

# THE BOSPHORUS ONLINE

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## 1. ENFORCEMENT OF THE FOREIGN ARBITRATION AWARDS IN TURKEY: GENERAL OUTLOOK

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Enforcement procedure for foreign arbitration awards in Turkey are twofold: court proceedings to have the arbitration award enforceable and the bailiff proceedings for the execution of the decision. This paper will give a general outlook that surrounds these proceedings.

### *Legislation*

The main legislation regarding the enforcement of the foreign arbitration awards in Turkey is as follows:

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (The New York Convention)
- The International Arbitration Act (No: 4686)
- The Article 60 and the following Articles of the Turkish International Private and Procedural Act (IPPA)

According to the New York Convention, a foreign award could be recognised and enforced in any signatory state, only if that party against whom the arbitration award is sought to be enforced proves that the following reasons exist as listed under the Article V of the New York Convention:

- The incapacity of the signatories to the arbitration agreement to contract, or said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings was otherwise unable to present their case
- The award contains decisions beyond the scope of the arbitration agreement
- The commissioning of the arbitral authority or arbitral procedure was not in accordance with the law of the country where the arbitration took place
- The award has not become binding or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made

- The subject matter is not capable of settlement by arbitration under the law of that country where recognition and enforcement is sought
- The recognition or enforcement of the award would be contrary to the public policy of that country

The last two of the foregoing grounds will be taken into consideration by the domestic court, but the rest of them have to be put forward by the party against whom the arbitration award is sought to be enforced. Otherwise, as the plaintiff does not have the burden of proof, the court will not take them into account by itself.

*Revision au fond* is available in Turkish legal system, and the assessment of the Turkish Courts on the foreign arbitration award is limited to the examination as to whether the arbitrary award and the arbitrary proceedings meet the provisions of the New York Convention and the IPPA, meaning that the Turkish Court cannot handle the matter with regards to the disputes merits which have already been determined by the foreign arbitration proceedings unless the foreign arbitrary award is against the principles of the public policy.

The articles regarding the enforcement of foreign arbitration awards under the IPPA and the provisions of the New York Convention are similar and there are not significant differences. To that extent, it is important to remember that the provisions of the IPPA are applicable if the award is delivered by a non-signatory country to the New York Convention.

### *Procedure*

It is allowed under the Article V/1/(c) of the New York Convention to enforce only a part of the arbitrary award which is also granted under the Article 62 of the IPPA.

Pursuant to the Article 61 of the IPPA, the required documents to commence the enforcement of a foreign arbitral award are as follows:

- A submission with the request for the enforcement of the arbitrary award
- The original or the legalised copy of the arbitration agreement or arbitration clause
- The original or the legalised copy of the arbitrary award which has to be final, binding and enforceable
- A legalised power of attorney which authorizes the lawyer(s) to act on behalf of the principals
- Translations of any document in foreign language by a sworn translator

The proceedings for the enforcement of a foreign award may take a period from six to twelve months, excluding a possible appeal application to the higher court which may continue for about a year.

Once the enforcement decision of the court is final, then the arbitration award could be executed by the bailiff; and in case of non-payment, the bailiff could start confiscation procedure or resort to other methods available to them under the Execution and Bankruptcy Act to discharge the awarded payment. This procedure could take a period from one to six months.

## 2.MANDATORY MEDIATION SYSTEM IN TURKISH LAW

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The Law no. 6325 that arranges to solve legal disputes by way of mediation entered into force on June 22, 2013. However, unlike the legal systems adopting mediation as a dispute solution system, mediation in Turkey has not become a legal remedy preferred for the solution of the disputes within the period of over four years. Although the parties that do not want to apply to the law for the solution of the disputes bargain externally on the dispute, there are not enough witnesses in practice indicating that these people benefit from mediation.

The main reason that mediation is developed as a solution of disputes with a special law in Turkey is to reduce the workload of the courts. Indeed, the number of current courts and judges has become insufficient to meet the cases in Turkey; therefore, the conclusion of the cases might take long years, the duration between two trials might take 5-6 months due to the number of files. It is obvious that providing the solution of some disputes without bringing to trial will be advantageous in terms of current cases.

Due to the arbitrary nature of mediation, even though the Mediation Law accepts that the parties apply to this means by their own will without any force, extremely limited applications as mentioned above have necessarily directed the Lawmaker to mediation. In accordance with Article 3 of the Law on Labor Courts accepted on 12.10.2017, "It is the cause of action to apply to mediation in the cases opened upon re-employment lawsuit with the worker's or employer's claim and indemnity based on law, personal or collective employment contract." Thus, the "mediation as a cause of action" institution was introduced into Turkish Law for the first time. The European Court of Justice's decision of 18 March 2010, "*Rosalba Alassini and Others*," indicates that "as long as the extra-judicial compulsory mediation does not result in a binding decision, does not cause a significant delay in the case, does not exclude the jurisdiction of the court due to periods of limitation, and is not very expensive", it is not contrary to the European law. In case of compulsory mediation in Turkish law, the maximum period of mediation is limited to three weeks; and in case the parties fail to agree at the end of the interviews taking less than two hours, it is predicted that two-hour fee amount will be paid from the budget of the Ministry of Justice.

Thus, it is possible to state that current compulsory mediation regulation complies with the related resolution of the European Court of Justice. Therefore, according to the results of this first compulsory mediation initiative, it is highly probable that in the near future the necessity of first resorting to a mediator in terms of any kind of private law dispute arises.

### **3. APPLICATION OF THE NEW (2015) LIMITS IN TURKEY UNDER 1996 PROTOCOL TO LLMC 1976**

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As you will recall, an amendment was made by the IMO on 19 April 2012 to increase the limits of liability in the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims (LLMC).

The amendments came into effect internationally in June 2015 through the Protocol's tacit acceptance procedure. This meant the amendments were deemed accepted at the end of 18 months after the date of notification to all contracting states, and entered into force 18 months thereafter on 8 June 2015.

As per article 8 (paragraph 9) of 1976 Protocol, all contracting states shall be bound by the amendment, unless they denounce the Protocol at least six months before the amendment enters into force.

However, the implementation of the amendments under national laws depended upon each contracting State's domestic procedures for giving effect to international treaties.

Turkey has not denounce the Protocol; however, the amendment has neither been approved by the Council of Ministers or the Parliament nor been published in the official gazette, which is a necessity for the implementation of international treaties.

There is no certainty whether Turkey has adopted the dualist or monist notion in respect of enactment of international treaties. Despite that the enactment of a national legislation is not required in order to bring the amendments into force, the treaties/protocols should have been approved by the Council of Ministers or the Parliament and published in the official gazette.

There are different opinions on whether the abovementioned procedure should be concluded for giving effect to the amendment or it should have a direct effect as per the 1996 protocol wording.

We have not had the chance to see the approach of court to the amendment, yet. However, we will inform you once we test the application of the new limits.

## **4. LIMITATION OF LIABILITY IN BLACK SEA COUNTRIES**

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Limitation of liability for the ship owner is a basic and fundamental institution of the shipping law. According to this institution, the liability of the ship owner is limited, which is based on a method of calculation per gross tonnage. One of the reasons of such limitation is promoting the sea transport; otherwise, i.e. if the liability would be unlimited (that is to say that if claimants would be able to pursue everything the owner possesses, not only his/her other ship but also his other investments, his house, etc.), this business would be a very risky business for the ship owner, which would turn it into a profession that nobody would want to do.

The present regime of limitation of liability is based on 1976 LLMC convention. However, it has been upgraded in 1996 due to the changing need of the commercial world.

The liability regime in the Black Sea as per above conventions is as follows:

Turkey – Party to 76 LLMC and also party to 96 Protocol  
Bulgaria – Party to 76 LLMC and also party to 96 Protocol  
Romania – Party to 76 LLMC and also party to 96 Protocol  
Ukraine – Party to neither 76 LLMC nor 96 Protocol  
Russia – Only party to 96 Protocol  
Georgia – Party to 76 LLMC

We can see from the list above that the position of Russian Federation is interesting. During 1976 and the following years, that state was non-existent; however, Russia has accessed 96 protocol, which makes us believe that there is a special legislation for the transition period, making the Russian Federation automatically a party to those conventions ratified by the USSR.

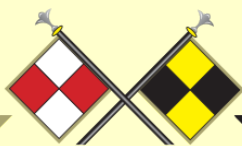
## **5. NOTIFICATION PROCEDURE TO FOREIGN FLAGGED VESSELS IN TURKEY**

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With the provision in the article 1104 of the New Turkish Commercial Code, along with the various processes of the master regarding voyage safety when the ship is outside the port of registry, any cases or enforcement towards the owner or the lessee of the ship may be directed to the master with being valid towards them. This provision gives the opportunity to serve notifications to the master as referred to the owner a case, or execution proceeding will be filed towards the owner on foreign-flag vessels. In practice, the notification will be deemed valid and in due form upon being served to the master with Turkish and English translation as referred to the owner.

The purpose of this provision is to prevent vessels and cargo from waiting for no reason and occupation of the ports and unjust treatment of the ship's crew due to undelivered notifications to the legal entities shown in the register.

This rule is included in the New Turkish Commercial Code, but since it is related to Procedural Law, it will be applied as part of International Procedural Law (lex fori). Therefore, the law governing the foreign registered ship and the master in terms of their private legal relations shall not be competent. Due to the same reason, whether the master of a Turkish flagged vessel can be served abroad as the representative of the shipper shall be determined as per the foreign Procedural Law applicable in the location of the ship.



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*Ulgener LC/LO, based in Istanbul, with its office right in the Shipping Center, where the most major Turkish ship holding groups have their headquarters, is a law firm dedicated mainly to shipping matters, with a wide scope including all kind of related issues, such as: P&I matters, such as cargo claims - disputes arising from bills of lading, crew claims, pollution, liens on vessels; as well as accidents, such as collisions, salvage, wreck removal and general average matters, etc. FD&D matters, such as disputes arising from voyage and time charterparties, i.e. forced freight & demurrage collection, liens on cargoes, etc. H&M, war and strike clauses and cargo insurance matters, such as salvage, general average adjustment, etc, also representing underwriters and providing legal advice regarding local and international law, collection of outstanding premiums on behalf of P&I Associations, Ship Finance - Sale & Purchase, as well as assisting foreign banks and other financial institutions, covering also mortgages and disputes arising out of mortgages, Enforcement of foreign arbitration and court awards, Advising shipowners and P&I Clubs regarding issues arising from Turkish as well as International maritime law, (legal correspondent of a P&I Club within International Pool) Also assisting owners for protection of their interests and avoiding conflicts on drafting charterparties, bills of lading, MOA's and other documentation, advising leading Turkish steel manufacturers for shipping related issues, Serving as legal advisers to Turkish Chamber of Shipping, also representing the Chamber at the Bimco Documentary Committee.*

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