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RESEARCH ARTICLE

Violation of the Right to A Fair Trial in Arbitration: Analysing the Turkish Court of Cassation's Decision of 10 February 2021

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Abstract

Based on a recent Turkish Court of Cassation decision, this article puts forward that the right to a fair trial, embodied nearly in all legal systems and fundamental international regulations such as ECHR, must be respected in arbitration proceedings as well. Since member states indirectly exercise control over arbitration proceedings during the annulment or enforcement phase, member states' courts ensure that arbitrators comply with the principles of ECHR, specifically with the right to a fair trial. Additionally, most national laws impose a duty on arbitrators to observe the equality of the parties, which in turn serves to the application of fair trial principles. The right to a fair trial is also an essential part of public order, a violation of which shall lead to the annulment of arbitral awards or dismissal of the recognition and enforcement thereof. As a basic element of the right to a fair trial, the right to be heard encompasses the right to be informed about the allegations, defenses, and evidence that occupy the foreground of this article. This article first reviews the decision of the court of first instance, followed by the Court of Cassation decisions rendered upon the request for appeal and later, request for revision.

Keywords

Arbitration, Public Order, Right to A Fair Trial, Right to be Heard, Equality of Parties

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I. Introduction

The decision rendered by the 11th Civil Chamber of the Turkish Court of Cassation on 10 February 2021 is of great importance as it reveals, through a comprehensive legal analysis, that the parties' right to be heard and right to a fair trial must be respected in arbitration proceedings.

The dispute arose from a shareholders' agreement ('the Agreement') regarding a company ('the Company') established in Turkey. In 2010, the claimant, one of the shareholders, initiated arbitration proceedings before the "ICC Court of Arbitration" against two respondents, alleging breach of the Agreement, based on the arbitration clause therein. The claimant's breach of contract claim was based on the allegation that the shares of the Company lost value due to the behaviours and actions of the respondents, and that the claimant suffered loss therefrom.

The arbitral tribunal bifurcated the arbitration proceedings between liability and quantum. In the award of 13 December 2012 regarding liability, the arbitral tribunal ordered that the respondents were to jointly and severally pay for the damages suffered by the claimant. Regarding the calculation of the quantum, the parties submitted expert reports, and in addition, the respondents requested production of certain third party valuations of the Company but the claimant refused to provide them on the grounds that they were not expert reports prepared for the purposes of the arbitration and that they included confidential contemporaneous third party valuations by a leading accountancy firm. Thereupon, the arbitral tribunal issued a procedural order entitling the claimant to redact from those reports the names of their drafters and any information not relating to the valuation of the Company, ruling that the documents produced shall be exclusively for the use of respondents' counsel, valuation experts and the arbitral tribunal whilst leaving the door open to consider any additional restriction which may be required in relation to confidentiality provisions at the claimant's request.

Thus, the arbitral tribunal restricted respondents from viewing such valuation reports personally. Upon the request of the respondents, the arbitral tribunal ordered in the subsequent procedural order that, first, the port industry expert and the valuation expert of the respondents are also entitled to view such valuation reports. Second, the respondents' valuation expert was authorized to show a copy of its draft report to the respondents and discuss its contents with them, including any references to information contained in the third party valuations while the respondents continued to be restricted from having sight of any of the third party valuation reports personally.

The arbitral tribunal ordered in its final award (on quantum) on 19 June 2013 regarding the amount of compensation to be paid by the respondents to the claimant. The arbitral tribunal determined the amount of compensation upon the valuation

report of 18 March 2010 ('March 2010 Report') provided by the claimant under the restriction ordered by the arbitral tribunal.

II. Decision of the Court of First Instance

The claimant filed a lawsuit before Istanbul courts for the purposes of recognition and enforcement of the foreign arbitral award against only one of the respondents in the arbitration ('the respondent').

The respondent objected to recognition and enforcement of the foreign arbitral award on the grounds of different nature. One of those objections was that the procedural order of the arbitral tribunal, restricting the examination of the March 2010 Report -upon which the decision regarding amount of compensation was based- by the respondents personally.

According to the respondent, both the arbitral tribunal and the respondents had the opportunity neither to know the drafter(s) of the March 2010 Report nor to question them regarding the guidelines they adopted and the conclusions they had reached in the March 2010 Report, as the arbitral tribunal had entitled the claimant to redact from those reports the names of their drafters and any information not relating to the valuation of the Company. However, in the course of arbitration proceedings the report drafted by the claimant's expert was not taken as a basis of the arbitral decision as the conclusions thereof were refuted by the respondents and the same was true for the report prepared by the respondents' expert. Therefore, the arbitral tribunal did not abide by these reports prepared by the experts of the parties and required to take another report as a basis. In this respect, the fact that the respondents were not able to raise questions in the arbitration proceedings against those who drafted the March 2010 Report means that they were deprived of the opportunity to refute the principles adopted and the conclusions reached in such report. Moreover, it is not known by the respondents what kind of instructions the plaintiff gave to the drafters of the March 2010 Report. The respondents also requested submission of the financial models adopted in the March 2010 Report in order to carry out a sound assessment thereof. The respondents are of the opinion that it is not possible to understand and to examine the conclusions reached in the March 2010 Report without having knowledge with respect to the financial models adopted therein. However, the claimant rejected this request, citing the relevant procedural order (no.7) of the arbitral tribunal. Thus, the respondents were deprived of the opportunity to examine the financial models adopted in the March 2010 Report, which was taken as the basis for the determination of the compensation amount by the arbitral tribunal. In addition to these, the arbitral tribunal also did not know what information the claimant had redacted from the March 2010 Report, in line with the authority given to the claimant to redact any information not relating to the valuation of the Company.

In response to these claims and objections by the respondent, the claimant alleged that the respondent was not deprived of the opportunity to defend himself, as the respondent's lawyers, valuation experts, and port industry experts were allowed to review the March 2010 Report, which the respondent could not view personally; that the arbitrators examined the allegations of the expert appointed by the respondent and explained why they were not accepted in the arbitral award; that the March 2010 Report was kept hidden from the respondent because of commercial and technical reasons and this was in compliance with Article 9 of the 'International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration'; that since the March 2010 Report contained confidential information, the respondents' review thereof may have adverse consequences as the respondents had many disputes with the claimant; that the arbitral tribunal expanded, upon the request of respondent, the scope of the persons who were allowed to view the March 2010 Report and allowed it to be viewed by the port industry expert; and that the respondents were not deprived of the opportunity to submit their evidence in arbitration.

The Istanbul 8th Commercial Court of First Instance, in its decision[1] of 30 June 2016 (File no.2014/762, Decision no.2016/572), dismissed the request for recognition and enforcement of arbitral award on the ground that the arbitral award of 19 June 2013 was rendered in violation of the right to a fair trial and accordingly it violated the Turkish public order. The related part of the decision is as follows:

> The arbitral award of 19 June 2013 was given on the basis of a report which was drafted upon the instruction of the claimant, which the claimant initially refused to submit but later submitted in accordance with the procedural order of the arbitral tribunal regarding confidentiality, whose drafter was unknown even by the arbitral tribunal, and which was not allowed to be viewed by the respondent. At this point, an evaluation should be made regarding the right to a fair trial. The facts that the valuation report taken as a basis for the arbitral award was not drafted by an expert appointed by the arbitrators, that it did not have the character of an expert witness report submitted by the parties, and was only a report drafted within the claimant's own organization before the commencement of the case, that the identity of the person who drafted the report was kept confidential and was not disclosed to the respondent, that the report was not disclosed to the respondent as a whole, and that the financial models taken as a basis for the valuation were not disclosed to the respondent personally, are also related to two concepts regarding the public order. The first of these is the principle of publicity, and the other is the right to be heard, which is a part of the right/principle of the right to a fair trial. These principles are adopted by both Turkish law and international law (Article 36 of the Constitution and Article 6 of the ECHR). The right to a fair trial also comprises a real and effective legal protection. Otherwise, a trial in the state of law could not be ensured. This right serves to conduct the trial in accordance with the law and justice, and to render a fair decision. Again, in this way, the realization and protection of fundamental rights before the courts are ensured. The right to a fair trial is

1 Unpublished. Unofficial translation by the author.

more comprehensive than the right to be heard (Art.27), and comprises the latter as well. As a fundamental right, the right to a fair trial is a right granted to both parties as per the civil procedure law. This right continues as from the filing of a case until the end of the trial and until the end of the enforcement procedure upon any decision. The right to claim or defence and the right to a fair trial, which are secured pursuant to Article 36 of the Constitution, also comprise the right to be heard. Again, in the European Convention on Human Rights, the right to be heard is secured under the right to a fair trial. This right is also regarded as the right to express herself or the right to claim or defence. It is stipulated in Article 27 of the Code of Civil Procedure No. 6100 that parties have the right to be heard in connection with their own rights, and that this right comprises being informed about the trial, the right to explain and prove, the evaluation of courts by taking into account the explanations, and the concrete and clear justification of the decisions. The right to be heard is the most important element of the right to a fair trial, which is regulated in Article 36 of the Constitution and Article 6 of the European Convention on Human Rights. In this context, it is obligatory for the parties to be informed about the procedural actions taken either by judicial organs or by the other party. This information usually requires due service of process. As a rule, it is not possible to render a decision by conducting a trial without the parties' knowledge. The second element of this right is the right to explain and prove. The parties have the right to make a statement regarding the trial, to put forward and prove their claims and defences within this framework. Both parties benefit from this right equally. This is also referred to as the "equality of arms principle". The third element of this right is the full consideration and evaluation of the claims and defences of the parties by the judicial organs. The right to be heard is not a principle valid only for a certain trial or for a certain stage of a trial, rather, it is a principle that must be abided in all trials and at every stage of any trial. Since it is not possible to conceal a trial from the parties, the parties may exercise their right to be informed in full with regard to all transactions concerning the trial without being subject to any limitations, except for protection of the case file and for reliable administration of the trial. However, these restrictions shall not be in a nature of revoking the right to be informed, but may only be in the form of setting certain rules for the proper administration of proceedings. No matter that is not within the knowledge of the parties cannot be taken as a basis for the decision. In this context, for instance, taking an expert report as a basis for a decision without informing the party and without taking his/her opinion violates the right to be heard. The right to be informed also comprises the right to examine the case file. Parties and persons involved in the trial may also examine the minutes, information and documents within the scope of the case file. The parties and their attorneys cannot be prevented from examining the case file. The parties may examine all documents that affect and will constitute a basis for the decision. Preventing the review and examination of case material shall constitute a violation of the right to be heard. If sufficient examination opportunity is not provided for the information and documents in the case file, the right to explain will be executed incompletely due to misinformation. It should be emphasized that exceeding the principle of proportionality in limiting the principle of publicity in terms of abolition of the publicity of the parties in trial and its relevance to the right to prove, or concealing the trial from any party means a violation of the right to prove. This is generally expressed as the abolition of the publicity of the parties in the trial; and, in addition to the right to prove, this violates the right to a fair trial, the equality of

arms principle, and the right to be heard. Then in this case, one of the parties cannot obtain information regarding the content of certain evidence, against which he/she shall exercise the right to prove, and the trial would be conducted confidentially against him/her. Considering the above-mentioned stages, a valuation report drafted under the claimant's initiative before the commencement of arbitration was prioritized over the reports of expert witnesses who were appointed by the parties and subjected to cross-examination in the trial, and was taken as a basis for the judgment. This report, on the other hand, was submitted to the review of only the respondent's lawyers, valuation experts and port industry experts by the arbitral tribunal for confidentiality purposes, but was not allowed to be reviewed by the respondent itself. Before state courts or arbitral tribunals, concealing a document taken as a basis for the decision from any of the parties means abolition of publicity therefor. The abolition of the publicity will result in the violation of the right to be heard and, as explained above, in the restriction of the right to prove, as it limits the opportunities of the respondent, who is the real holder of the case and whose legal status will be directly affected by the decision at the end of the case, to be informed and to make a statement within the scope of this information. As the drafter or drafters of the report, which was taken as a basis of the award, were concealed from the respondent by the arbitral tribunal, it was concluded that the respondent was not given the opportunity to call the drafters for cross-examination in the trial, accordingly the rights to be informed and to make statements, which are the elements of the right to be heard, shall be deemed to have been violated, and the fact that the respondent's right to defence was limited by being deprived of the right to examine the report personally but only allowing his lawyers and consultants, and not being allowed to access information about which parts of the report had been redacted and what the financial models were based on, should be considered as a violation of the right of publicity and of the right to prove indirectly.

III. Court of Cassation Decision of 29 November 2018 upon the Request for Appeal

Upon the appeal of the decision by the claimant, the 11th Civil Chamber of the Court of Cassation reversed the judgment of the court of first instance with its decision[2] of 29 November 2018, File No.2016/14160, Decision No.2018/7501. The section of the judgment of the Court of Cassation regarding the right to a fair trial is as follows:

> On the other hand, by arguing that it was decided to redact the names of the persons who drafted the report and the parts that are not related to the market capitalization of (…) A.Ş. from the report called the 'March 2010 Report', which was taken as a basis for the award by the arbitral tribunal, to allow only the respondents' lawyers and experts to review the report, and to prohibit the respondent (…) and (…) Company officials from examining the report; the respondent argued that the right to a fair trial was violated in the arbitration proceedings, however, no concrete evidence was submitted to set forth that this conduct practiced by the arbitrators in the arbitration proceedings is contrary to the procedural rules that should be adopted and applied in the proceedings.

2 Unofficial translation by the author. For the Turkish version of the decision visit https://legalbank.net/belge/y-11-hd-e-2016-14160-k-2018-7501-t-29-11-2018/3380816/14160

IV. Court of Cassation Decision of 10 February 2021 upon the Request for Revision

Against this decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018, the respondent requested a revision of decision. With its decision[3] of 10 February 2021 File No.2019/2417 and Decision No.2021/1051, the 11th Civil Chamber ruled, by a majority vote, to accept the request of revision of the decision and to cancel the reversal decision of 29 November 2018. The section of the decision of the 11th Civil Chamber regarding the right to a fair trial is as follows:

> …The right to a fair trial concerns not only disputes arising within the scope of domestic law, but also disputes involving cross-border elements. This right is regarded among the "fundamental human rights" in Article 6 of the ECHR, to which Turkey is also a party, and among the basic human rights in Article 36 of our Constitution of 1982. In this context, among the basic elements of the right to a fair trial are the "right to be heard" and "the principle of access to court and the publicity of the trial". The right to a fair trial should not be restricted unless deemed necessary.
>
> As required by the right to be heard, both the claimants and the respondents should be able to freely express and prove their claims without encountering any obstacles before the judicial organs, and they should be able to rebut the claims of the other party freely without encountering any obstacles within the scope of the right to defence. In the context of the right to be heard, both parties should easily access to court. The right to access to court contains the access to evidence and documents in dispute easily. For this reason, the parties should be able to freely examine the evidence, and any matter that is not open to the knowledge of the parties should not constitute the basis for a decision.
>
> Even though 'protection of trade secrets' is a legitimate right in the legal world, the other party's right to be heard in a trial should not be violated by taking shelter behind this right. If any evidence subject to trial is to be concealed as a trade secret from the other party, there must be reasonable grounds for this, and this matter must be explained in a consistent and lawful manner, the principle of proportionality should not be exceeded or contradicted when it is necessary to protect the secrets.
>
> The framework of public order in domestic law was drawn by the General Assembly of the Court of Cassation as a 'violation of the basic values of Turkish law, the Turkish general sentiment of propriety and morality, the basic sense of justice on which Turkish laws are based, the fundamental rights and freedoms in the Constitution, the common principles prevailing in the international arena, the civilization level of civilized communities, political and economic regime, human rights and freedoms.' It is essentially left to the discretion of judges to determine whether the foreign decision subject to the recognition and enforcement request violates the Turkish public order. However, a judge has to take into account the basis of existence of private international law and the general principles of this law when using his/her discretion (Court of Cassation Assembly of Civil Chambers 26.11.2014 D. & 2013/1135-2014/973)

3 Unpublished. Unofficial translation by the author.

In the case at hand, pursuant to the procedural rules to be followed in the proceedings decided by the parties and approved by the arbitral tribunal, the parties are granted the right to submit a copy of their expert reports and evidence regarding the amount of loss suffered by the claimant to the arbitral tribunal, and to the other party simultaneously within a certain timetable, right of each party to simultaneously examine and respond to the evidence which is the subject of the other party's claim, and the expert reports they received during the trial, and to cross-examine the experts. As a matter of fact, both parties submitted the expert reports they obtained during the trial regarding the amount of loss to the case file as a whole, and none of these reports were kept secret from the other party. On the other hand, in order to strengthen its claim, the claimant also relied as evidence on the examination reports of 2008, 2009 and 2010, which were obtained long before the lawsuit in terms of the financial structure and market value of the (…) company, however, despite the obligation to submit a copy of these reports together with other evidence to the arbitral tribunal and a copy to the respondent in line with the dispute resolution timetable, and despite the respondent requested that these reports be submitted pointing out that the claimant had not still submitted them, the claimant refused to submit and this time the respondent applied to the tribunal. The arbitral tribunal ordered, in a procedural decision, the submission of these reports and transmittal of a copy to the respondent, however, this was, again, rejected by the claimant. A claim was made again by the respondent, and this time it was rejected by the claimant on the ground of confidentiality of trade secrets. Upon this request of the respondent, the arbitral tribunal ordered that only the relevant chapters regarding the valuation of the company of the claimant's review reports for the years 2009 and 2010 be submitted, that they may be submitted by redacting the names of the drafters and the sections of the report that are not relevant to the valuation, and that the reports can only be examined by the respondents' lawyers and valuation experts, not by the respondent personally. Upon submission of the 2009 and 2010 reports after redaction of information regarding the sections deemed appropriate by the claimant, lawyers and valuation experts of the respondents were able to only examine these reports limited with the section made available, however, this time, the respondents' experts were prohibited from sharing the draft of the report with the respondents personally and from making joint evaluations.

In its award, the arbitral tribunal determined the loss suffered by the claimant, based largely upon the March 2010 report from among the reports submitted by the claimant.

In enforcement cases, the enforcement court does not have the authority to review the award on the merits and on the discretion of the arbitrators, however, under Article 5 of the New York Convention, the court shall be able to freely evaluate whether the parties' rights of defence were restricted during the arbitration proceedings, and whether the decision taken by the arbitral tribunal is contrary to the Turkish public order, in particular for the case at hand. Regarding the examination of the March 2010 report, which was largely taken as a basis for the award, allowing the report to be submitted incompletely by hiding the names of the persons who drafted it, the part related to the financial model and method used in the calculation of the port value, and the part containing the purpose of this report in violation of the procedural rules agreed by the parties, concealing the original and the copy of the report from the respondent who suspects that such a report exists and that it may have been altered, also prohibiting the

> respondent from examining even the draft report prepared by the valuation expert of the respondent as can be seen from the disclosed parts of the report which is the basis of the award, preventing the respondents to cross-examine the drafters of these reports, not being able to base all this secrecy on any reasonable and legal basis, overshadowed the impartiality of the arbitral tribunal, and it has been concluded that the respondent's access to evidence and the right to defend themselves during the arbitration proceedings are severely violated.
>
> The restriction of the right to defence and thus the violation of the right to a fair trial also constitutes an evident violation of the Turkish public order.
>
> On the aforementioned grounds, the decision of the Court of First Instance rejecting the request for the enforcement of the award of 19 June 2013 rendered by the arbitral tribunal regarding the amount of loss suffered by the claimant is accurate due to the violation of Articles 5/1-b and 5/2-b of the New York Convention and clauses 62/1-b and d of the Code of PIL…[4]

Two members of the 11th Civil Chamber dissented the decision. The relevant part of the dissenting opinion is as follows:

> ...the fundamental basis of the right to be heard is the regulation regarding the right to legal remedies in Article 36/1 of the Constitution. Again, another basis of the right to be heard in the constitutional framework is the principle of the state of law (Cons. Art.2). There are three elements of the right to be heard. These are the right to demand information, the right to explain and prove, and the right to be considered. The right to be heard is a sub-element of the equitable trial element of the right to a fair trial. Therefore, the violation of the right to be heard, especially the fact that a right is not executed by the parties on the basis of equality, constitutes a violation of the right to a fair trial. Violation of the right to a fair trial is a matter of national and international public order, and therefore, the violation of this right should be perceived and evaluated as a violation of public order. In this case, the violation of the right to be heard during the arbitration proceedings, as a reason for annulment in the context of international arbitration, results in the violation of public order and is taken into account by the court ex officio. When it comes to the case at hand, after these statements, pursuant to the procedure approved by the arbitral tribunal, the parties were granted the right to submit a copy of the evidence regarding the amount of the claimant's loss to the arbitral tribunal and a copy to the other party within a specified timetable, and to simultaneously examine and respond to the evidence regarding the claim of the other party and the

4 It should be noted that, in the decision of 10 February 2021, the 11th Civil Chamber of the Court of Cassation made a distinction between the award of 13 December 2012 regarding liability and the award of 19 June 2013 regarding quantum and ruled that the court of first distance should have made a distinction between these bifurcated awards and should have determined availability of each award separately in terms of recognition and enforcement. Accordingly, the decision of 10 February 2021 of 11th Civil Chamber of the Court of Cassation coincides with the decision of 30 June 2016 of the Istanbul 8th Commercial Court of First Instance in terms of the reasons which bar the enforcement of the award of 19 June 2013 regarding quantum, namely restriction of the right to defence and thus the violation of the right to a fair trial and of the Turkish public order. Therefore, it has become final that the award of 19 June 2013 regarding quantum shall not be enforced in Turkey. However, the Istanbul 8th Commercial Court of First Instance had to rule on the issue whether the award of 13 December 2012 regarding liability may be recognized and in its decision of 11 November 2021 the Istanbul 8th Commercial Court of First Instance insisted on its decision of 30 June 2016 and ruled that the award of 13 December 2012 regarding liability may be recognized in Turkey. Now the file is before the General Assembly of Civil Chambers of the Court of Cassation to be solved whether the award of 13 December 2012 regarding liability may be recognized in Turkey.

expert reports obtained by the other party during the trial, and to cross-examine the experts who submitted the report. In addition to the report submitted by the respondent, the claimant relied on the special inspection report received in 2008, 2009 and 2010 in terms of the financial structure of the non-litigant company, and while the relevant parts of this report, on which the claimant relies as evidence, were allowed to be examined by the respondent's attorneys and company valuation experts, the respondent was prohibited to examine the report personally. Furthermore, the reason why the arbitral tribunal accepted claimant's report while rejecting the respondent's report is explained in the rendered award.

The order of the arbitral tribunal allowing examination of the relevant sections of the report, being the basis for the award, by the respondent's attorney and evaluation experts, and prohibiting the respondent from examining these reports personally may not be considered as a violation of the right to a fair trial and the right to be heard, in view of the case file and its annexes. Therefore, there is no violation of the Turkish public order in terms of the case at hand.

V. Legal Evaluation

The right to a fair trial brings the European Convention on Human Rights (Art.6) into mind at first. However, arbitrators are not under any obligation to directly observe the ECHR's rights and freedoms during arbitral proceedings, since they are not considered as being part of a state machinery, and thus not required to directly observe the ECHR and its standards[5]**.** Accordingly, states in whose jurisdiction arbitration proceedings are conducted, are neither directly responsible for the acts nor omissions of arbitrators unless, and only insofar as, the national courts were required to intervene[6]. Nevertheless, the responsibility of member states under the ECHR and thus the application of the ECHR to arbitration is engaged indirectly, i.e., through member states' failure to exercise certain control over arbitration proceedings and to ensure that such proceedings observed parties' basic human rights[7]. In this respect, as far as the member states' courts have the opportunity to audit the right to a fair trial during the annulment or recognition-enforcement phase, failure to make the necessary examination in this regard will result in the responsibility of the member states of the ECHR, and arbitrators are under an indirect obligation to observe the ECHR's rights and freedoms during arbitral proceedings, on the one hand.

On the other hand, most national arbitration laws impose a duty on arbitrators to act fairly or to observe the right to a fair trial or the principle of equality[8]. For

5 Jean-Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2006) 65

6 *See, e.g. R v. Switzerland*, App. no. 10881/84, ECmHR, 4 Mar. 1987.

7 Toms Krūmiņš, *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer 2020) 45. *See also Mutu/Pechstein v Switzerland*, App. no. 40575/10 and 67474/10, ECtHR, 2 Oct. 2018; *Beg S.P.A. v Italy*, App. no. 5312/11, ECtHR, 20 May 2021; *Tabbane v* S*witzerland*, App. no. 41069/12, ECtHR, 1 Mar. 2016.

8 *ibid.*

instance, according to Art. 8/B of the Turkish Code of International Arbitration 'The parties shall have equal rights and powers in arbitral proceedings. Each party shall be given the opportunity to assert his claims and defences[9]'.

In addition to these, the right to a fair trial is accepted as an essential element of the *public order*[10] and violation of *public order* in arbitral proceedings leads to annulment of arbitral awards or to dismissal of recognition or enforcement thereof.

Therefore, fair trial principles do not consist of the principles with which the state courts comply only. Arbitrators are also considered to be under the obligation to abide by the principles of fair trial and to treat the parties equally in arbitral proceedings[11]. In this respect, arbitrators must ensure full equality between the parties throughout the entire trial.

Embodied nearly in all national legal systems and in fundamental international regulations such as the ECHR, to be applied both in state courts and in arbitration, *the principle of equality* and *the right to be heard*, which are the basic elements of the right to a fair trial and which are deemed to have become the 'international minimum standards of procedural law', are regarded as the 'Magna Carta' of arbitration[12].

The principle of *equality of parties* in procedural law means that the parties have the opportunity to have equal influence on the decision rendered at the end of the trial, to have an equal opportunity to make claim thereof, and to defend themselves against the claims of the other party. Examining the evidence set forth by the parties, providing the parties with the opportunity to make claims and defences and granting them the right to speak are within the scope of the principle of equal treatment. It is considered as a violation of the principle of equality when one of the parties is not duly invited or is not granted the opportunity to examine documents or evidence[13].

On the other hand, the principle of equality of parties requires arbitrators to avoid biased behaviour, to maintain their impartiality in all matters, and to administer equal treatment between the parties in terms of procedural law during the trial. Therefore, the arbitrators giving priority to one of the parties in arbitral proceedings shall constitute a violation of the principle of impartiality of the arbitrators. Failure to comply with the principles of fair trial and the principle of *equality of the parties* in

9 Unofficial translation by the author.

10 Gary B. Born, *International Commercial Arbitration* vol III (Wolters Kluwer 3d ed. 2020) 3863; Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (Beta 7th ed. 2019) 518; Ziya Akıncı, *Milletlerarası Tahkim* (Vedat Kitapçılık 5th ed 2020) 547 etc.

11 Gary B. Born, *International Commercial Arbitration* vol II (Wolters Kluwer 3d ed. 2020) 2326-2334 etc; Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration,* International and Comparative Law Quarterly 991 (2020) 1023.

12 Musa Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller* (On İki Levha Yayıncılık 2014) 113.

13 Güray Erdönmez, *Pekcanıtez Usûl Medenî Usûl Hukuku* (On İki Levha Yayıncılık 15th ed. 2017) 885.

arbitral proceedings also violate the Turkish public order[14]. Pursuant to Article V(2) (b) of the New York Convention, enforcement of foreign arbitral awards that are contrary to the public order of the state, where the enforcement is sought, may be refused[15].

The Right to be heard, which is one of the indispensable principles of procedural law and which constitutes the guarantee of a fair trial, requires that the parties have the right to be informed about the allegations and defences made, the right to respond to the claims of the other party, the right to present counter evidence, and the right to be given sufficient time for these transactions[16].

It is a *sine qua non* ingredient of a fair trial for an individual to be fully informed regarding the content of the trial concerning him/her, the transactions of the judicial authority and the evidence affecting the outcome of the trial. Otherwise, the trial would be secreted from the person judged, which, undoubtedly, cannot be considered legally acceptable.

It is not possible to preclude the parties from viewing the documents and information within the scope of a case file, or for a document, which is accessible by one of the parties, to be secreted from the other party. Matters that are not open to the knowledge of the parties cannot constitute a basis for the decision. Otherwise, it is not possible to regard it as a fair trial. Preventing the examination of allegations, defences and evidence by any party constitutes a violation of the *right to be heard*. All parties should be given the opportunity to equally examine all documents affecting the trial and forming the basis of the decision. If not possible, such documents should not be taken as a basis for the decision.

Accordingly, in terms of the case at hand, the following matters should be considered as contrary to fair trial principles:

(i) The March 2010 Report, on which the award is based, was drafted upon the instruction of the claimant before the lawsuit, and only the claimant knew the preparation purpose thereof;

(ii) the respondent did not know what kind of instructions were given by the claimant to the drafters of the report and on what assumptions was the report drafted;

(iii) the drafters of the report are only known by the claimant;

(iv) the arbitral tribunal issued a procedural order entitling the claimant to redact from the report, but the respondent was unaware of the redacted information;

14 Born, (n.10) 3863; Şanlı, (n.10) 518; Akıncı, (n.10) 547 etc.

15 Born, (n.10) 4046; Ergun Özsunay and Murat R Özsunay, *Interpretation and Application of the New York Convention in Turkey* in Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts (George A. Bermann ed., Springer 2017) 971.

16 Ejder Yılmaz, *Hukuk Muhakemeleri Kanunu Şerhi vol I* (Yetkin 4th ed. 2021) 1024; Erdönmez, (n.13) 867; Bantekas, (n.11) 1007.

(v) the arbitral tribunal restricted the report from being viewed by the respondents personally,

(vi) the drafters of the report should have been questioned in accordance with the arbitral tribunal's procedural order, but could not be cross-examined or questioned neither by the arbitral tribunal nor by the respondents;

(vii) the respondents were not even given the opportunity to examine the financial models which constituted the basis of the report.

With the attitude set forth above, the arbitral tribunal did not observe the principle of *equality of the parties*, which is one of the most basic requirements of a fair trial, and violated the *right to defence* and *right to be heard* of the respondents. On the other hand, this attitude of the arbitral tribunal, which is not based on any just and reasonable justification, indicates that the arbitral proceedings were conducted in favour of the claimant and against the respondents, and overshadows the impartiality of the arbitral tribunal. Enforcement of the arbitral award rendered in consequence of such a trial shall violate the Turkish public order, within the scope of Article V(2)(b) of the New York Convention.

At this point, it should be emphasized that the fact that arbitral tribunal allowed the March 2010 Report to be for the use of respondents' counsel, valuation experts and port value experts does not justify such an award to be based upon such a report. Violation of the right to defence, caused by the failure to recognize the right of the aforementioned report to be viewed and to be evaluated by the respondent personally, who is the beneficiary or the obligator of the rights and debts subject to the lawsuit, is not of a nature to be removed once the relevant report is examined by the counsel or experts appointed by the respondent. As stated in the report of the valuation expert appointed by the respondent, the facts that the calculations of the March 2010 Report, taken as a basis for determining the amount of compensation by the arbitral tribunal, were not given to the valuation expert, that the cash flow statements behind the evaluation were not legible, and therefore the valuation expert could not compare this report with his own report, reveals that enabling the valuation expert of the respondent to examine the March 2010 report is insufficient in terms of a healthy execution of the right to defence.

In regards to the judicial decisions, it should be underlined that the court of first instance rendered a glorious decision, as the court properly determined what this attitude of the arbitral tribunal means in law, correctly determined the basic concepts and principles concerning the issue, and also accurately determined the legal consequences of the violation thereof in the case of recognition and enforcement of the foreign arbitral award. The court of first instance made determinations worthy of commendation, by considering that it is obligatory for the parties to be informed about the transactions made by the judicial organs or the other party, that matters

not available for the knowledge of both parties cannot be taken as the basis of a decision, that preventing the viewing and examination of the case material by any party will be a violation of the right to be heard, that the right to explain will be executed incompletely in conclusion of incomplete information, that concealing a document taken as the basis of a judicial decision from any party of the trial shall mean eliminating the publicity of the party and restricting the right to prove, thus, the principle of equality of arms, the right to a fair trial and the right to be heard of the respondent, who is the real holder of the case and whose legal status will be directly affected by the decision at the end of the case, will be violated, and that the enforcement of such a foreign arbitral award shall be contrary to Turkish public order.

However, the issue was not fully understood in the decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018. In this decision the Court of Cassation concluded, in response to the respondent's claims that his right to a fair trial has been violated, that no concrete evidence was submitted, indicating that the conduct applied by the arbitrators in the arbitral proceedings is contrary to the procedural rules to be abided by in such arbitral proceedings. Violation of the right to a fair trial and breach of procedure are different legal concepts that fall under different subparagraphs of Article V of the New York Convention. In order for a violation of the right to a fair trial to occur, there does not necessarily have to be a breach of procedure. An award that complies with the rules governing the arbitral procedure may violate the right to a fair trial. For this reason, in the Court of Cassation's decision of 29 November 2018, it is not justifiable to regard breach of procedure as a prerequisite in order to accept violation of the right to a fair trial.

Moreover, the attitude of the arbitral tribunal, which violates the fair trial principles such as the principle of *equality of the parties* and *the right to be heard* and also undermines the principle of impartiality of the arbitrators, actually constitutes a breach of the arbitral procedure. The arbitration procedure, according to which the award was made, was governed by the ICC Arbitration Rules of 1998, and pursuant to Article 15(2) thereof, the arbitral tribunal shall act fairly and impartially, ensuring that each party has a reasonable opportunity to present its case. However, as presented and explained in detail above, the arbitral tribunal did not provide the respondent with reasonable opportunity to present his case, on the one hand, and acted contrary to the obligation to act fairly and impartially, on the other hand, and consequently violated Article 15(2) of the ICC Arbitration Rules of 1998; by hiding the purpose and the drafters of the March 2010 report and the financial models that constitute the basis thereof from the respondent, and thus, by depriving the respondent of the right to question and cross-examine the drafters of the report. The fact that the arbitral tribunal has taken such a report as a basis for determining the compensation amount evidently makes the relevant breach effective on the merits.

Violation of Article 15(2) of the ICC Arbitration Rules of 1998 by the arbitral tribunal constitutes an obstacle for enforcement of arbitral awards pursuant to Article V(1)(d) of the New York Convention, which stipulates that 'the arbitration procedure shall be conducted in accordance with the agreement of the parties or in case the agreement is unclear in accordance with the provisions of the local law in which the arbitration takes place'.

Besides, detailed regulations on taking and evaluation of evidence are not included in the ICC Arbitration Rules. The International Bar Association (IBA) has prepared the 'IBA Rules on the Taking of Evidence in International Arbitration' as a result of this common incident that usually occurs in regards to the institutional arbitration rules[17]. Considering that there are not enough regulations in the rules of international arbitration institutions regarding the submission and evaluation of evidence, it is evident that the IBA Rules fill a massive and crucial gap in the submission and evaluation of evidence in the field of international arbitration. But in order to apply these IBA Rules, they need to be chosen either by the arbitrators or by the parties[18].

It is stated in the Terms of Reference that the arbitral tribunal would apply the IBA Rules in matters falling within its scope but would not be bound by these rules. Nonetheless, as is evident from paragraph 26 of the final award, the respondent made certain statements regarding the IBA Rules during the disclosure discussions, and, as is evident from paragraph 27 of the final award, the claimant relied on the IBA Rules while objecting to the respondent's statements on this matter. These statements mean that the parties have a mutual and compatible will in terms of matters covered by the IBA Rules and the obligation to enforce the IBA Rules. Moreover, as is evident from paragraph 28 of the final award, the fact that the arbitral tribunal settled this conflict between the parties as per the procedural order no.7, and that the IBA Rules constituted basis thereof, indicates that both parties as well as the arbitral tribunal agreed upon the application of IBA Rules.

The third paragraph of the IBA Rules in the preamble introduces a very basic principle in terms of this topic: 'The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.' In accordance with the Article 3(1) of the IBA Rules, all documents relied on by the parties shall be submitted to the arbitrators and to the other party. Pursuant to Article 3(13) of the IBA Rules, any document submitted or produced by a party or a non-party in the arbitration and not otherwise in the public domain shall be kept confidential by the arbitral tribunal and the other parties, and

17 Gary B. Born, *International Commercial Arbitration vol I*, (Wolters Kluwer 3d ed. 2020) 225.

18 Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press 2013) 30; Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Routledge 2012) 7.

shall be used only in connection with the arbitration. Pursuant to the Articles 5 and 6 of the IBA Rules, the expert report prepared by parties or by the arbitral tribunal shall contain the names and addresses of experts, a statement regarding his or her present and past relationship (if any) with any of the parties, a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions, and the cases on which the conclusions reached in the report are based, and the methods and information used in reaching these conclusions[19].

When the IBA Rules mentioned above are evaluated as a whole, it is evident that it is not possible for the names of the experts who drafted the report and for the methods they applied while reaching such conclusions to remain undisclosed, that it is not possible to hide the documents presented by the claimant as evidence from the respondent, and that concealment of the document submitted by one of the parties from the other party cannot be based on the principle of confidentiality, since the principle of confidentiality means that the documents presented in the arbitration may be concealed only from third parties[20].

Consequently, by concealing the relevant assumptions and data being the basis for the financial model of the March 2010 report and also the drafters and the purpose thereof, from the respondent, and by depriving the respondent from the opportunity to cross-examine the experts who drafted the report, the arbitral tribunal acted in violation of the IBA rules specified above.

Violation of the IBA Rules by the arbitral tribunal constitutes an obstacle for enforcement of arbitral awards pursuant to Article V(1)(d) of the New York Convention.

It is seen that there are certain breaches of procedure regarding the award in different respects. Accordingly, the determination of the Court of Cassation in its decision of 29 November 2018, regarding that there was no concrete evidence setting forth the breach of the arbitral procedure was totally groundless, and the request for enforcement should also have been rejected due to breach of procedure.

As a matter of fact, in its decision of 10 February 2021, rendered upon a request by the respondent for a revision of decision, the 11th Civil Chamber of the Court of Cassation stated that 'The examination of the March 2010 Report, which was largely taken as the basis for the award by the arbitral tribunal, violates the procedural rules agreed by the parties', and accepted that this attitude of the arbitral tribunal in the arbitral proceedings also constituted a breach of procedure.

Against the decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018, the respondent requested for a revision of decision. The Code of

19 Ashford, (n.18) 107; O'Malley, (n. 18) 333-334.

20 Ashford, (n.18) 12; O'Malley, (n. 18) 324.

Civil Procedure (CCP) no.6100 does not set forth a legal remedy in the form of a revision of a decision, however, it is stipulated in Provisional Article 3 of the CCP no.6100 that pursuant to the Provisional Article 2 of the Law on the Establishment, Duties and Powers of the Courts of First Instance and the Regional Courts of First Instance, the provisions of the Code of Civil Procedure (HUMK) n.1086 regarding the appeal shall continue to be applicable until the activation date of Regional Courts of Appeals to be announced in the Official Gazette, and the mentioned provisions also include the procedure of revision of decision.

As of 30 June 2016, which is the date of the decision by the Istanbul 8th Commercial Court of First Instance, since the Regional Courts of Appeals had not been activated yet, it was possible to request for the revision of the decision of the 11th Civil Chamber of the Court of Cassation of 29 November 2018 in accordance with the provisions of the CCP no.1068.

Considering the grounds for the revision of decision in the Article 440 of the CCP no.1086; the rejection of the respondent's claim regarding the right to a fair trial was based on the ground that there was a breach of procedure, which fall within the scope of the reason of revision provided as such: 'the objections that were put forward in the reply petition of the other party and that had an effect on the judgment were partially or completely left unanswered'. Furthermore, it can also be considered that 'the decision of the Court of Cassation is found to be contrary to the procedure and the *law*'.

The decision of 10 February 2021 rendered by the 11th Civil Chamber of the Court of Cassation accepting the request for revision of decision and cancelling the reversal decision of 29 November 2018 unanimously is quite justifiable. As the Court of Cassation decided; the parties should be able to examine the evidence freely and an issue that is not available for the parties should not constitute the basis of a decision as the right of access to court also connotes the right to easily access to the evidence and documents subject to the dispute, any party's right to be heard should not be harmed in a trial by hiding behind the protection of trade secrets though it is a legitimate right, the attitude of the arbitral tribunal on this matter is not based on any reasonable and legal basis and causes doubts regarding the impartiality of the arbitral tribunal, the respondent's access to evidence and defence rights were severely violated in the arbitral proceedings, and the restriction of the right to defence and thus the violation of the right to a fair trial constitute an evident violation of the Turkish public order.

However, the dissenting opinion was without merit. Because after making theoretical explanations about the right to be heard, the right to legal remedies, the state of law, the right to demand information, the right to explain and prove, the right to be considered, the right to a fair trial, and public order, and a very accurate

determination i.e. the violation of the right to be heard during the arbitration proceedings will result in violation of public order, the dissenting members reached the conclusion, completely contradicting with these explanations, that the order of the arbitral tribunal allowing examination of the relevant sections of the March 2010 Report, by the respondent's attorney and evaluation experts, and prohibiting the respondent from examining this report personally may not be considered as a violation of the right to a fair trial and the right to be heard, in view of the case file and its annexes, and therefore, there is no violation of the Turkish public order. The dissenting members couldn't explain the basis and justification of these opinions, and merely stated that there was no violation 'in view of the case file and its annexes'. The dissenting opinion was extremely inadequate, when compared with the well-reasoned, legally based and satisfactorily explained decisions of both the first-instance court and the Court of Cassation rendered upon the request for revision of decision.

Finally, it should be emphasized that, by prohibiting the respondent from viewing the March 2010 report, by concealing from the respondent the drafter and purpose thereof, by hiding the financial models based on the preparation thereof from both the respondent and the respondent's valuation expert, the arbitral tribunal not only violated the principles of fair trial such as the *equality of the parties* and the *right to be heard*, and not only damaged the principle of impartiality of the arbitrators, but also deprived the respondent of the opportunity to present his case. Pursuant to Article V(1)(b) of the New York Convention, any request for enforcement of an award has to be rejected if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or *was otherwise unable to present his case*.

If the respondent had the opportunity to learn who drafted the March 2010 report, for what purpose it was prepared, what the financial models were based on while drafting the report, and to question and to cross-examine the experts who drafted the report, he would have had the opportunity to refute the March 2010 report in the same way as he rebutted the valuation report submitted by the claimant's expert. However, the arbitral tribunal's attitude prevented the respondent from presenting his evidence and objections against the March 2010 Report and constitutes an obstacle for the enforcement of this arbitral award pursuant to Article V(1)(b) of the New York Convention.

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Bibliography

Akıncı Z, *Milletlerarası Tahkim* (Vedat Kitapçılık 5th ed 2020)

Ashford P, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press 2013)

Aygül M, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller* (On İki Levha Yayıncılık 2014)

Bantekas I, 'Equal Treatment of Parties in International Commercial Arbitration' (2020) 69 (4) International and Comparative Law Quarterly 991-1011.

Born GB, *International Commercial Arbitration vol I*, (Wolters Kluwer 3d ed. 2020)

Born GB*, International Commercial Arbitration vol II* (Wolters Kluwer 3d ed. 2020)

Born GB, *International Commercial Arbitration vol III* (Wolters Kluwer 3d ed. 2020)

Erdönmez G, *Pekcanıtez Usûl Medenî Usûl Hukuku* (On İki Levha Yayıncılık 15th ed. 2017)

Krūmiņš T, *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer 2020)

O'Malley ND, *Rules of Evidence in International Arbitration: An Annotated Guide* (Routledge 2012)

Özsunay E and Özsunay MR, 'Interpretation and Application of the New York Convention in Turkey in Recognition and Enforcement of Foreign Arbitral Awards' in (George A. Bermann ed) *The Interpretation and Application of the New York Convention by National Courts* (Springer 2017)

Poudret JF and Besson S, *Comparative Law of International Arbitration* (Sweet & Maxwell 2006)

Şanlı C*, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (Beta 7th ed. 2019)

Yılmaz E, *Hukuk Muhakemeleri Kanunu Şerhi vol 1* (Yetkin 4th ed. 2021)