



Due Process Rights in Arbitration in the light of the Austrian Supreme Court's Decision: Remote Hearings During the Pandemic^(*)

Avusturya Yüksek Mahkemesi Kararı Işığında Tahkimde Adil Yargılanma Hakkı: Küresel Salgında Online Duruşmalar

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Abstract

The limit of the arbitral tribunal's power has been a controversial subject. There is an ambiguity about whether due process rights are violated if the arbitral tribunal conducts a virtual hearing contrary to one of the parties' objectives. In particular, virtual hearings have come to the fore during the Covid-19 pandemic. In this study, by the evaluating the Austrian Supreme Court's groundbreaking decision regarding due process rights during the global pandemic, the framework of due process rights in arbitration and the power of arbitrators in holding remote hearings are examined, and solutions are proposed in light of current developments of international arbitration.

Keywords

Due Process Rights, International Arbitration, Virtual Hearings, The Power of Arbitrators, Impartiality and Independence of Arbitrators.

Öz

Tahkim yargılamasında hakem heyetinin yetkilerinin sınırlarının belirlenmesine ilişkin tartışmalar güncelliğini korumaktadır. Bu bağlamda hakem heyetinin bir tarafın talebinin hilafına online duruşma yapması durumunda ilgili tarafın adil yargılanma hakkının ihlal edilip edilmediğine ilişkin belirsizlik söz konusudur. Özellikle Covid-19 küresel salgını ile birlikte tahkim yargılamasında online duruşmaların etkin kullanılmasıyla bu sorunun daha da belirginleştiği görülmektedir. Bu makalede, Avusturya Yüksek Mahkemesi'nin küresel salgın sırasında yapılan tahkim yargılamasında adil yargılanma hakkına ilişkin vermiş olduğu özgün karar değerlendirilerek, tahkim yargılamasında adil yargılanma hakkının kapsamı bağlamında hakem heyetinin online duruşma belirleme konusundaki yetkilerinin sınırları incelenmekte ve uluslararası ticari tahkimdeki güncel gelişmeler esas alınarak bu belirsizliği gidermek için çözüm önerilerinde bulunmaktadır.

Anahtar Kelimeler

Adil Yargılanma Hakkı, Uluslararası Ticari Tahkim, Online Duruşma, Hakem Heyetinin Yetkileri, Hakemin Tarafsızlığı ve Bağımsızlığı.

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INTRODUCTION

In a society ruled by law, no one should be deprived of her life, liberty or property without due process rights, which is a chance to be heard and to introduce a case as stated in rules set forth by authorities. The concept of due process has been a controversial and a vital subject of procedural law.¹ Because once the award is rendered, a new marathon begins: procedural issues to set aside the award.² In particular, due process in arbitration is a critical subject because of its nature. Arbitration is a gift and a curse³ in terms of due process rights protection. In this framework, the Austrian Supreme Court (*Oberster Gerichtshof, OGH*), recently, held a case⁴ in context of due process in arbitration during the pandemic. The court evaluated the application regarding the violation of due process rights based on a virtual hearing in arbitration proceedings, and delivered a remarkable verdict. Before analysing the OGH's decision, for a better understanding, the underlying justification for the measurement of due process in arbitration and the limits of arbitrators' power are briefly examined in terms of the scope of due process rights and its dimensions. In order to properly understand the question at stake, certain fundamentals should be established from the outset.

This study focuses on due process in arbitration during the pandemic. The remainder of this paper is divided into three sections. The first section presents the concept and effectiveness of due process in arbitration. The second section considers the ground-breaking case of the Austrian Supreme Court's decision on due process during the pandemic. Finally, the third section provides concluding remarks and makes some proposals for future research.

¹ JDM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 *Arbitration International* 179, 179.

² Gisela Knuts, 'Jura Novit Curia and the Right to be Heard - An Analysis of Recent Case Law' (2012) 28 *Arbitration International* 669, 669; Peter M Hoffman and Lindsee Gendron, 'Judicial Review of Arbitration Awards after Cable Connection: Towards a Due Process Model' (2010) 17 *UCLA Entertainment Law Review* 1-2.

³ Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 2-7; Charalambos Pamboukis, 'On Arbitrability: The Arbitrator as a Problem Solver' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 123; Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 2-21. W Michael Reisman, *Systems of Control in International Adjudication and Arbitration Breakdown and Repair* (Duke University Press Books 1992) 7.; Thomas E Carbonneau, *Cases and Materials on Arbitration Law and Practice* (5th edn, Wolters Kluwer 2009) 11; Ziya Akıncı, *Milletlerarası Tahkim* (4th edn, Vedat 2016) 3.

⁴ OGH Docket No. 18 ONc 3/20s (2021).

I. DUE PROCESS AS A PRINCIPAL OF LAW IN ARBITRATION

A. DUE PROCESS

Due process is a set of criteria that protects people having relations with the State and authorities.⁵ To more specify, due process is such a shield which protects parties against unfairness; therefore, due process rights are protected under constitutions. It is commonly known that it is related to criminal matters; but actually, it is an inseparable part of civil matters. Within civil matters, arbitration in commercial matters must meet the certain requirements of due process rights; *ergo*, it would likely to be considered due process as a principal of law.⁶ Arbitration being an alternative dispute resolution method to court trials is not contrary to *lex proceduralia*,⁷ which covers due process requirements even if arbitration agreement draws the line of accessing to courts. Whilst arbitration is a private dispute resolution method, in which parties are not required to be protected against States, parties' due process rights in arbitration are protected.⁸ The main reason why due process rights are protected in arbitration lies in finality and binding features of arbitration.⁹ In this context, even though arbitration agreement depends on parties' autonomy stemming from the concept of freedom of contract, the result of arbitration, i.e. arbitral award, is directly related to states' powers.¹⁰ Therefore, in arbitration procedure, arbitral tribunal must consider due process rights in accordance with due process standards in courts.¹¹

The key conditions of fair trial and arbitrators' autonomy are equal treatment of parties and providing the opportunity to present parties' cases.¹² The arbitrators must ensure that each party has a sufficient opportunity to present its case.¹³ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention)¹⁴ sets three essential standards for international arbitration: (1) the arbitration must be in conformity with the arbitration agreement;

⁵ Müge Vatansver Öztürk, *Adil Yargılama İlkesi* (Seçkin Yayıncılık 2022) 23; Sezin Aktepe Artık, *Medeni Usul Hukukunda Adil Yargılanma Hakkı* (Seçkin Yayıncılık 2014) 37-40.

⁶ Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2014) 2144.

⁷ Matti Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (Oxford University Press 2010) 201.

⁸ *ibid* 1.

⁹ Lucy Reed, 'Ab (Use) of Due Process: Sword vs Shield' (2017) 33 *Arbitration International* 361, 365.

¹⁰ Charles H Oldfather, 'Compulsory Arbitration and Due Process' (1953) 1 *Kansas Law Review* 281-283.

¹¹ Kurkela and Turunen (n 6) 2.

¹² Lew (n 1) 179-180.

¹³ Pamboukis (n 3) 123.

¹⁴ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>.

(2) fair and equal treatment, i.e. international due process, must be applied to all parties; and (3) the international public policy must be respected in the arbitral award.¹⁵ With reference to the enforceability of arbitral awards in light of the New York Convention, arbitral tribunal must meet the stated international quality standards, which concerns procedural rules.¹⁶ That is to say, it is commonly accepted that due process rights are opportunity to be heard, procedural fairness, access to justice, and equal treatment.¹⁷ In universal legal sphere, there are standards of measurement in terms of due process. According to Article 18 of UNCITRAL Model Law,¹⁸ ‘the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.’ Also, according to ICC Article 22(4),¹⁹ ‘...in all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.’ British perspective on due process is the same as others. According to English Arbitration Act:²⁰

The tribunal shall (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Even if universal codes specify the higher standards of due process requirements, arbitral tribunal would prefer to apply the lower standard of due process than those exercised by judges in litigation because of the parties’ discretion on waiver principles and the party autonomy.²¹ In this regard, due process can be divided into four elements or principles in arbitration, (i) a party shall be notified of the case against it; (ii) in this way the party has a chance to introduce its claims and respond to the claims put against it; (iii) before an unbiased and neutral tribunal; (iv) that behaves all parties with equality.

¹⁵ Lew (n 1) 179-181.

¹⁶ Kurkela and Turunen (n 6) 15.

¹⁷ Gabrielle Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (2003) 36 Vanderbilt Journal of Transnational Law 1313, 1313.

¹⁸ UNCITRAL Model Law on International Commercial Arbitration, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

¹⁹ International Chamber of Commerce, Arbitration Rules, available at <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf>.

²⁰ English Arbitration Act of 1996, available at <https://www.legislation.gov.uk/ukpga/1996/23/contents>.

²¹ Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 100-121; Bernardo M Cremades, ‘The Arbitral Award’ in LW Newman and Richard D Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (JurisNet 2008) 813.

B. A MUST FOR DUE PROCESS: FAIR ARBITRATION

Natural justice, a time-honored law doctrine which is implemented in all judicial proceedings and having an impact on individuals' rights,²² incorporates two foundational motto ensuring equal treatment: (i) *audi alteram partem* (fair hearing) and (ii) *nemo iudex in sua causa* (independence and impartiality of the adjudicator).²³ Fair trial, an international principle that everyone must comply with during trial, is essential in arbitration.²⁴ According to Carbonneau,²⁵ the fairness question in arbitration arises from the circumstances and content of the arbitration agreement, and the operation and conduct of arbitral proceedings. Within this context, due process requirement is divided into two. The first one is the jurisdiction of the tribunal, arbitration agreement and the guarantee of sufficient access to justice.²⁶ The second is the procedural requirement, i.e. fair arbitration. Put it another way, these are fairness of the procedure itself, equality of arms, reasonable opportunity to present one's case and the principle and the rule of *audiatur altera pars* (let the other side be heard as well).²⁷ As Park states 'due process and efficiency, of course, do not always marry well in practice.'²⁸ This means that not only access to arbitration is enough, but the procedure should also be fair in order to have an enforceable award. Fair arbitration means that parties must be able to functionally participate in the proceedings.²⁹ Arbitrators' discretion regarding due process rights must always be exercised in the shadow of fairness.³⁰ And arbitral awards may be challenged for serious irregularities and set aside if those irregularities results in substantial injustice.³¹ What is meant by justice here is that the parties can access the judgment in an equal way.³² That is to say, equality of arms, reasonable opportunity to present one's case, the principle and rule of *audi alteram partem* are indispensable. Considering a fair proceeding, the arbitrators

²² Paulo Ferreira da Cunha, *Rethinking Natural Law* (Springer 2013); Hörnle (n 20) 97.

²³ Hörnle (n 21) 97.

²⁴ Paulsson (n 3) 2-7; Pamboukis (n 3) 1.

²⁵ Thomas E Carbonneau, 'Defining Arbitral Due Process' (2001) 3 *Journal of Alternative Dispute Resolution* 14, 14.

²⁶ Kurkela and Turunen (n 6) 1-2.

²⁷ Klaus Peter Berger and J Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016) 32 *Arbitration International* 415, 421.

²⁸ William W Park, 'Two Face of Progress: Fairness and Flexibility in Arbitral Procedure' (2013) 23 *Arbitration International* 499, 499.

²⁹ Kurkela and Turunen (n 6) 3-4.

³⁰ Reed (n 8) 367.

³¹ Park (n 28) 500.

³² Carbonneau (n 25) 14-15.

must be impartial and independent, which are condition *sina qua non* (without which it could not be).³³

1. Impartiality and Independence of Arbitrators as Due Process Requirements

In arbitration, arbitrators' Sword of Damocles³⁴ is that the possibility of rendered award can be set aside or rejected enforcement for the violation of due process rights by state courts.³⁵ Arbitrators are very diligent to consider the requests regarding situations where due process rights might be an issue.³⁶ While conducting arbitral process, arbitral tribunal exercises its power when a due process issue arises.³⁷ While exercising their power in arbitral proceeding, arbitral tribunal finds itself in a 'grey zone' in which parties' true rationale is not effortlessly understandable and the 'right and just' decision is not straightaway obvious.³⁸ Due process is one of the grey zones for arbitral tribunal while exercising their power. In five circumstances where these grey zones regarding due process arise when one of the parties: (1) applies for the extension of a deadline, (2) submits of an unrequested but unavoidable document, (3) presents a document after a drop-dead date, (4) introduces any last-minute new claim, and (5) requests to reschedule the hearing in last minute. While arbitrators exercise their power on these grey zones, the essential inquiry regarding the arbitral tribunal is as to its impartiality.

Arbitrators' impartiality, a significant factor among due process requirements, at every step along the way, plays a vital role to have an enforceable award.³⁹ The impartiality of an arbitrator means both their unbiasedness towards the parties and the lack of prejudice in their approach to the subject-matter of arbitration.⁴⁰ As can be understood from its definition, the impartiality of arbit-

³³ Gary Born, *International Arbitration: Cases & Materials* (Aspen 2010) 1179.

³⁴ Mayer Henry, 'The Developing Law Arbitration and the Judicial Sword of Damocles' (1953) 4 Labor Law Journal 723-724.

³⁵ Berger and Jensen (n 27) 417. Also, this fear is stated in Queen Mary's Survey in 2015 as 'Due process paranoia describes a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully.' See Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (accessed 10 April 2022).

³⁶ Elizabeth A Murphy, 'Standards of Arbitrators Impartiality: How Impartial Must They Be? - Lifecare International, Inc. v. CD Medical, Inc.' [1996] Journal of Dispute Resolution 463, 476; Loretta Malintoppi, 'Remarks on Arbitrators' Independence, Impartiality and Duty to Disclose in Investment Arbitration' (2008) 7 The Law and Practice of International Courts and Tribunals 351, 356.

³⁷ Hoffman and Gendron (n 3) 3-4.

³⁸ Reed (n 8) 361.

³⁹ Erman Eroğlu, 'Enforcement in Turkey of Foreign Arbitral Awards: The Challenge of Business Location' (2022) 1 Law and Justice Review 134.

⁴⁰ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008); Didem Kayalı, 'Milletlerarası Ticari Tahkimde Hakemlerin Bağımsızlığı ve Tarafsızlığı' (Doktora Tezi, Ankara Üniversitesi 2015) 22 <https://tez.yok.gov.tr/UlusalTezMerkezi/tez-Detay.jsp?id=gmrFwxjwVWUd3VpYSXXkQ&no=DO_YZcZvjYFxxQI8rJ0mEg> accessed 5 May 2022.

rator is strictly not based on objective standards. The impartiality of arbitrator somewhat like walking on slippery ground, because unlike the independence of the arbitrators, it is not defined by objective standards.⁴¹ Thus, forming a standard based on objective evaluation of the impartiality of arbitrators is a necessity for fairer proceeding.⁴² In order for such a concept to create, first of all, the definition of arbitrator impartiality needs to be revised and placed on a solid ground. There are some opinions as to what these impartiality standards must be. According to Hascher,⁴³ arbitral tribunal performs an adjudicatory role; thus, arbitrators cannot act as the representative of parties. Even though the arbitrator is appointed by any of parties, he cannot act partially after being selected. In fact, the appointed arbitrator must break of his ties with all parties. In a sense, according to Rau,⁴⁴ since the arbitrator is a “special judge”, they must be as impartial as a judge or jury. After an arbitrator is appointed, he must act as impartially as a juror. The impartiality that is expected from an arbitrator is at a level similar to the way a juror would act and how much connection a juror would have with the parties. According to Cole,⁴⁵ arbitrators must decide in an impartial manner. Nonetheless, the party-appointed arbitrator must be aware of his legal position of the party which selected him and should convey the legal arguments to the other arbitrators. According to Rogers,⁴⁶ arbitrators’ ethical duties are very particular due to their role. Even though this role looks quietly similar to the one of judges’, it is different in a variety of aspects. In this context, it is definitely for the best to base the impartiality term on objective standard based on equality of arms and reasonable opportunity to present one’s case.

2. Equality of Arms and Reasonable Opportunity to Present One’s Case

That the parties should be treated equally during the trial is a universal rule of law. In the provisions of the UNCITRAL Model Law, better-known as ‘Magna Carta of arbitral procedure’, explicitly states ‘the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.’ The requirement of equality and full participation is the most basic rule of the due process and is directly related to the public order. The European Court of Human Rights has concluded that the right to access of courts and a public trial

⁴¹ Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 91.

⁴² Dominique Hascher, ‘Independence and Impartiality of Arbitrators: 3 Issues’ (2012) 27 *American University International Law Review* 789, 789.

⁴³ *ibid.*

⁴⁴ Alan S Rau, ‘Integrity in Private Judging’ (1997) 38 *Texas Law Review* 485, 529.

⁴⁵ Tony Cole, ‘Authority and Contemporary International Arbitration’ (2010) 70 *Los Angeles Law Review* 801, 854.

⁴⁶ Rogers (n 41); Catherine A Rogers, ‘The Ethics of International Arbitrators’ in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (JurisNet 2008) 11.

can be relinquished in favor of arbitration through an agreement.⁴⁷ Notwithstanding, the European Convention on Human Rights (ECHR)⁴⁸ is not out of game in terms of arbitration. As arbitration is an alternative dispute resolution method of litigation,⁴⁹ essential procedural standards need to be protected for loss of access to court. As stated in Article 6(1) of the ECHR:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

According to Hörnle,⁵⁰ the ECHR Article 6(1) is applicable in arbitration. Because a binding arbitration agreement prevents any party from seeking resolution of the dispute through the conventional, ‘competent’ courts established by law, arbitration has the potential to conflict with the right to a fair hearing in a court of law. This is because arbitration agreements are enforceable (in the sense that the courts impose a stay of legal procedures), and the final award is also enforceable. As a result, an arbitration agreement could theoretically deprive a person of their right to a fair trial in court, and hence of their right to compensation under Article 6(1) of the ECHR. The essential question here is whether the due process rights established in Article 6(1) apply to arbitration because of its binding nature and finality. Because the ECHR’s human rights standards are primarily applicable to state actors, it’s unclear if they can also be applied in private relationships. Surprisingly, there is no consensus on this complicated subject. Essentially, three theories can be distinguished. The first theory contends that Article 6(1)’s provision of a fair trial applies directly to arbitration, the second that it does so indirectly, and the third that it does not apply at all.

⁴⁷ Hörnle (n 21) 100; Kurkela and Turunen (n 6) 2.

⁴⁸ European Convention on Human Rights, available at https://www.echr.coe.int/documents/convention_eng.pdf (accessed 11 April 2022).

⁴⁹ There has been ongoing discussions in the literature regarding whether or not arbitration is a form of alternative dispute resolution. Some scholars claim that arbitration is not a form of ADR because of its nature. See Frank EA Sander, ‘Future of ADR - The Earl F. Nelson Memorial Lecture’ [2000] *Journal of Dispute Resolution* 3, 3; Süha Tanriver, ‘Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk’ [2006] *Türkiye Barolar Birliği Dergisi* 151, 171; Ergin Nomer, *Devletler Hususi Hukuku* (Beta 2017) 555.

⁵⁰ Hörnle (n 21).

The section has recognized the fundamental due process principles and evaluated the degree to which they utilize to arbitration and the way they are applied in the arbitral process. To that end, two definitive examples of due process, independence and impartiality of the arbitrators and the fair hearing principle, have been discussed. All in all, it is observed that standards of due process in arbitration is lower than those in litigation in terms of these two principles.⁵¹ For a better understanding of the situation, in the lights of this information, the Austrian Supreme Court's decision should be analysed.

II. THE OGH'S GROUND-BREAKING DECISION ON DUE PROCESS RIGHTS IN ARBITRAL PROCEEDINGS

A. FACTS IN THE CASE

Pursuant to the arbitration agreement that parties agreed upon, parties submitted their disputes arising from underlying contract to arbitral tribunal in 2017. After arbitral tribunal scrutinized the claims that parties alleged, the arbitral tribunal decided to come together with parties on March 2020 for one day evidentiary hearing. In January 2020, arbitral tribunal decided holding a hearing on 15 April 2020. By mid-March of 2020, parties discussed the advantages and drawbacks of holding conference call for remote arbitral proceedings. With the spread of the pandemic disease globally, when the possibility of travel restriction became a current issue, one of the parties (respondent) argued that the arbitral hearing should be held in person at a later date. On 8 April 2020, the arbitral tribunal decided that the hearing was going to be conducted on 15 April 2020. Also, the tribunal stated that the hearing was going to be held remotely instead of face-to-face because of the global pandemic. That is to say, the hearing was going to be conducted by way of video conference.

The place of arbitration is Vienna, Austria, and parties selected Vienna International Arbitration Centre (VIAC) for arbitral proceeding. The arbitral tribunal decided that the hearing was going to be held at 15:00 local time in Vienna. However, the respondent's counsel and one of witnesses reside in Los Angeles, California, the United States of America. The time difference between Vienna and Los Angeles is nine-hour. To put it in a different way, the hearing time in Los Angeles is 6:00 in the morning. The respondent complained about the early morning hours. In addition, while the respondent asserting his complaint, the appointed arbitrator by the claimant rolled his eyes. The respondent challenged the VIAC Board against the arbitral tribunal. However, VIAC refused. After then, pursuant to Austria Code of Civil Procedure Section 583(3), the respondent applied to the Austrian Supreme Court for the annulment of the arbitral award.⁵²

⁵¹ *ibid.*

⁵² OGH Docket No. 18 ONc 3/20s (n 4) 5-7.

B. CLAIMS ARISEN BY THE RESPONDENT

First, the respondent claimed that the arbitral tribunal did not give appropriate notice of hearing day; therefore, they could not properly prepare for the hearing on 15 April. The decision of arbitral tribunal regarding not to postpone the hearing date was given three-business-day before the virtual hearing.⁵³ Second, the respondent claimed that the decision regarding the time of hearing caused an unequal treatment of the parties. The respondent stated that the hearing started at 15:00 local time in Vienna (where the claimant resides) and at 6:00 local time in Los Angeles (where the respondent's counsel and one of witnesses reside).⁵⁴ Third, the respondent claimed that holding a virtual hearing caused the violation of arbitral tribunal's duty of fairness due to the lack of the tribunal's control to prevent the witness tampering.⁵⁵ Precisely, the respondent asserted that the tribunal could not know whether there would be another person in witnesses' room; or whether witnesses would communicate while being examined. The OGH scrutinized each ground asserted by the respondent taking applicable legal standard for the challenge of arbitrators into account.

C. THE OGH'S DECISION REGARDING GROUNDS RAISED BY THE RESPONDENT

1. Challenges of Arbitrators for Remote Hearings

The OGH stated that the arbitral awards must be set aside according to the provisions in the Austrian Civil Procedure Code (*Zivilprozessordnung, ZPO*).⁵⁶ Pursuant to Section 588(2) ZPO, arbitral awards can be set aside by the Austrian Supreme Court. The way the decision can be annulled within the context of the relevant article of the ZPO is the emergence of doubts about the impartiality and independence of the arbitrators. In the OGH's decision, the court stated that inappropriate conduct of proceedings and procedural errors by arbitrators did not constitute a ground for the annulment of the arbitration decision.⁵⁷ The court argued that a serious violation of fundamental procedural principle was required to annul the decision given as a result of the arbitration. However, according to Section 594(2) of ZPO and Arbitration Rules of Vienna International Arbitral Centre (Vienna Rules)⁵⁸ 28(1), as a result of the actions of the tribunal, one of the parties should be at a disadvantage against the other.

⁵³ *ibid* 6.

⁵⁴ *ibid* 7-8.

⁵⁵ *ibid* 13.

⁵⁶ The Austrian Code of Civil Procedure, Arbitration Section (*Zivilprozessordnung, Abschnitt über das Schiedsverfahren*) English version is available at https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2006_1_7/ERV_2006_1_7.html (accessed 11 April 2022).

⁵⁷ OGH Docket No. 18 ONc 3/20s (n 4) 13.

⁵⁸ Rules of Arbitration and Mediation, Vienna International Arbitral Centre, English version is available at https://www.viac.eu/images/documents/vienna_rules/VIAC_schieds_mediationsordnung_2021_e_20211110.pdf (accessed 11 April 2022).

2. The OGH's Decision on Remote Hearings

The principle of treating parties equally is a principle that must be applied by the arbitrators at all stages of the proceedings. The court stated that pursuant to the first sentence of the ZPO Section 594(2), the parties must be treated fairly. This requirement is one of the most prominent procedural principles that must be considered during the whole arbitration process.⁵⁹ To a certain extent, it includes equal treatment of the parties and is part of procedural public policy. The reference to 'fairness' instead of 'equality' in Section 594(2) ZPO clarifies that the focus in the proceedings should not only be on 'formal equality'. Furthermore, fair treatment does not mean that both parties were actually equally involved in the proceedings.⁶⁰ It is crucial that a party has to be given a fair opportunity to participate in the proceedings. Pursuant to the Article 28(1) of Vienna Rules, the arbitral tribunal must conduct the proceedings in accordance with the Vienna Rules and the agreements of the parties, but otherwise at its own discretion. In accordance with Section 594 (2) of the ZPO, Article 28(1) of the Vienna Rules explicitly states that the parties are to be treated fairly and that they must be granted a fair hearing at every stage of the proceedings.⁶¹ The rendered award of the arbitral tribunal resulting from the proceedings conducted without complying with equal treatment principle are annulled by the courts.⁶² Thus, the arbitrators must ensure that the parties participate equally in the proceedings. Even though arbitral tribunal is bound by foundational principle of fair treatment of the parties, it must manage the proceedings in accordance with the authorized scope of its own discretion.

By citing the global pandemic as a reason, the arbitral tribunal rejected the respondent's request for face-to-face trial. The respondent stated that, this violated the principle of equal treatment. The OGH decided on whether the decision of the arbitral tribunal on the request for in-person trial violates the equal treatment principle under global pandemic measures. The Austrian Supreme Court ruled that the refusal decision of the arbitral tribunal on requested in-person trial by the respondent during the Covid-19 global pandemic did not violate the arbitrators' obligation to treat equally.⁶³ The court rejected the respondent's request that the appropriate time was not given, stating that there was no basis. That is to say, the OGH stated that the arbitral tribunal and the parties knew that the next hearing, 15 April, was decided on 15 January. The OGH stated that the parties could be well prepared between 15 January and 15 April.

⁵⁹ OGH Docket No. 18 ONc 3/20s (n 4) 10.

⁶⁰ *ibid* 11.

⁶¹ *ibid* 12.

⁶² *ibid*.

⁶³ *ibid* 13.

The Court stated that it was not appropriate for the respondent to claim that although he knew the date of the hearing for months, he was not prepared sufficiently, and also the starting time of arbitral hearing at 6 a.m. in the morning for the respondent was not against equal treatment principle because the arbitration proceedings are generally conducted out of classical business hours.⁶⁴ In the OGH's opinion, the required fair treatment by the arbitral tribunal was not affected by the starting time of the hearing. The reason behind why the requirement of fair treatment was not affected is that the time difference between Austria and United States of America meant that the entire hearing could not take place during 'classical office hours' for all parties involved, or parts of the hearing for either the participants in Austria or for the party in California.⁶⁵ In addition, the Austrian Supreme Court stated that the parties initially declared that they accepted the problems arising from the geographical difference while making the arbitration agreement. To put it in another way, through the agreement of the Vienna International Arbitration Centre, the parties accepted the disadvantages associated with the geographical distance, i.e. travel and time difference. Compared to the stresses and strains of traveling from Los Angeles to Vienna, the starting time of the hearing means much less interference in the normal daily routine of a person residing in the United States of America, especially since they can also participate in the hearing through the video conference from home, which also saves more time for work because of staying home instead of spending time on travel.⁶⁶

In the Court's opinion, the trial was conducted through video conference did not violate the fundamental principles of procedure. Both the arbitral tribunal and VIAC's Board decided that using of conferencing technology was not resulted in any procedural violation. Also, the respondent did not claim specific procedural violations, but rather complained about a general violation of the principles of fair proceedings and the right to be heard because of the video conference.⁶⁷ In fact, no such thing can be deduced from its general explanations.⁶⁸ The use of video conference technology is widespread and well-known in court proceedings for hearings and taking evidence. This widespread use of video conferencing technology as a recognized standard of procedural management also has an impact on arbitration proceedings.⁶⁹ Hearings and taking of evidence by way of a video conference is considered permissible in any case with the consent of the parties.⁷⁰ During the

⁶⁴ *ibid* 13.

⁶⁵ *ibid* 11-12.

⁶⁶ *ibid* 12.

⁶⁷ *ibid* 15.

⁶⁸ *ibid*.

⁶⁹ *ibid* 16.

⁷⁰ *ibid* 15.

course of the COVID-19 pandemic, video conferences are founded as a means of resuming the procedural operation that is largely come to a standstill.⁷¹ A video conference hearing due to the pandemic is also advocated for the arbitration. The use of video conferencing technology, which is widespread in judicial proceedings and recognized worldwide, does not constitute a violation of Article 6 of the ECHR even if one of the parties does not agree to such process.⁷² It must be kept in mind that Article 6 of the ECHR includes not only the right to be heard, but also the right to justice, which in turn is closely linked to the right to effective legal protection.⁷³ In proceedings on civil rights, it is therefore not only necessary to ensure that the parties are heard. Conducting proceedings through video conferencing can save costs and time and thus promotes legal enforcement while at the same time ensuring the right to be heard.⁷⁴ Specifically, when the goal of delivering justice in time is threatened by the pandemic, video conferencing technology gives opportunity to provide the necessities of the rule of law and the right to be heard. In any case, conducting a hearing by way of a video conference does not constitute a serious procedural violation which may give rise to bias or a violation of the principles of fair proceedings.⁷⁵ The use of video conferencing technology cannot solely therefore provide the ground for annulment either. The Court stated that if both sides agree, a trial can be made through video conference. However, the Court indicated that the situation was different in this case. The Court rested Article 6 of the ECHR. This article provides effective justice. Within this context, in the middle of the global pandemic, the videoconference method provides effective justice and to be heard. According to the Austrian Supreme Court, requesting to be adjudicated in person would be contrary to effective justice and the justice could not be done for an unpredictable period. That is to say, it acknowledges that there may be videoconference for effective justice in terms of the ECHR.⁷⁶

In the OGH's opinion, the respondent could not be surprised by the implementation of the hearing because parties were informed about the hearing date for months as the VIAC also stated in its decision as to the rejection of the respondent's application. They, therefore, had enough time to prepare.⁷⁷ A party representative must always consider that the hearing might take place regardless of his request.

⁷¹ *ibid.*

⁷² *ibid* 16.

⁷³ *ibid.*

⁷⁴ *ibid* 16-17.

⁷⁵ *ibid* 16.

⁷⁶ *ibid.*

⁷⁷ *ibid* 13.

3. The OGH's Decision on the Fear of Witness Tampering

The fundamental harmlessness of the use of video technology, contrary to the view of the respondent, cannot cause any disadvantages associated with the possible misuse of witness evidence. Such abuse, i.e. tampering witnesses, could not be completely eliminated even in the case of a face-to-face hearing. On the other hand, the arguments of the respondent reveal that the hearing of witnesses by means of a video conference certainly offers the arbitral tribunal and the parties to control options against abuse.⁷⁸ These sometimes go beyond those of a conventional hearing because all those involved have the technical possibility of observing the interrogated person from the front and close and also to record their interrogation.⁷⁹ To put it more explicitly, if there is a risk that someone who is interrogated receives text messages on their screen, he can stop to look directly at the camera.⁸⁰ Also, in any case where there is a suspicion of being influenced by a third party, parties could ask the witness to 'swing out' the room with the camera.⁸¹

To conclude, the Court held that the respondent's claim regarding the probable misuse of remote communication technology in examining witnesses could not cause any unsuitable situation.⁸² Also, the intimidation of witness tampering exists in face-to-face hearings. Remote hearings have positive features, which are not possible in a conventional hearing, such as recording of the possible evidence, observing witnesses to be examined by all participants.⁸³

CONCLUDING REMARKS

The arbitral tribunal paved the way for them to use their powers even more independently within the scope of the power of arbitrators. Under common circumstances, once any party objects to remote arbitral hearings, it must be conducted personally. Nonetheless, considering the pandemic conditions, in the case decided by the OGH, the arbitral tribunal decided that the hearing should be remote even though there was an objection by one party. In deciding remote hearings, the arbitral tribunal rested on the power of arbitrators. Neither the VIAC nor OGH gave a positive reaction to the respondent's objection that the decision regarding the remote hearing was not within the power of the arbitral tribunal. This ultimately means the extension of arbitrators' power. The Austrian Supreme

⁷⁸ *ibid* 17.

⁷⁹ *ibid*.

⁸⁰ *ibid*.

⁸¹ *ibid* 18.

⁸² *ibid*.

⁸³ *ibid*.

Court rested on the Article 6 of the ECHR while making decision on whether there is a violation of the right to equal treatment. In its decision, the OGH, taking the pandemic conditions into account, considered effective access to justice as the right to be heard. The Court ruled that remote hearings provide access to justice in case of a pandemic that is not clear when it disappears in the near future.

On conclusion, the Austrian Supreme Court made a precedent decision by not intervening the power of the arbitral tribunal, which is a landmark case for international arbitration proceedings since the core due process rights are not violated even if the hearing is conducted through video conference. Holding a remote hearing does not cause witness tampering by itself. There must be concrete effects affects shown by parties; otherwise, there is no distinction between remote hearings and conventional hearings. Merely the time difference does not affect the fairness of arbitral proceedings while conducting remote hearings since the unfairness must be presented in a concrete way other than blanket claims of practical concerns. With the Austrian Supreme Court's decision, courts will help to eliminate the negative perception against remote hearings.

BIBLIOGRAPHY

- Akıncı Z, *Milletlerarası Tahkim* (4th edn, Vedat 2016).
- Aktepe Artık S, *Medeni Usul Hukukunda Adil Yargılanma Hakkı* (Seçkin Yayıncılık 2014).
- Berger KP and Jensen JO, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016) 32 *Arbitration International* 415-435.
- Born G, *International Arbitration: Cases & Materials* (Aspen 2010).
- Born GB, *International Commercial Arbitration* (Kluwer Law International 2014).
- Carbonneau TE, 'Defining Arbitral Due Process' (2001) 3 *Journal of Alternative Dispute Resolution* 14-18.
- Carbonneau TE, *Cases and Materials on Arbitration Law and Practice* (5th edn, Wolters Kluwer 2009).
- Cole T, 'Authority and Contemporary International Arbitration' (2010) 70 *Los Angeles Law Review* 801-855.
- Cremades BM, 'The Arbitral Award' in LW Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (JurisNet 2008).
- English Arbitration Act of 1996, available at <https://www.legislation.gov.uk/ukpga/1996/23/contents>.
- Eroğlu E, 'Enforcement in Turkey of Foreign Arbitral Awards: The Challenge of Business Location' (2022) 1 *Law and Justice Review* 133-149.
- European Convention on Human Rights, available at https://www.echr.coe.int/documents/convention_eng.pdf.
- Ferreira da Cunha P, *Rethinking Natural Law* (Springer 2013).
- Gaillard E and Savage J, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999).
- Hascher D, 'Independence and Impartiality of Arbitrators: 3 Issues' (2012) 27 *American University International Law Review* 789-806.
- Henry M, 'The Developing Law Arbitration and the Judicial Sword of Damocles' (1953) 4 *Labor Law Journal* 632-636.
- Hoffman PM and Gendron L, 'Judicial Review of Arbitration Awards after Cable Connection: Towards a Due Process Model' (2010) 17 *UCLA Entertainment Law Review* 1-38.
- Hörnle J, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009).
- International Chamber of Commerce, *Arbitration Rules*, available at <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf>.
- Kaufmann-Kohler G, 'Globalization of Arbitral Procedure' (2003) 36 *Vanderbilt Journal of Transnational Law* 1313-1333.

- Kayalı D, 'Milletlerarası Ticari Tahkimde Hakemlerin Bağımsızlığı ve Tarafsızlığı' (Doktora Tezi, Ankara Üniversitesi 2015) available at https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=gmrFXwjjwVWUd3VpYSXXkQ&no=D0_YZcZvjYFxxQI8rJ0mEg.
- Knuts G, 'Jura Novit Curia and the Right to be Heard - An Analysis of Recent Case Law' (2012) 28 *Arbitration International* 669-688.
- Kurkela M and Turunen S, *Due Process in International Commercial Arbitration* (Oxford University Press 2010).
- Lew JDM, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 *Arbitration International* 179-203.
- Malintoppi L, 'Remarks on Arbitrators' Independence, Impartiality and Duty to Disclose in Investment Arbitration' (2008) 7 *The Law and Practice of International Courts and Tribunals* 351-356.
- Moses ML, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008).
- Murphy EA, 'Standards of Arbitrators Impartiality: How Impartial Must They Be? - Lifecare International, Inc. v. CD Medical, Inc.' [1996] *Journal of Dispute Resolution* 463-476.
- Nomer E, *Devletler Hususi Hukuku* (Beta 2017).
- OGH Docket No. 18 ONc 3/20s (2021), available at https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf.
- Oldfather CH, 'Compulsory Arbitration and Due Process' (1953) 1 *Kansas Law Review* 281-296.
- Pamboukis C, 'On Arbitrability: The Arbitrator as a Problem Solver' in Loukas a Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009).
- Park WW, 'Two Face of Progress: Fairness and Flexibility in Arbitral Procedure' (2013) 23 *Arbitration International* 499-505.
- Paulsson J, *The Idea of Arbitration* (Oxford University Press 2013).
- Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.
- Rau AS, 'Integrity in Private Judging' (1997) 38 *Texas Law Review* 485-521.
- Reed L, 'Ab (Use) of Due Process: Sword vs Shield' (2017) 33 *Arbitration International* 361-377.
- Reisman WM, *Systems of Control in International Adjudication and Arbitration Breakdown and Repair* (Duke University Press Books 1992).
- Rogers CA, 'The Ethics of International Arbitrators' in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (JurisNet 2008).

- Rogers CA, *Ethics in International Arbitration* (Oxford University Press 2014).
Rules of Arbitration and Mediation, Vienna International Arbitral Centre, English version is available at https://www.viac.eu/images/documents/vienna_rules/VIAC_schieds_mediationsordnung_2021_e_20211110.pdf.
- Şanlı C, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (Beta 2019).
- Tanriver S, 'Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk' [2006] Türkiye Barolar Birliği Dergisi 151-179.
- Vatansever Öztürk M, *Adil Yargılama İlkesi* (Seçkin Yayıncılık 2022).
- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>.
- The Austrian Code of Civil Procedure, Arbitration Section (*Zivilprozessordnung, Abschnitt über das Schiedsverfahren*) English version is available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2006_1_7/ERV_2006_1_7.html.
- UNCITRAL Model Law on International Commercial Arbitration, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.