MIDDLE EAST AND TURKEY

Israel

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*With more global companies undertaking business in Israel in recent years, infrastructure, construction, and cross-border agreements have noticeably increased. Unfamiliar with the Israeli legal system and the governing law, these companies often bypass Israeli laws and jurisdiction in their agreements, opting for arbitration. However, international arbitration ("**IA**") had long remained underdeveloped in Israel, with the Arbitration Law enacted in 1968 ("**Arb. Law**") dealing primarily with local arbitration, without addressing the specific challenges and unique features of international arbitration.*

*Against this backdrop, the International Commercial Arbitration Bill, 2023 ("**ICAB**") proposal has been introduced, aiming to add Israel to the list of 87 countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration (2006) ("UNCITRAL Model Law"), substantially changing Israel's landscape of arbitration. ICAB is slated to be adopted within a few weeks of mid-January 2024.*

In this article, we will review the most significant changes enacted by ICAB and offer a quick review of its influence on urgent relief and their enforcement under Israeli Law.

Highlights of the ICAB

The most important contribution of the ICAB is the distinction between local and international arbitration. While the Arb. Law defines IA awards as given outside of Israel; the ICAB establishes a clear definition of IA, compatible with Article 1(3) of the UNCITRAL Model Law. The only difference between the ICAB and the UNCITRAL Model Law is that the ICAB does not recognize the parties' autonomy to agree to conduct the arbitration as IA even when the dispute does not fully comply with the definition set in the ICAB. The intention is to retain local arbitration proceedings under the Arb. Law. However, the current discussions in

Parliament seem to point to this section being re-introduced in a manner that would promote and preserve party autonomy even more than the current form of the UNCITRAL Model Law.

The definition of IA raises questions regarding the scope of proceedings that apply to this term, mostly since it is common for foreign companies acting as main contractors in Israeli infrastructure projects to be incorporated as an Israeli vehicle, whether for tax reasons or due to the state's requirements in national projects executed via tenders. In such cases, the ICAB will not necessarily apply, and the arbitration will be governed by the Arb. Law.

Another important change lies within Article 6 of ICAB, which sets limits on the court's powers to intervene with the arbitral jurisdiction except in matters it expressly allows. The ICAB intends to convey to IA users that the judicial system will act as a supporting authority for arbitral disputes but will refrain from intervening in most issues that may arise as part of IA proceedings. This section expresses the great importance of parties' autonomy, its supremacy in such matters, and the need for courts to recognize and promote it. This principle also reflects the tendency in Israeli case law to refrain from interfering with arbitral proceedings and awards or to do so only in the rarest circumstances.

Urgent Interim Measures – Current and Future Position

Perhaps the most significant change compared to the existing Arb. Law lies within Articles 18-26 to ICAB dealing with urgent interim measures, allowing parties to enforce urgent relief more easily.

The Arb. Law offers two options for a party seeking urgent relief bonded by a cross-border Israel-related IA dispute:

- File for an Emergency Arbitration ("EA") to the selected institution before the constitution of an arbitral tribunal.
- Request an urgent relief from the Israeli courts.

Israel's Judicial Authority and its Advantages in the Matter of Urgent Relief

The authority of Israeli courts to grant interim relief is anchored in legislation and several case laws and is not anticipated to vary distinctively under the ICAB.

Article 16(a)(5) of the Arb. Law grants Israeli courts a jurisdiction to grant urgent relief which runs in parallel to the equivalent jurisdiction of the appointed arbitrator in matters, and Article 75 of the Israeli Courts Law, 1984 allows the Israeli court (adjudicating a civil matter) to issue remedies as it deems fit.

The Supreme Court addressed this matter in **CA 102/88 Maadanei Avaz Hakesef v. Cent Or S.A.R.l., 42(3) P.D. 201 (1988)**. This case involved a contract with an arbitration clause with the seat in London, governed by English law. The Supreme Court determined that Israeli Courts have parallel jurisdiction to IA on matters of temporary relief, even on an ex-parte basis. The court ruled that the interim process is not the substance of the matter, and, as such, it does not interfere with the arbitrator's jurisdiction.

Considering the concurrent jurisdiction, there are a few advantages of the interim procedure handled by the Israeli courts as opposed to the EA mechanism, making the former more appealing.

First is the **enforcement** obstacle of interim relief granted by the EA mechanism, since under the current Arb. Law (Articles 23 and 37), any interim decision granted by the EA mechanism is deemed an "order"

rather than an "award", and, as such, its enforcement requires the Israeli Court to hold a de-novo examination of the party's arguments and rights. Unlike an EA order, an interim relief granted by an Israeli court comes into force immediately. This option may also serve as an intermediate solution until the appointment of an arbitral tribunal or the constitution of an EA.

Second is the **timeframe** for granting each one of the relief. For example, according to Appendix V of the International Chamber of Commerce Arbitration Rules (2021) ("ICC Rules"), an emergency arbitrator must be appointed within two days, and the order must be issued within 15 days of both parties filing their respective submissions (and even longer in some cases). While under Israeli law, urgent relief might be granted in just a few hours in matters such as asset seizure and prohibitive injunctions.

In addition, Israeli courts may grant relief on an **ex-parte basis**.

Lastly, appealing for interim relief before an Israeli court is more **cost-efficient**: while Appendix V of the ICC Rules sets the opening fees as high as USD 40,000, making it an expensive mechanism in case of relatively small disputes under Israeli court jurisdiction, the fee is based on the amount of the requested relief, or the award claimed.

Given these four clear advantages of the Israeli procedure as opposed to the EA mechanism and because of the vast majority of arbitration institutions allow parties to file requests for relief with a competent judicial authority (for example, article 29(7) of the ICC Rules), it is much easier, efficient and therefore more common to immediately seek relief before Israeli courts.

Advantages in Handling Urgent Interim Measures and Their Enforcement in Light of the Upcoming ICAB

The final proposed set of modifications under the ICAB will allow easier enforcement of urgent relief granted in international and domestic arbitrations while keeping Israel's concurrent judicial authority.

As one of the main goals of the ICAB is to encourage courts to refrain from intervening in awards and orders given in IA proceedings, under Articles 24 and 25 of ICAB, Israeli courts are provided with a narrow list of reasons allowing them to deny enforcement of interim relief granted by an arbitral tribunal. Therefore, enforcement of interim relief will be preferable to its denial, with Article 25(a)(2)(a) even allowing the court to redraft the remedy of an urgent relief (without altering its essence) in case it does not align with its jurisdictional powers.

Nevertheless, the ICAB still gives preference to Israeli courts regarding urgent relief. For instance, Article 18 provides a closed list of urgent remedies available to the arbitral tribunal. More accurately, the arbitral tribunal will be authorized to grant interim remedies intended inter alia to preserve the existing situation, prevent harm to the arbitration process, avoid damage or preserve assets against which a future arbitration award may be enforced, or preserve evidence that may be essential to the proceedings.

Moreover, although the original UNCITRAL Model Law allows parties to request urgent relief on an ex-parte basis, the ICAB proposal in its current form does not expressly regulate the enforcement of ex-parte emergency measures granted by arbitrators."

On the other hand, as Article 26 of ICAB determines that Israeli courts will keep their existing authority for urgent interim relief, including the power to issue ex parte interim orders, they will have the legal authority to grant any interim remedy as they see fit. However, ICAB determines that a court **must** consider the unique characteristics of IA when exercising its jurisdiction to grant urgent interim relief.

The new bill promotes the use of EA and urgent relief by IA (by changing the enforceability status), but only partially, and will keep the advantage of the courts regarding extremely urgent and ex-parte applications in place.

ABOUT THE AUTHORS

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Turkey

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Throughout 2023, Türkiye has took taken important steps in refining its approach to international arbitration with national and international developments As Turkish courts deliver remarkable rulings in the field of arbitration, Türkiye has navigated a tough year marked by two international arbitration awards involving different states. Despite these challenges, Türkiye has remained committed to enhancing its role in international arbitration by ratifying a new bilateral investment treaty. We are excited to share the significant developments concerning arbitration of 2023 with you in this review, shedding light on Türkiye's development with regard to the arbitration practice.

Recent Developments in Investment Treaty Arbitration

Ratification of a Bilateral Investment Treaty

As per the Presidential Decree issued on April 25, 2023, the Belarus-Türkiye BIT (2018) became effective on December 30, 2022, replacing the former treaty between the two nations.

Disputes

While no claims have been brought against Türkiye in 2023, Güriş İnşaat ve Mühendislik Anonim şirketi, which is a Turkish construction company, has filed a case (Güriş v. Saudi Arabia) with the International Centre for Settlement of Investment Disputes ("ICSID") against Saudi Arabia on August 21, 2023. The company claims it has suffered a denial of justice within the Saudi judicial system.