differences between appeals and applications to set aside awards?

Appeal of an award is not possible under Turkish law as the courts are not allowed to overview the merits of the case. Therefore, setting aside of an award is the only recourse available under Turkish law.

Applicable procedural law for setting aside of arbitral awards

Time limit

4 Is there a time limit for applying for the setting aside of an arbitral award?

Application for setting aside of an arbitral award must be filed within 30 days of the notification of the award (one month for domestic arbitration). If there is an application for correction, interpretation or supplementation of the award, then this period starts running from the notification of the relevant award to the parties.

Award

5 What kind of arbitral decision can be set aside in your jurisdiction? Can courts set aside partial or interim awards?

Final and partial awards can be set aside under Turkish law.

Competent court

6 Which court has jurisdiction over an application for the setting aside of an arbitral award?

The court having jurisdiction to hear a setting aside proceeding is the regional appellate court at the respondent's domicile, habitual residence or place of business. If the respondent does not have any of these in Turkey, the Istanbul Regional Appellate Court has jurisdiction (TIAL, article 15(1) and 3).

Form of application and required documentation

7 What documentation is required when applying for the setting aside of an arbitral award?

As the TIAL does not foresee a specific form of application for the setting aside of an arbitral award, the party filing the application must include the mandatory elements of a plaint petition listed under article 119 of the CPL. Accordingly, the application must contain, among others, the subject matter of the claim, a summary of material facts, legal grounds and prayers for relief. The courts do not require an original or duly certified copy of the arbitral award in set-aside actions. The applicant is required to submit a copy of the submission and its exhibits for the court and a copy for each defendant.

Translation of required documentation

8 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with the application for the setting aside of an arbitral award? If yes, in what form must the translation be?

If the document is not in Turkish, the party submitting it to the court must provide its Turkish translation certified by a sworn translator. Turkish courts generally request a full translation.

Other practical requirements

9 What are the other practical requirements relating to the setting aside of an arbitral award? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

Article 15(1) of the TIAL requires setting aside actions to be heard as a primary and urgent matter. As the CPL governs the procedure of the proceedings, upon notification of the plaint petition, the defendant has two weeks to file its responses, with an opportunity to request extension for further two weeks. Whether the application fee that the applicant will deposit when filing the action is a fixed or proportionate fee is controversial in practice. However, the majority of the courts apply the fixed application fee.

Form of the setting-aside proceedings

10 What are the different steps of the proceedings?

Set-aside proceedings are subject to a simplified procedure, meaning that the exchange of the petition stage is finalised upon submission of the response petition. However, in practice, the parties can make further submissions on their statements if need be.

Unless the court deems a hearing necessary, it can render its decision based on the file only. Yet In practice, the courts generally prefer holding a hearing.

Suspensive effect

11 Do setting-aside proceedings have suspensive effect? May an arbitral award be recognised or enforced pending the setting-aside proceedings in your jurisdiction?

As for international arbitrations in Turkey, filing of setting-aside proceedings suspends the enforcement of the award automatically. Enforcement of the award is only possible when (i) the setting-aside proceeding is rejected, and the decision is finalised, (ii) the setting-aside proceeding is not filed within the required period, or (iii) the parties waived from their right to file setting-aside proceedings (waiver is only possible if both parties are not permanent or temporary residents in Turkey).

For domestic arbitrations, on the other hand, setting-aside proceedings do not have any suspensive effect on the award. However, the respondent can request the stay of enforcement in return for security that would suffice to cover the amount of the receivable in the award (CPL, article 439).

Grounds for setting aside an arbitral award

12 What are the grounds on which an arbitral award may be set aside?

The grounds for setting aside arbitral awards of domestic and international arbitration are identical as both are adopted from the UNCITRAL Model Law (CPL, article 439; TIAL, article 15).

Accordingly, the parties can assert that:

- a party to the arbitration agreement did not have the capacity to agree on arbitration, or the arbitration agreement is invalid;
- the composition of the arbitral tribunal was not in compliance with the parties' agreement or with the TIAL;
- the final award was not rendered within the required period;
- the arbitrator or the arbitral tribunal unlawfully decided their competence or incompetence;
- the arbitrator or the arbitral tribunal decided beyond the scope of the arbitration agreement or not decided on the entire claim or decided beyond their competence;
- the arbitral proceedings were not in compliance with the parties' agreements, or with TIAL if there is no such agreement, and such non-compliance affected the substance of the award; and
- the parties were not treated equally.

The Court can ex officio examine:

- the dispute subject to the arbitration is not arbitrable; and
- with the award violates public policy.

Decision on the setting-aside application

13 What is the effect of the decision on the setting-aside application in your jurisdiction? What challenges are available?

The Regional Appellate Court's decision on the setting-aside application is not final and can be appealed before the Court of Cassation within two weeks of the notification of the reasoned decision to the parties.

Effects of decisions rendered in other jurisdictions

14 Will courts take into consideration decisions rendered in the same matter in other jurisdictions or give effect to them?

Although the decisions rendered in the same manner in other jurisdictions cannot have biding effect on Turkish courts, such decisions can be considered as evidence, especially if the arbitration proceedings were found to lack procedural requirements. Other than that, setting aside an award in another jurisdiction may prevent recognition and enforcement of the award as per article V(1)(e) of the New York Convention.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

15 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

CPL is the governing law in terms of recognition and enforcement of domestic arbitral awards. Having the effect of a final and enforceable court decision, domestic arbitral awards are immediately enforceable.

The governing law for Turkish arbitral awards with a foreign element, on the other hand, is TIAL. These awards could be enforced by obtaining a certificate of enforceability from the competent civil court of the first instance, (i) upon finalisation of the decision rejecting the setting-aside of the award, (ii) if there is no application to set aside the award, upon expiry of the period to file this application, and (iii) if the parties waived from filing the setting-aside proceedings.

Foreign arbitral awards (ie, the arbitral awards rendered in a seat outside Turkey) must be properly recognised and enforced to have a legal effect in Turkey. Recognition and enforcement of the foreign awards is primarily governed by the 1958 New York Convention. Where the 1958 New York Convention is silent or not applicable, then International Private and Procedural Law (IPPL), which contains similar rules to the 1958 New York Convention, applies.

Turkey is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the 1961 European Convention on International Commercial Arbitration (Geneva Convention) and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

The New York Convention

16 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under article I(3) of the Convention?

Turkey is a party to the 1958 New York Convention, which entered into force on 25 September 1992. Turkey has both reciprocity and commercial relationship reservations.

Recognition proceedings

Time limit

17 Is there a time limit for applying for the recognition and enforcement of an arbitral award?

IPPL, TIAL or other relevant laws do not contain any time limit for the recognition and enforcement of an arbitral award. However, there is a general time limitation of 10 years for enforcement of judgments under the Execution and Bankruptcy Law (EBL). Therefore, it is advisable to initiate the proceedings for the recognition and enforcement of an arbitral award within 10 years of the finalisation of the arbitral award.

Competent Court

18 Which Court has jurisdiction over an application for recognition and enforcement of an arbitral award?

The civil or commercial court of first instance located where the parties agreed, or in the absence of such agreement, where the defendant permanently or temporarily resides, has jurisdiction over an application for recognition and enforcement of an arbitral award. If the defendant does not reside in Turkey, the competent court will be the court where the defendant's assets that could be the subject of enforcement are located (IPPL, article 60).

Whether to file the action to civil or commercial court of first instance must be decided based on the subject matter of the underlying dispute.

Jurisdictional and admissibility issues

19 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement and for the application to be admissible? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

There is no requirement for a court to have jurisdiction over such an application other than those explained under question 18. In terms of the admissibility of the application, the arbitral award must be finalised, enforceable and binding on the parties. The general procedural rules under the CPL must also be followed when filing the action for recognition and enforcement of an arbitral award.

If the jurisdiction of the court is established over the assets that could be the subject of the enforcement, then the applicant must prove that the assets are located in the region of the court.

Form of the recognition proceedings

20 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*? What are the different steps of the proceedings?

The proceedings for recognition and enforcement of arbitral awards are adversarial. As the proceedings are subject to a simplified procedure, the written phase is completed with the exchange of plaint and response petition. However, in practice, the parties are allowed to make further submissions on their statements if the need be.

The courts conduct the proceedings by opening hearings. Both the defendant's objections to the recognition and enforcement request and the court's overview of the case are limited to the grounds for refusing the request for recognition and enforcement of an arbitral award.

Form of application and required documentation

21 What documentation is required to obtain recognition?

With the application for recognition and enforcement of an arbitral award, the applicant must submit (i) the original or duly certified copy of the arbitration agreement, (ii) the original or the duly certified copy of the arbitral award, and (iii) the certified translations of (i) and (ii). The applicant must prepare a copy for the court and a copy for each defendant (IPPL, article 61).

Translation of required documentation

22 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition? If yes, in what form must the translation be?

Article 61 of the IPPL requires the submission of certified translations of the arbitration agreement and arbitral award. The translations should be certified by a sworn translator. Turkish courts generally request full translation.

Other practical requirements

23 What are the other practical requirements relating to recognition and enforcement? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

As the CPL governs the procedure of the proceedings, upon notification of the plaint petition, the defendant has two weeks to file its responses, with an opportunity to request an extension for a further two weeks. Whether the application fee that the applicant will deposit when filing the action is a fixed or proportionate fee is controversial in practice. However, the majority of the courts apply the fixed application fee.

Recognition of interim or partial awards

24 Do courts recognise and enforce partial or interim awards?

Whereas partial awards can be recognised by Turkish courts, this would not apply for interim awards in most of the cases as they are not deemed as final and binding.

Grounds for refusing recognition of an arbitral award

25 What are the grounds on which an arbitral award may be refused recognition? Are the grounds applied by the courts different from the ones provided under article V of the New York Convention?

Article V of the New York Convention is directly applicable for recognition and enforcement of foreign arbitral awards. Where the IPPL governs, the grounds listed under article 62 for refusal are very similar to article V of the New York Convention.

Among all grounds for refusal, Turkish courts give particular importance to public policy, the standards, and scope of which are set by the court precedents. The concept of public policy has changed positively over time, embracing a trend towards an enforcement-friendly approach.

Effect of a decision recognising an arbitral award

26 What is the effect of a decision recognising an arbitral award in your jurisdiction?

Recognition and enforcement are in fact separate mechanisms under Turkish law. Although enforcement contains in itself recognition as well, recognition of an award can also be

sought separately. While recognition would give the award the effect of *res judicata* or final evidence, enforcement would enable the execution of the award

The first instance court's decision on recognition and enforcement of an arbitral award is subject to appeal before the Regional Appellate Court, and the Regional Appellate Court's decision can also be appealed before the Court of Cassation. These challenges have suspensive effect. There is no challenge available to third parties.

Decisions refusing to recognise an arbitral award

27 What challenges are available against a decision refusing recognition in your jurisdiction?

The same appeal procedure explained under question 26 also applies to a decision refusing recognition and enforcement.

Recognition or enforcement proceedings pending annulment proceedings

28 What are the effects of annulment proceedings at the seat of the arbitration on recognition or enforcement proceedings in your jurisdiction?

As provided under article VI of the 1958 New York Convention, the court can adjourn the recognition and enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration. The party seeking for adjournment of the proceedings must establish on a prima facie basis that the annulment of the award is likely and its adjournment request is not merely to delay the recognition and enforcement of the award. As cases requiring the application of article VI of the 1958 New York Convention are not common in practice, there is no published case law specific to this matter.

Security

29 If the courts adjourn the recognition or enforcement proceedings pending annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security?

Under article VI of the 1958 New York Convention, Turkish courts have the discretion to order security upon the applicant's request to preserve its chances for the successful execution of an award. However, there is no published case law specific to this matter.

Basied on the general practice of Turkish courts, the court can grant provisional attachment to secure the successful enforcement of the award. Therefore, the party seeking enforcement may (separately or from the court hearing the enforcement action) ask for an interim attachment if the court adjourns the enforcement action pending annulment proceedings.

Recognition or enforcement of an award set aside at the seat

30 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an arbitral award is set aside after the decision recognising the award has been issued, what challenges are available?

Although it is still under discretion, Turkish courts would generally refuse to recognise or enforce an award that has been fully set aside at the seat, especially where the award is annulled based on grounds other than public policy or arbitrability.

If an arbitral award is set aside at the seat of the arbitration after a Turkish court's decision recognising or enforcing the award, the counterparty may seek to annul this decision under article V(1)(e) of the 1958 New York Convention.

Service

Service in your jurisdiction

31 What is the procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction? If the extrajudicial and judicial documents are drafted in a language other than the official language of your jurisdiction, is it necessary to serve these documents together with a translation?

If the defendant and court are domiciled in Turkey, the service of documents must be made to the last known residence address of the defendant (Notification Law, article 10).

The applicable rules will differ if the court requesting the service is located in a different country. Turkey is a party to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the 1954 Hague Convention on Civil Procedure, although the application of the latter is rare due to the specific nature of the 1965 Hague Convention. If the court is located in a country that is a party to these Conventions and no bilateral treaty exists, the Turkish authorities will apply the 1965 Hague Convention.

If the official language of the documents is not Turkish, those documents have to be served together with a translation into Turkish.

Service out of your jurisdiction

32 What is the procedure for service of extrajudicial and judicial documents to a defendant outside of your jurisdiction? Is it necessary to serve these documents together with a translation in the language of this jurisdiction?

If the defendant is located in a being a party to the 1965 Hague Convention and no bilateral treaty exists, the service would be made under the provisions of this Convention. If the Convention does not apply and there is no bilateral treaty, then the relevant provisions of the Notification Act would apply (Notification Law, article 25).

It is necessary to serve the documents together with a translation in the language of the jurisdiction.

Identification of assets

Asset databases

33 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

The award creditor might use some of the public databases to identify the award debtor's assets. For example:

- general information about companies can be found in the public trade registry records;
- ownership details for identified land and real estates can be accessed from the Turkish land registry, provided that the applicant can show a legitimate interest to see the details of these properties; and
- trademark and patent ownerships can be accessed from the public records of the Turkish Patent and Trademark Office.

In addition, before initiating the attachment proceedings, the award creditor can request from the execution office to access further registries (ie, vehicles, vessels, and immovables and determine the debtor's assets) (EBL, article 78).

Information available through judicial proceedings

34 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

The award creditor can apply to the execution office for sending a payment order with judgment to the award debtor. The execution office will send a payment order to the debtor and request the payment of the debt and disclosure of assets (by indicating their value) within seven days of the notification date. However, since the execution offices have the tools to search the debtor's assets through their system, the disclosure of assets is not commonly used for identifying assets.

Nevertheless, the award debtor's failure to disclose its assets might result in his or her imprisonment for 10 days (EBL, article 337). A prison sentence is rarely imposed, and even if it is, the debtor would be released from imprisonment once the assets are disclosed.

Enforcement proceedings

Attachable property

35 What kinds of assets can be attached within your jurisdiction?

With some exceptions, any of a debtor's movable and immovable assets, rights and receivables with economic value can be attached. Even crypto assets were recently attached. However, the law also provides some safeguards to the debtors to ensure that they have sufficient goods to survive and continue their economic existence. Accordingly, goods required for the debtor to continue its business and a certain percentage of the debtor's salary could not be attached.

Availability of interim measures

36 Are interim measures against assets available in your jurisdiction?

Yes, it is possible to obtain a provisional attachment order or preliminary injunction decision before or during the arbitration proceedings according to article 6 of TIAL. The requirements to obtain a provisional attachment order are specified in article 257 of EBL, whereas the requirements for obtaining a preliminary injunction decision are stated in article 389 of CPL.

Procedure for interim measures

37 What is the procedure to apply interim measures against assets in your jurisdiction?

A party seeking enforcement may obtain a provisional attachment order pursuant to articles 257 et seq of the EBL. The provisional attachment proceedings must be conducted before the competent court located at the award debtor's residence in Turkey.

The creditor must establish prima facie that the receivables are matured and unsecured to obtain the provisional attachment order. However, it is also possible to obtain a provisional attachment for unmatured receivable in specific circumstances. The creditor must show a clear and present danger that the debtor will lack sufficient assets out of which the applicant satisfies the award. In this regard, the applicant would be expected to show that:

- the debtor has no domicile in Turkey; and
- the counterparty is preparing or engaging in bad faith maneuvers intending to frustrate enforcement of the arbitral award.

The court has the discretion to grant a provisional attachment subject to a deposit. Although the courts have wide discretion on determining the amount, usually 15-20 per cent of the awarded compensation is required as a deposit. To protect the interests of the award creditor, Turkish courts regularly grant provisional attachment applications that are filed after an award is rendered but when a set-aside or enforcement proceedings are pending.

For the enforcement of the provisional attachment, the applicant must apply to the competent execution office within 10 days as of the decision. If not, the provisional attachment decision would be void.

According to articles 389 et seq of the CPL, the creditor may apply for a preliminary injunction decision from the competent court located at the award debtor's residence in Turkey.

The award creditor must show prima facie that it would be difficult or impossible to satisfy the right due to the change that may occur in the current situation in the matter of dispute or that a disadvantage or serious damage will arise due to lack of such a decision.

If the court grants the preliminary injunction decision, the applicant must deposit the amount determined by the court and request the enforcement of the decision within one week of the execution office.

Both the provisional attachment order and the preliminary injunction decision will be valid until the final award is enforceable or the tribunal rejects the claim (TIAL, article 6).

Interim measures against immovable property

38 What is the procedure for interim measures against immovable property within your jurisdiction?

There is no specific provision for interim measures against immovable properties. Hence the provisions of EBL for obtaining a provisional attachment order and the provisions of CPL for obtaining a preliminary injunction decision would be applied.

Interim measures against movable property

39 What is the procedure for interim measures against movable property within your jurisdiction?

There is no specific provision for interim measures against movable properties. Hence the provisions of EBL for obtaining a provisional attachment order and the provisions of CPL for obtaining a preliminary injunction decision would be applied.

Interim measures against intangible property

40 What is the procedure for interim measures against intangible property within your jurisdiction?

There is no specific provision for interim measures against intangible properties. Hence the provisions of EBL for obtaining a provisional attachment order and the provisions of CPL for obtaining a preliminary injunction decision would be applied.

Attachment proceedings

41 What is the procedure to attach assets in your jurisdiction?

The arbitral award must be enforceable to start the attachment proceedings. For instance, for foreign arbitral awards, the enforcement proceedings must be completed, and for the arbitrations seated in Turkey with a foreign element, the enforceability certificate must be obtained. Since domestic arbitral awards are directly enforceable, no further action is required.

Initially, the award creditor must apply to the execution office requesting them to issue the payment order and notify it with the judgment to the award debtor. The award debtor has seven days to make the payment, starting from the service date.

If no payment is made within seven days, the award creditor can start the attachment proceedings. In any case, the creditor can initiate the attachment proceedings within one year, starting from the notification date of the payment order (EBL, article 78).

With the amendment to EBL on 22 July 2020, the execution office can attach the immovables, movables (subject to the compulsory registry), and bank accounts electronically if the relevant systems are compatible with the system of the execution office.

Attachment proceedings differ depending on the nature of the assets and may be conducted ex parte.

Attachment against immovable property

42 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The award creditor can request the attachment of the immovables after the seven days passes and, in any case, within one year, starting from the service date of the payment order. Upon the request of the award creditor, the execution office can search for the immovables registered in the name of the award debtor in the land registry records and, upon detecting the immovables, can attach the immovables by sending a writ. Since the execution office and land registry systems are compatible, the attachment is registered to the records instantly. This registration restricts the award debtor's disposal right on the immovables.

The award creditor must request the compulsory sale of the immovable within one year starting from the attachment date. Otherwise, the attachment will be removed. (EBL, article 106).

Attachment against movable property

43 What is the procedure for enforcement measures against movable property within your jurisdiction?

Movable property can be attached by way of their seizure (EBL, article 102). The applicant requests the execution office to attach specific objects covering the amount of the receivable. However, specific movables counted in article 82 of EBL (ie, movables necessary for the family members) could not be subject to an attachment.

However, the execution office can attach the movables required to be registered, ie, motor vehicles. Since the execution office and motor vehicle registry systems are compatible, the attachment is instantly registered in the records.

The award creditor can request the compulsory sale of the movable within six months as of the attachment date. Otherwise, the attachment will be removed (EBL, article 106).

Attachment against intangible property

44 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Pursuant to article 148 of The Industrial Property Code No 6769 (the IP Code), IP rights could be attached. Neither EBL nor IP Code sets specific procedures for the attachment of the IP rights, and since they are not classed as either movables or immovables, there are different views on which procedure should be applied by analogy. Nevertheless, the attachment would be affected by sending an electronic writ to TURKPATENT records, and the sale of the IP rights must be requested within six months to be on the safe side. The attachment registered on the registry records would restrict the award debtor's disposal right on the IP rights.

It is possible to bring claims against third parties. Accordingly, an award creditor can compile a list of natural or legal persons whom the award creditor believes are third parties with debt against the award debtor. The execution office will then send a notice to all those included on the list, asking them to pay their debts to the execution office to be sent to the

award creditor. The execution office will inform the third-party debtors that if they do not pay their debts to the award creditor and instead pay the award debtor, they will be liable to make the same payments to the execution office (EBL, article 89).

Attachments against bank accounts

45 Is it possible to attach in your jurisdiction bank accounts opened in a branch or subsidiary of a foreign bank located in your jurisdiction or abroad? Is it possible to attach in your jurisdiction the bank accounts opened in a branch or subsidiary of a domestic bank located abroad?

Provided that all banks operating in Turkey, whether as branch or subsidiary, must establish a Turkish legal entity, the creditors' accounts in these banks could be subject to attachment irrespective of the bank's origin. It is not possible to attach the bank accounts located out of Turkey's jurisdiction.

The attachment of the bank accounts is carried out by sending a writ electronically to the relevant banks since their system is compatible with the execution office system.

Enforcement against foreign states

Applicable law

46 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific rules that govern the recognition and enforcement of arbitral awards against foreign states. Hence, Turkish courts will apply the general rules on recognition and enforcement by taking into account the general sovereign immunity principles.

Availability of interim measures

47 May award creditors apply interim measures against assets owned by a sovereign state?

Availability of interim measures against foreign states depends on whether the states acted with *acta jure imperii* or *acta jure gestionis* at the underlying dispute. Foreign states cannot claim immunity from jurisdiction in legal disputes arising out of private law relations (*acta jure gestionis)* (IPPL, article 49/1).

Hence, the creditor can apply for interim measures against the states that acted with *jure gestionis.* In contrast, Turkish courts cannot order interim measures in disputes where the foreign states act with *jure imperii*.

The interim measures cannot be applied to the assets used for foreign state's diplomatic matters in Turkey.

Service of documents to a foreign state

48 What is the procedure for service of extrajudicial and judicial documents to a foreign state? Is it necessary to serve extrajudicial and judicial documents together with a translation in the language of the foreign state?

The notifications related to *acta jure gestionis* can be made to diplomatic representatives of the foreign state (IPPL, article 49/2). This notification must be made through diplomatic channels. However, if there is a specific multilateral or bilateral treaty between the states, this method must be used rather than the general rule.

Immunity from enforcement

49 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? Are there exceptions to immunity?

Courts will have to distinguish between assets used for a commercial purpose and a sovereign purpose. All assets could be subject to execution, except those used for sovereign purposes. For example, assets used for diplomatic and military purposes would be protected by state immunity.

Waiver of immunity from enforcement

50 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? What are the requirements of waiver?

A foreign state can waive immunity from enforcement in Turkey, but there should be an agreement between the parties to waive immunity. Under Turkish law, the agreement to arbitrate is generally understood as a waiver of immunity for the purposes of the arbitration proceedings. However, the waiver of immunity resulting from an arbitration agreement will not extend to the execution proceedings, and a separate waiver is required for execution proceedings.

Piercing the corporate veil and alter ego

51 Is it possible for a creditor of an award rendered against a foreign state to attach the assets held by an alter ego of the foreign state within your jurisdiction?

In principle, it is not possible to attach the assets held by an alter ego of a foreign state. However, we recently experienced the attachment of the assets of an alter ego of a foreign state by the award creditor through the execution office. It is noteworthy to highlight that this practice of the execution office is an atypical one and does not reflect the general approach of Turkish courts to this controversial matter.

Appendix 1

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Asena Aytuğ Keser has been with the firm since 2011 and is a senior associate. Her practice focuses on dispute management, employment, business crime and anti-corruption.

She advises and represents both national and international clients in their commercial law, law of obligations, construction and real estate related disputes. She has a specific focus on business crimes and she handles various disputes where the dispute contains the application of both civil and criminal law principles. She also actively involves in proceedings where recognition and enforcement of foreign judgments/arbitral awards is sought.

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Direnç Bada is a senior associate at Gün + Partners, and he has been working for the firm since 2014. Direnç has specialised in the firm's dispute management, intellectual property and data protection and privacy practices.

He has experience in civil and criminal IP litigation involving all aspects of IP rights. He also took part in major anti-corruption cases involving various state administrations and represented clients before ICC arbitration cases.

Direnç also deals with matters related to data protection and privacy, including privacy compliance projects and give advice to multinational clients on international data transfers and data localisation requirements. He holds Certified Information Privacy Professional Europe (CIPP/E) from the International Association of Privacy Professionals since 2019.

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