

TIAL Issues and ISTAC Fixes: There is Only So Much You Can Do!

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Introduction

The law at the place of the arbitration – the *lex loci arbitri* – governs the validity of the arbitration agreement^[1], the procedure before the arbitral tribunal^[2], and setting-aside proceedings before the state courts.^[3] When the parties agree to resolve their dispute in accordance with the ISTAC Rules, then, unless otherwise stipulated by the parties, the default seat of the arbitration is Istanbul pursuant to Article 23 of the ISTAC Rules. Agreeing on the ISTAC Rules will thus lead to the applicability of the Turkish International Arbitration Law ("TIAL")^[4], enacted in 2001, to these issues – at least its mandatory provisions for disputes concerning a foreign element. While many of the provisions of the ISTAC Rules are substantively similar to the corresponding provisions of modern arbitration rules, for example the ICC Rules of Arbitration^[5], the provisions of the TIAL still play an essential role in any arbitration to be conducted in Turkey. TIAL is based on the UNCITRAL Model Law 1985 ("Model Law")^[6], the text of which has largely been adopted by many other countries as well, including Germany and Belgium. That being said, TIAL also contains certain unusual features that do not originate from the Model Law. Although TIAL is in principle arbitration-friendly, some specific features of the TIAL can give rise to issues, especially in an international context, and in particular as far as the validity of the arbitration agreement, the procedure before the Arbitral Tribunal, or enforcement prospects are concerned. This article will elaborate on examples which show that selecting the ISTAC Rules as an institutional set of arbitration rules can help fix some of these issues.

1. Constitution of the Arbitral Tribunal

The parties are free to agree on the number of the arbitrators under both, Article 7 of TIAL and Article 13 of ISTAC Rules. Both provide for a limitation to parties' freedom of choice concerning the number of the arbitrators, by establishing a rule that in cases where the parties agree on a tribunal of more than one arbitrator, they cannot refer their dispute to an arbitral tribunal consisting of even numbers of arbitrators. When a dispute is referred to a sole arbitrator, the default rule under Article 7 of the TIAL stipulates that the parties shall choose the sole arbitrator jointly. Article 14 of ISTAC Rules is in line with this rule. When the dispute is referred to a tribunal of three arbitrators, each of the parties appoint an arbitrator, and then these two arbitrators jointly appoint the third arbitrator. In the event that the parties have not agreed on the number of arbitrators, the dispute is referred to a tribunal of three arbitrators under TIAL. This might lead to unreasonably high costs in relatively small and simple cases. Article 13 of ISTAC Rules, on the other hand, takes a more flexible approach and provides that the ISTAC Board of Arbitration^[7] shall decide on the number

of arbitrators, by taking all relevant circumstances and facts into consideration.^[8] In cases where the parties fail to jointly choose an arbitrator, the Turkish courts, pursuant to Article 7 of TIAL, or the Board of Arbitration, under Article 14 of ISTAC Rules, appoint the arbitrator. Under TIAL, the Turkish courts appoint the sole arbitrator on whom the parties; or the third arbitrator on whom the other two arbitrators could not agree, upon request of a party. ISTAC does not have a national committee system for arbitrator appointments as has the ICC^[9]. But pursuant to ISTAC Rules, it is ISTAC Board of Arbitration consisting of qualified members of the arbitration community who are more likely to appoint competent arbitrators in an international setup than Turkish courts which is responsible for appointment of arbitrators .

2. **Time** **Limits**

Under both, TIAL and ISTAC Rules, arbitration is designed to be an expeditious dispute resolution mechanism. Pursuant to Article 10 of TIAL, an arbitration proceeding in Turkey shall be concluded within one year following the appointment of the sole arbitrator, or the issuance of the first meeting minutes^[10] of the arbitral tribunal in a case where there is a panel of more than one arbitrator. The ISTAC Rules shorten this time period by way of Article 33 of the ISTAC Rules which provides for a time limit of 6 months from the date on which the signatures on the Terms of Reference are completed or, the date of notification to the tribunal by the Secretariat of the approval of the Terms of Reference, in order for an arbitral tribunal to render its final award. The ISTAC Rules' fast track arbitration provisions foresee an even shorter time limit of three months instead of six months. These time limits may be advantageous since they may have the effect of accelerating the proceedings. Yet, the consequences of non-compliance are severe: An arbitral award that is not rendered within the applicable time limits may be annulled under the express wording of Article 15 of TIAL. Article 10 of TIAL provides that the parties may agree on extensions of the time limit for the award. Although this provision does give the parties the opportunity to agree to an extension and to waive the corresponding ground for annulment, in the event that the parties cannot agree on extension, the Turkish Courts decide on the extension upon the application of a party.^[11] Pursuant to the same subsection, in the case of refusal of time extension, the time limit for the award is terminated upon the elapse of initial time period. The Court's decision refusing the extension is final. Bearing in mind that the parties tend to disagree on many procedural details in practice, the possibility of annulment of an award is a very severe sanction for not being able to agree on a time extension. Yet in such cases, the jurisdiction of the arbitral tribunal elapses and the dispute will have to be resolved by the state courts. Article 33 of ISTAC Rules, which supersedes Article 10 of TIAL when the ISTAC Rules have been agreed on, adopts a more flexible approach, and provides that the time limit for the award may be extended either upon the agreement of the parties or by decision of the Board of Arbitration, whether upon the request of the Arbitral Tribunal, or on the Board's own initiative^[12]. In practice, the Board of Arbitration is expected to take the risk of annulment into consideration and to extend the time limit in cases where it is highly likely that the time limit will not be

reached.

3. TIAL Issues the ISTAC Rules Cannot Fix

Although TIAL is based on the Model Law, TIAL and the arbitration-related provisions of the Turkish Code of Civil Procedure ("CCP") still exhibit certain problematic features. One example is the narrow notion of the writing requirement under the earlier version of the Model Law, as reflected in Article 4 of TIAL.^[13] Another issue with having Turkey as the place of the arbitration – and thus the TIAL as the *lex loci arbitri* – that cannot be fixed by the ISTAC Rules is the fact that any arbitral tribunal in Turkey would face a narrow notion of arbitrability.^[14] Finally, Turkish courts' broad interpretation of public policy that affects the enforcement of awards^[15], is also an issue that is often addressed and criticized in Turkish international arbitration practice.^[16]

Conclusion

The Turkish legislator still needs to take the initiative to revise and clarify certain provisions of TIAL and CCP to be able to meet the internationally accepted modern standards of international arbitration, and compete with other arbitration jurisdictions, such as Switzerland, France, or Germany. Steadiness in the quality that ISTAC and its rules promise, and the fixes ISTAC Rules already provide, combined with desirable future revisions to Turkish arbitration legislation, and an arbitration-friendlier approach of the Turkish courts may well clear the issues still standing in the way of Turkey becoming a more frequently visited, international arbitration destination.

[1] *Born*, International Arbitration: Law and Practice, 2nd ed. 2015, pp. 47 – 72; Article 5(1)(a) of the New York Convention; and Articles 1 of the TIAL.

[2] *Born*, International Arbitration: Law and Practice, 2nd ed. 2015, pp. 111 – 128; Article 5(1)(d) of the New York Convention; and Article 1 of the TIAL.

[3] *Born*, International Arbitration: Law and Practice, 2nd ed. 2015, pp. 311 – 374; Article 5(1)(e) of the New York Convention; and Article 15 of the TIAL.

[4] Law No. 4686, published in the Official Gazette dated 7 July 2001, numbered 24453.

[5] Some of the unique features of the ICC Rules have, however, not been adopted by the ISTAC Rules, such as scrutiny process under Article 33 of the ICC Rules, or the case management conference under Article 24 of the ICC Rules.

[6] Without the amendments adopted in 2006.

[7] The Board of Arbitration is, under Article 1 of the ISTAC Rules, responsible for the administration of both the application of the ISTAC Rules, and the resolution of disputes in accordance with the Rules. The Board of Arbitration is comprised of a national and an international divisions.

[8] Similar to Article 13 of the ISTAC Rules, Article 12(2) of the 2012 ICC Rules of Arbitration empowers the ICC International Court of Arbitration to decide on the number of arbitrators

where the clause is silent on the issue. On the criteria applied by the ICC Court in this regard, see *Herzberg*, *Selecting ICC Arbitrators: What's New Under the Revised Rules?*, in: *Mealey's International Arbitration Report 2012*, p. 1 et seq.

[9] In an ICC Arbitration, national committees, taking into consideration of parties' nationalities and applicable law to the merits of the dispute, are responsible for the appointment of the arbitrators. Thereby, it is aimed that arbitrators which are closely related to the dispute are appointed.

[10] The TIAL assumes that the arbitrators gather, issue "preliminary meeting" minutes, and thus set in motion the proceedings before the arbitral tribunal; which is often the case in domestic arbitration cases in Turkey. It is suggested in practice that in cases where the arbitrators do not issue meeting minutes, the time period of one year shall start counting on the date of arbitrators' very first procedural activity (*Akıncı*, *Milletlerarası Tahkim*, 2003, pp. 214 – 215), e.g., following the issuance of the first procedural order.

[11] In practice, it is sometimes the arbitrators who mistakenly submit applications for time extensions with the state courts (*Akıncı*, *Arbitration Law of Turkey: Practice and Procedure*, 2011, p. 161).

[12] Pursuant to Article 31 of the ICC Arbitration Rules, which is in line with Article 33 of the ISTAC Rules, ICC Court of Arbitration Board may extend the time limit for the award upon a reasoned request of the arbitrators or on its own initiative if deemed necessary.

[13] With the amendments to the Model Law in 2006, the formal requirements for arbitration agreements under the Model Law are now more flexible even than the formal requirements under Article II of the New York Convention. Pursuant to the new Article 7(3) of the Model Law, an arbitration agreement may even be concluded orally as long as its contents are recorded.

[14] According to Article 408 of the CCP and Article 1(4) of the TIAL which goes in the same direction, any dispute arising in relation to rights in rem over immovable properties or that are out of the scope of parties' free disposition are non-arbitrable. While similar restrictions are not uncommon in other jurisdictions, the way the restrictions are handled in practice in Turkey sometimes give rise to uncertainties.

[15] In Turkey, the competent court for arbitration related court proceedings is the first instance courts. On the appellate level, there is no specific chamber at the Court of Appeals to decide on such issues. Both circumstances create a major lack of foreseeability as far as the enforcement or setting aside proceedings are concerned.

[16] *Ekşi*, *Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi*, 2008, p. 1 et seq.