

Kluwer Arbitration Blog

Enforceability of Emergency Arbitrator Orders in Turkey and Take-Aways from the 15th ICC Turkey Arbitration Day 2020

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The 15th ICC Turkey Arbitration Day was held on 24 January 2020 in Istanbul. The aims of the conference were to contribute to the development of commercial and investment arbitration in [Turkey](#), to promote Istanbul as a place for arbitration and alternative dispute resolution as well as the work of Turkish arbitration practitioners both on domestic and international levels.

Discussions at the Conference

The day started with introductory remarks from M. Rifat Hisarcıklıoğlu, President of the Union of Chambers and Commodity Exchanges of Turkey and Chair of the Board of the ICC Turkey National Committee, Alexander G. Fessas, Secretary General of the ICC International Court of Arbitration, Prof. Dr. Metin Feyzioğlu, President of the Union of Turkish Bar Associations and Zekeriya Birkan, Deputy Minister of the Turkish State Department of Justice. They highlighted the valuable contribution of arbitration to judicial systems and its crucial importance in meeting the needs of business life as well as Turkey's desire and ambition to become one of the top arbitration centres in the world. Five sessions were held to discuss various hot topics of international arbitration. In four of these sessions, local and foreign practitioners and academics (i) provided a general overview on the 2019 Report of the ICC Commission on the Arbitration and ADR Task Force on emergency arbitrator proceedings, (ii) presented the Report of the ICC Commission on Arbitration and ADR on construction arbitrations and its particularities, (iii) discussed the local and European banks' approach to arbitration as a means to settle finance industry disputes, and (iv) finally referred to the importance of securing an enforceable award.

One of the sessions focused particularly on arbitration practice in Turkey. During this session academics and judges addressed the enforceability of interim reliefs and emergency measures in international arbitrations seated in Turkey and the courts' approach. This post aims to give a summary of the discussions held in this session.

Enforceability of interim reliefs and emergency measures under the applicable rules

Prof. Dr. Ali Yeşilirmak opened the session by presenting the regulatory framework of the available options and avenues to seek interim relief under Turkish arbitration law and the arbitral tribunals' powers to grant interim measures. He highlighted the differences between the regulations of the Turkish International Arbitration Law No. 4686 ("TIAL") and the Turkish Code of Civil Procedure No. 6100 ("CCP"). Under Article 414 of the CCP, which is more recent compared to the TIAL, the law explicitly prohibits the courts to decide on interim measures when the dispute is to be resolved by domestic arbitration unless the arbitrators allow the parties to seek for court assistance. This article also explicitly mentions the court's duty to enforce interim reliefs granted by the arbitrators. To the contrary, under Article 6 of the TIAL the parties are always free to ask for court assistance before or during the arbitration, and the arbitral tribunal is not entitled to grant interim measures or interim attachments that are required to be enforced through execution offices or to be executed through other official authorities or that bind third parties. Prof. Yeşilirmak criticised the incompatibilities between these two legislations and recommended to amend the TIAL in order to reflect the arbitration friendly approach of the CCP.

Prof. Yeşilirmak also noted that even though the TIAL and CCP allow the arbitrators to grant interim relief, he is of the opinion that emergency arbitrators are not able to enjoy such prerogative since they should not be considered as arbitrators for the purposes of settling the main dispute in arbitration.

Courts' approach

After these remarks, Judge Nevzat Boztaş, the Chair of the 14th Civil Chamber of Istanbul Regional Court of Appeal, and Judge Dr. Adem Aslan, Member of the 11th Civil Chamber of the Court of Cassation took the floor to discuss the courts' approach to the enforceability of interim reliefs granted by the arbitrators and the scope of the judicial review of such reliefs when they are brought before the court.

Judge Boztaş discussed the scope of the court's examination of the emergency arbitrator orders when the parties ask for court assistance to enforce these interim reliefs under Article 6 of the TIAL and Article 414 of the CCP. The discussion mainly evolved around the question of whether the court should respect the emergency arbitrator's order as it is and solely decide on the validity of the arbitration agreement without getting into the merits or whether the court should conduct a separate and independent evaluation based on *lex fori* and general principles such as, *inter alia*, urgency of the relief sought, mandatory rules of law, public order and fundamental rights. Judge Boztaş stated that his approach leans towards the latter, meaning that the court should conduct its own test for granting interim relief even though the dispute is to be resolved by arbitration. According to his view, the emergency arbitrator's order would only weight as evidence during this judicial process. Judge

Boztaş defended his position by highlighting the principle of the courts' independent decision-making. He suggested that the legislator had consciously chosen those words that explain how the courts ought to enforce the arbitrator's interim reliefs under the CCP and highlighted the lack of explicit wording under the TIAL concerning international arbitrations.

We would like to note that, Article 6(1) and 6(4) of the TIAL reserves the parties' right to apply to courts for emergency measures under the CCP before or during arbitration albeit the existence of an arbitration agreement. Article 6(3) also allows the parties to seek for court assistance in case the emergency measure was sought in arbitration, but one of the parties does not comply with the arbitrator's interim relief. This leads us to the question of whether the legislator intended for the courts to conduct a different *prima facie* review when dealing with an interim order granted by an arbitrator as opposed to considering the arbitrator's order as only an evidence in their judicial review. This question will probably be answered by future practice of the courts.

Judge Aslan closed the session by discussing another aspect of court assistance and focused on the debate as to whether an interim order is final under national laws and within the meaning of the [New York Convention](#) ("Convention"), and thus, whether the Convention may be applicable to the enforcement of emergency arbitrator orders. Judge Aslan informed the attendees about a recent Court of Cassation decision ([11th Chamber, E. 2017/3469, K. 2019/4259, 11.6.2019](#)) which reversed the Court of Appeal's position on enforcing interim reliefs granted by arbitrators which remains to be a controversial issue. In the said decision, the Court of Appeal was reluctant to enforce interim orders on the grounds that: (i) interim orders are not final or binding neither under national laws nor under the Convention which renders them unenforceable, and (ii) the parties do not hold any legal interest in enforcing interim orders that deal with the arbitral tribunal's competence due to the fact that such determinations are merely declaratory.

The Court of Cassation, however, concluded that the Court of Appeal erred in its above reasoning and held that interim orders are enforceable on the following grounds:

- Since partial awards are set forth under Article 14/A(2) of the TIAL and may be subject to enforcement under Article 15/B, by the same token, so should the interim orders granted by the arbitrators.
- The Convention does not mention the finality of an award as a prerequisite for enforcement but rather refers to awards that have a binding effect on the parties. Partial or interim awards in fact bind the parties on the date the order is granted and also final for the purposes of the subject of the relief sought.

This particular interpretation of the Court of Cassation is of great importance since it may also pave the way for enforceability of the emergency arbitrator orders which are final in terms of the subject of the interim relief sought and binding for the parties on the date the order is granted.

Judge Aslan concluded his presentation by discussing more decisions of the Court of

Cassation relevant to understand the courts' position on granting interim reliefs where the main dispute is to be or is already resolved by arbitration. These note-worthy holdings may be summarized as follows:

- It is possible to seek interim reliefs from a national court even if the final arbitration award has not been enforced yet. The lack of such an enforcement decision alone does not constitute a legal barrier to make an application for an interim measure before national courts. (19th Chamber, E. 2004/9775, K. 2004/13391, 30.12.2004)
- It is a material procedural violation and against public order when the arbitral tribunal decides on interim relief without having an explicit request raised by the party during the arbitration considering that there is no available avenues for judicial review of such reliefs falsely granted by arbitrators. (11th Chamber, E. 2019/781, K. 2019/2161, 25.03.2019)

The overall conclusion of this session was that the nature of interim reliefs granted by arbitrators, and the smooth enforcement of such orders by national courts remain a controversial issue. It seems like the courts still have a tendency to thoroughly review the interim orders granted by the arbitrators and conduct their own legal tests if they believe the arbitrator's order does not respect certain national principles and laws.

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