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RESEARCH ARTICLE

The Impact of Online Hearings on the Enforcement of Arbitral Awards

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Abstract

Due to the flexible nature of arbitration, it was possible to continue arbitral proceedings through online hearings during the global COVID-19 pandemic. The immense use of online hearings during these tough times forced arbitral institutions to provide certain guidelines and principles regarding the organization of online hearings. Meanwhile, the arbitration community figured out the advantages and efficiency of online hearings. Along with the rapid increase in energy prices, inflation rates, and climate change concerns, we believe that online hearings will continue to be an indispensable part of international arbitration practice in the future. However, despite being cost and time-effective, online hearings raise discussions in the context of the right to a fair trial, the right to be heard, and the principle of equality of the parties provided by Article 6 of the European Convention on Human Rights and by Article 36 of the Turkish Constitution. In our study, we will examine whether online hearings per se will be considered as an infringement of the right to a fair trial in light of recent decisions of the Turkish Constitutional Court evaluating the use of online hearings in court practice. We will try to make conclusions whether and/or under which circumstances the use of online hearings will constitute a ground of setting aside under the Turkish International Arbitration Act or denial of recognition or enforcement according to the New York Convention.

Keywords

International arbitration, Online hearings, International litigation, Right to be heard, Arbitral awards

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I. Introduction

Online hearings were widely used in arbitral proceedings during the Covid-19 pandemic. Thanks to the technological developments and certain platforms that enable several different participants to meet online by way of simultaneous sound and video transmission, arbitral proceedings were not completely halted although people were locked up at their homes. After the pandemic, along with the rapid increase in energy prices, inflation rates, and increasing climate change concerns, we believe that online hearings will continue to be an indispensable part of international arbitration practice in the future. However, despite being cost and time-effective, online hearings raise discussions in the context of the right to a fair trial, the right to be heard, and the principle of equality of the parties provided by Article 6 of the European Convention on Human Rights and by Article 36 of the Turkish Constitution. In this study, we will examine whether online hearings *per se* will be considered an infringement of the right to a fair trial and try to make conclusions about whether and/or under which circumstances the use of online hearings will constitute a ground for setting aside under the Turkish International Arbitration Act or denial of recognition or enforcement according to the New York Convention. First, we will briefly explain the relevant legislation in the Turkish criminal procedure law and Turkish civil procedure law; and explain recent decisions of the Turkish Constitutional Court evaluating the use of online hearings in criminal court practice. Then, we will give information about hearings and the use of online hearings in Turkish international arbitration law and come up with conclusions concerning the impact of online hearings on the enforcement of arbitral awards.

Online arbitration may be divided into two categories based on the level of use of information technologies. One may be referred to as "technology-assisted online arbitration" where information technologies are used for the exchange of information and a means of communication, and the other may be referred to as "technology-based online arbitration" where information technologies are used in all aspects of arbitration[1]. The concept of online hearing that is subject to our study is different from electronic dispute resolution methods where the disputes are resolved by an artificial intelligence system. We refer to classic arbitral proceedings where only certain evidence is conveyed via electronic means and where the hearings are held via an electronic platform.

Secondly, although our conclusions are induced from the use of online hearings in Turkish litigation; the concept of online hearing is different in litigation and arbitration. In arbitration, both parties and the arbitrators attend the hearings electronically; there is no physical contact of any relevant parties. In litigation, however, the judges

1 Seda Özmumcu, 'Dünyada ve Ülkemizde Online Uyuşmazlık Çözümleri Bağlamında Online Tahkim ve Uygulamaları', (2020) 78(2) İstanbul Hukuk Mecmuası 436.

are always physically present in the courtroom, and usually only one of the parties attends the hearing via an electronic system, whereas the other party is also physically present in the courtroom.

II. Online Hearings in Turkish International Litigation

A. Online Hearings in Turkish Criminal Procedure Law

Sound and video transmission techniques can be used to hear suspects, witnesses, experts, and accused persons according to Turkish Criminal Procedure Law[2]. Article 196/4 of the Criminal Procedure Law provides that an accused person may be interrogated and/or attend the hearings by use of sound and video communication systems if the judge or the court deems it necessary.

The Regulation on the Use of Sound and Video Information System in Criminal Procedure[3] entered into force on September 20, 2011. The Regulation provides principles and procedures for hearing relevant people by the public prosecutors, judges, or courts via Sound and Video Information System ("SEGBIS") which is defined as the system that enables transmission and collection of both sound and video within UYAP system which is the information system established to conduct justice services in an electronic platform.

According to Article 13 of the Regulation, those people who cannot attend the hearings due to a justifiable ground accepted by the authority that will hear them may be heard via SEGBIS and attend hearings via SEGBIS. There are special provisions for hearing of those who are imprisoned (Article 14); who are hospitalized (Article 15); who reside outside the jurisdiction of the relevant authority which will make the hearing (Article 16). SEGBIS can be used in appellate courts and the Court of Cassation (Article 21).

Upon entry into force of the Regulation, the SEGBIS system was welcomed by some of the Turkish doctrine and still, its advantages are accepted. One of these advantages is that the hearings are recorded so can be listened to and/or watched by the authorities and higher courts repeatedly which also eliminates the burden of holding accurate minutes. SEBGIS replaces the procedures of proxy judge which is used for hearing of those who reside outside the jurisdiction of the court which has to hear the party and/or witnesses. Therefore, the principle of directness and equality of arms are strengthened[4].

2 OG. 17.12.2014 / 25673.

3 OG. 20.09.2011 / 28060.

4 Erdal Yerdelen, 'Ceza Muhakemesinde Video Konferans Yönteminin (SEGBIS) Kullanımı' (2019) 2 Bilişim Hukuku Dergisi 273-275; S Acar and H Gürsoy, 'Türk Mahkemelerinde Sesli ve Görüntülü Kayıt ve Videokonferans Sistemi Uygulamasına Geçiş, Ceza Mahkemeleri Örneği', (2012) 70 (4) Ankara Barosu Dergisi 131; T Açıkmeşe and U Karaşahin,

On the other hand, the problem arises when the suspect or accused person wishes to personally attend a hearing but is obliged to use the SEGBIS system by the court. It is feared by some scholars that involuntary use of SEGBIS will spread, and an exceptional procedure will become the rule. It is opined that the court shall explain the reasons for the necessity of the use of SEGBIS and the grounds for not permitting the accused person's presence. The expedition of a criminal procedure can not solely be a ground for the use of SEGBIS as the aim of a criminal procedure cannot be finalization of the procedure in a short period but to reach the substantial reality[5].

Others opine that although the use of the SEGBIS system may be open to certain criticism such as the occurrence of technical problems, or reluctance of some courts to evaluate the condition of the necessity of use of SEGBIS, its use cannot be ended but has to be sustained and improved. Especially the circumstances that justify the use of SEGBIS shall be prescribed in more detail by law to prevent infringement of the right to a fair trial[6].

B. Online Hearings in Turkish Civil Procedure Law

On July 22, 2020, Article 149 of the Turkish Civil Procedure Law[7] was completely amended to enable the court hearings to be held via sound and video transmission[8]. According to Article 149/1, a party can request to attend hearings and take other procedural actions online. There is no requirement for the court to take into consideration the opinion of the other party in evaluating its decision concerning e-hearings[9]. Similarly, the court may order, or the parties may request that a witness or an expert be heard online. Article 149/3 makes a distinction for cases in which the parties are not free to dispose of. In such cases, the court may on its motion decide to interrogate parties online[10]. Therefore, the law requires no consensus of the parties for the use of the e-hearing system and even entitles the court to decide on its motion without the wills of the parties in certain types of disputes.

'Sesli Görüntülü Bilişim Sistemi (SEGBİS)', (2012) 5 UYAP Bilişim Dergisi 25-27.

5 Fahri Gökçen Taner, *Ceza Muhakemesi Hukukunda Adil Yargılanma Hakkı Bağlamında Çelişme ve Silahların Eşitliği*, (1st Edn, Seçkin 2019) 325-328.

6 Burak Ateş, 'Adil Yargılanma Hakkı Kapsamında Sanığın Duruşmada Hazır Bulunma Hakkı ve SEGBIS Sistemi' (July 2022) 13 (51) Türkiye Adalet Akademisi Dergisi 477-479.

7 OG. 04.02.2011/27836.

8 Act Amending Code of Civil Procedure and Several Other Acts, OG. 28.07.2020/31199.

9 Emre Kıyak, 'Duruşmada Etkinlik Kazanan Yargılama İlkeleri ile Usuli Müktesep Hak Işığında Türk Hukuk Yargılamasında Eş Zamanlı Ses ve Görüntü Aktarımıyla Duruşma Yapılmasının Olması Gereken Sınırları', (November-December 2021) 16 (205) Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 1463.

10 It is stated in the doctrine that this provision shall be deemed as contrary to the Turkish Constitution as one can not be forced to waive his/her right to a fair trial. FG Taner and A Yıldırım, 'Suç İsnadına veya Medeni Hak ve Yükümlülüklere İlişkin Uyuşmazlıklarda Duruşmaya Video Konferans Yöntemiyle Uzaktan Katılma' (2021) 70 (1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 284.

Based on this new provision, the Regulation on Hearings Via Sound and Video Transmission in Civil Procedure[11] entered into force on June 30, 2021[12]. The Regulation defines online hearings as "e-hearing"[13]. E-hearing system is saved, integrated with, and protected by the UYAP system which is the information system established to conduct justice services in an electronic platform. According to Article 7 of the Regulation, one of the parties may request to attend hearings or take other procedural actions via the e-hearing system at least two working days before the hearing. One of the parties may also request that a witness or expert be heard online. According to Article 9/1, the court shall decide on the request for e-hearing at least one working day before the hearing. The Court may deny the request if it is not timely made or if it is made with bad faith to delay the proceedings (Article 9/2). Article 9/3 of the Regulation provides that if it will be burdensome for a party, witness, expert, or other related persons to attend a hearing in person due to his/her illness, age, or disability, e-hearing shall be decided upon his/her request. According to Article 10/3, in the cases in which the parties are not free to dispose of, the court shall first hear the parties via the e-hearing system if the party resides outside the jurisdiction of the court and cannot personally attend the hearing.

According to Article 11 of the Regulation, parties and their attorneys may attend an e-hearing from the office of the attorney, special rooms dedicated to e-hearings by the bar associations or courts. If the party is interrogated or takes an oath, he/she shall attend the e-hearing from the rooms dedicated to this purpose by the courts or prisons. The same applies to witnesses or experts. However, if the party, witness, or expert is attending the e-hearing because of his/her illness, age, or disability, he/she may attend from his/her residence or institution. If the party attending via the e-hearing system makes a proposal concerning waiver, acceptance, or amicable settlement, the court shall settle a new hearing date to which the party will personally attend and repeat his/her proposal (Article 13/4). Article 12/4 provides that the verification of the identity of those who attend an e-hearing due to their illness, age, or disability is performed via the use of a secure electronic signature or mobile signature[14].

11 OG. 30.06.2021/31527.

12 Due to infrastructural deficiencies, the e-hearings could not be held immediately upon entry into force of the Regulation. Gökçe Varol Karaosmanoğlu, 'Ses ve Görüntü Nakli Yoluyla Duruşma Yapılmasına İlişkin Olarak 7251 Sayılı Kanunla Yapılan Değişikliklerin Doğrudanlık İlkesi Kapsamında Değerlendirilmesi' (2022) 8 (1) Anadolu Üniversitesi Hukuk Fakültesi Dergisi 76. However, according to the Turkish Union of Bar Associations, by November 2021, 1400 civil courts of first instance in all cities of Turkey started holding e-hearings. https://www.barobirlik.org.tr/Haberler/e-durusma-bugun-itibariyle-81-ilde-basladi-82051.

13 The same concept is referred to with different names in criminal and civil procedures. This variation is criticized in the doctrine. Same authors also believe that neither SEGBIS nor e-hearing are appropriate terminology. "Attendance to a hearing from abroad via videoconference" would be a better statement of the concept and in line with comparative law. Taner and Yıldırım (n 10) 232.

14 Ceyda Süral and Ekin Ömeroğlu, 'Protection of Persons with Disabilities in Turkish Law' (2022) 17 Actualidad Jurídica Iberoamericana 353-354.

It must be noted that, although the name e-hearing resembles a situation where all parties of the hearing are attending the hearing via an electronic platform, e-hearing refers to the cases where one of the parties or witnesses or experts attend the hearing via video conference whereas the other relevant parties are present in the courtroom. There is no option for the judges to attend hearings via video conference; they and other court officials always have to be present at courtroom[15].

C. The Relevance of Online Hearings with the Right to a Fair Trial

The key case where the ECHR evaluated the relevance of online hearings with the right to a fair trial is the case of *Marcello Viola v. Italy*[16]. In this case, ECHR stated that "*Although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention*." In this case, the applicant whose personal participation in a hearing was restricted had been accused of serious crimes related to the mafia's activities. The ECHR opined that the transfer of such a prisoner entails stringent security measures and a risk of absconding or attacks. It could also provide the applicant with an opportunity to contact his former criminal organizations. Furthermore, mafia members may, even by their mere presence in the courtroom, exercise undue pressure on other parties in the proceedings, the victims, and secret witnesses. Therefore, the ECHR considered that the applicant's participation in the hearings by video conference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offenses in respect of their rights to life, freedom, and security.

In the case of *Yevdokimov and Others v. Russia*[17], the ECHR reiterated that "*Article 6 of the Convention does not guarantee the right to personal presence before a civil court but enshrines a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. ... The Court should establish whether the applicant, a party to the civil proceedings, had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent*". Therefore, in deciding whether personal presence is necessary, "*The Court must first examine*

15 Kıyak, (n 9) 1467.

16 Application no. 45106/04, 05.10.2006, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-77246%22]}.

17 Applications nos. 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12, 16.05.2016, *https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-160620%22]}*

the manner in which the domestic courts assessed the question whether the nature of the dispute required the applicants' personal presence. Secondly, it must determine whether the domestic courts put in place any procedural arrangements aiming at guaranteeing their effective participation in the proceedings."

The Court has held in different decisions, that the appearances by video-link are as such not necessarily problematic, as long as this measure serves a legitimate aim and that the arrangements are compatible with the requirement for due process (see, for example, *Dijkhuizen v. the Netherlands*, no. 61591/16, § 53, 8 June 2021; *Bivolaru v. Romania (no. 2)*, no. 66580/12, § 138, 2 October 2018); *Ichetovkina and Others v. Russia*, nos. 12584/05 and 5 others, § 37, 4 July 2017; *Yevdokimov and Others v. Russia*, nos. 27236/05 and 10 others, §§ 41-43, 16 February 2016; and *Marcello Viola v. Italy*, no. 45106/04, §§ 67 and 73-74, ECHR 2006XI (extracts)).

In light of the relevant decisions of the ECHR, the requirements that are necessary for restricting personal presence in the hearings may be listed as follows: (i) The restriction shall have a legal base. In other words, online participation shall be provided by the domestic law of the relevant jurisdiction. (ii) The restriction shall have a legitimate aim. (iii) The restriction shall be proportionate. The right of defense mustn't be completely demolished. The relevant party shall have appropriate means to present his case and defenses. It is also important that the party who attends via video conference can see and hear what others in the courtroom say and that he/she is not in a very disadvantageous position due to technical problems[18].

D. Turkish Constitutional Court Decisions Concerning Online Hearings

The relevance of online hearings to the right of a fair trial was first evaluated by the Turkish Constitutional Court in its decision rendered as a result of the application of Emrah Yayla[19], who is imprisoned and who had initiated proceedings against prison officials claiming that their actions constitute torture. Emrah Yayla believed that prison officials restricted the prisoners' right to stay outside for fresh air by their arbitrary behaviors; so, one day when he was requested to go inside, he resisted doing so and shouted slogans. He was condemned to stay in an isolated cell for 5 months by the Disciplinary Board. Emrah Yayla opposed this penalty before the Judge of Execution. The judge did not allow Mr. Yayla to be taken to the court in person but decided to hear him via SEGBIS from the prison. Mr. Yayla refused to defend himself via SEGBIS and applied to the Criminal Court of First Instance against the decision of the Judge. The Criminal Court did not annul the Judge's decision. Emrah Yayla applied to the Constitutional Court claiming that his right to a fair trial was infringed because he was deprived of speaking before the judge or asking direct questions

18 Taner and Yıldırım (n 10) 251-255.

19 Turkish Constitutional Court, General Assembly, B. 2017/38732, T. 6.2.2020. Lexpera Caselaw Database.

to the witnesses. The Constitutional Court underlined that the right to a fair trial is guaranteed by Article 36 of the Turkish Constitution; therefore, it can only be limited by law and with a legitimate purpose. The legal ground is found in Article 196/4 of the Criminal Procedure Law where it is prescribed that the judge may decide to hear a defendant, residing in Turkey, by using technology that permits video and voice transmission if the circumstances require so.

On the other hand, it is also provided in Article 141 of the Constitution that the courts shall resolve cases within the shortest time possible using the least sources. Doing so, however, may become harder when the caseload of the courts increases; thus, they may need to resort to alternative methods to efficiently meet the requirements of this constitutional rule. Taking into consideration the need to expedite the proceedings and the burden of transferring prisoners to the court, the interference with the right to attend the hearing in person may be in line with the law and based on a legitimate purpose. The Constitutional Court also stated that a party does not necessarily have to attend a hearing in person especially if there are not any issues concerning the genuineness of the parties or witnesses or any other facts that require their physical presence, and the parties are given the opportunity of making their claims and defenses in writing. Nevertheless, the courts shall set forth the substantial and relevant grounds for the nonexistence of the necessity of the personal presence of the parties and the necessity of the use of SEGBIS. Therefore, the court shall explain why attendance to the hearings via SEGBIS is sufficient despite the demand of an applicant's presence and what the conditions that make personal presence impossible or burdensome.

In the case of *Emrah Yayla*, the Constitutional Court decided that the right to fair trial is infringed because the Judge of Execution only relied on the fact that the use of SEGBIS *per se* does not constitute infringement; but did not take into consideration that Mr. Yayla is making claims against the prison officials with whose presence he does not want to testify. Furthermore, the transfer of Mr. Yayla from the prison to the court is not burdensome as Kırıkkale is a small village and Mr. Yayla is in Kırıkkale prison which is not far from the Judge of Execution also located in Kırıkkale.

In its simultaneous case of *Şehrivan Çoban*[20], the Constitutional Court also was not satisfied by the mere statement of security concerns by the criminal court of first instance as a ground for denying the right of personal presence in the hearing. Şehrivan Çoban was accused of being a member of a terrorist organization and she was imprisoned in Van. In the days that coincided with the hearing, there was a risk of protests and demonstrations in Van. So, her life and public security could be at risk if she is transferred from Van to Ankara where the criminal court is located. The Constitutional Court decided that the right to a fair trial is infringed taking into

20 Turkish Constitutional Court, General Assembly, B. 2017/22672, T. 6.2.2020. Lexpera Caselaw Database.

consideration that the criminal court ignored the applicant's demand to personally participate in the hearing; continued the hearing without her presence; did not consider postponement of the hearing or other measures to enable her presence; and that a final decision was given at the hearing.

The Constitutional Court underlined the requirement that the courts shall set forth valid grounds for declining the demand of personal presence by the applicant in its subsequent decisions[21]. The mere statement that SEGBIS is prescribed by legislation without evaluating the circumstances of the case can not constitute a valid ground for declining personal presence and therefore causes infringement of the right to a fair trial[22].

In the case of *Ahmet Yalçınkaya*[23], the applicant himself was required to attend the hearings via SEGBIS, and upon finalization of the sentence of the criminal court finding the applicant guilty of being a member of a terrorist organization, he applied to the Constitutional Court. The Court decided that the right to a fair trial is not infringed as it was the applicant's demand not to be present at the hearings and one can waive the guarantees of the right to a fair trial by his own will[24]. Not only by making a clear demand, but also by not opposing attending the hearings via SEGBIS, one is deemed to have waived his right to be personally present at the hearings, and the right to a fair trial is not infringed in such a case either[25].

As seen, all Constitutional Court decisions are related to the use of the SEGBIS system in the criminal procedure. Unfortunately, there are yet no Turkish high court decisions concerning the e-hearing system and its compliance with the right to a fair trial. Especially in cases that are closely related to the character and lifestyle of the parties such as divorce, affiliation of and personal contact with a child, the right to attend personally to the hearings may be more delicate. In such cases, the court shall carefully evaluate whether there is a demand of the party for e-hearing, and the grounds for deciding an e-hearing shall be substantial and valid[26]. It is noteworthy that, according to the Regulation on e-hearings, these more delicate cases are the ones that the court may on its motion decide to use e-hearing.

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21 Case of Ahmet Aydın, Constitutional Court, 2nd Chamber, B.2019/41424, T.2.2.2022; Case of Cihan Sönmez, Constitutional Court, 2nd Chamber, B.2018/1347, T.2.3.2022; Case of Ali Osman Özpala, Constitutional Court, 2nd Chamber, B.2020/8108, T.14.4.2022; Case of Gazi Tekdemir, Constitutional Court, 2nd Chamber, B.2020/13836, T.14.4.2022; Case of Cebrail Sonkur, Constitutional Court, 2nd Chamber, B.2020/7708, T.14.4.2022; Case of Fatih Abdullah Oyar, Constitutional Court, 1st Chamber, B.2020/6573, T.21.9.2022. Lexpera Caselaw Database.

22 Case of Abdulkahar Aksoy and others, Constitutional Court, 2nd Chamber, B.2016/25089, T.10.6.2020. Lexpera Caselaw Database.

23 Turkish Constitutional Court, 1st Chamber, B.2020/19952, T.3.2.2022. Lexpera Caselaw Database.

24 One can waive the guarantees of right to a fair trial by his own will if the waiver is express, the result of the waiver is clearly foreseeable by the relevant party, minimum procedural guarantees are granted, and there is no higher public interest to prevent waiver. Case of Nurettin Balta, Constitutional Court, 2nd Chamber, B.2016/10023, T.28.12.2021. Lexpera Caselaw Daatbase.

25 Case of Ansar Onat, Constitutional Court, 2nd Chamber, B.2019/14515, T.15.6.2022; Case of Ökkeş Köksal, Constitutional Court, 1st Chamber. B.2020/25562, T.21.9.2022. Lexpera Caselaw Database.

26 Taner and Yıldırım (n 10) 284.

Furthermore, there are other concerns stated in the doctrine. For example, if the connection of the party is repeatedly interrupted, he/she will not be on an equal footing as the other party to the dispute[27].

III. Online Hearings in Arbitration

A. Arbitration in Turkey

In this part, firstly, the legislation regulating arbitration in Turkish law and the arbitration institutions commonly used in Turkey will be discussed. Then, the rules governing online arbitration hearings, which came to the agenda with COVID-19, and the advantages and problems that online hearings may bring will be discussed. Finally, the implications of the problems that may arise in the procedures for the recognition and enforcement of arbitral awards will be examined in detail.

1. Legislative Framework

International and domestic arbitrations are governed by different laws. The International Arbitration Law ("IAL")[28] applies to arbitrations of an international nature that are seated in Turkey or where its application is agreed to by the parties or arbitrators. Domestic arbitration is subject to the Code of Civil Procedure ("CCP")[29], which only applies to arbitrations seated in Turkey with no international element.[30]

Both laws are essentially based on the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law")[31]. Where the provisions of the IAL differ from the UNCITRAL Model Law, Swiss International Arbitration Law[32] has been used. In other words, regulations regarding arbitration in Turkish law are in line with modern international arbitration laws and with the needs of international arbitration practice and practice. [33]

The provisions of the IAL are based on the principle of party autonomy. The mandatory arbitration provisions include the right to a fair trial and the principle of equality of the parties. According to IAL Art.8 B: "*The parties shall have equal rights and competencies in the arbitral proceedings. The parties shall be given an opportunity to present their respective claims and defenses."*

27 Kıyak (n 9) 1484.

28 OG, 05.07.2001/24453.

29 OG, 04.02.2011/27836.

30 Ziya Akıncı, *Milletlerarası Tahkim* (6th Edn, Vedat 2021) 42.

31 For the UNCITRAL Model Law on International Commercial Arbitration see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

32 For the Swiss International Arbitration Law see https://www.swissarbitration.org/wp-content/uploads/2021/05/20210129-Chapter-12-PILA_Translation_English.pdf

33 Akıncı (n 30) 70.

2. Arbitral Institutions in Turkey

Turkish parties most commonly refer to the International Chamber of Commerce (the "ICC") arbitration[34]. The Swiss Arbitration Centre (formerly the Swiss Chambers' Arbitration Institution), the Stockholm Chamber of Commerce (the "SCC"), and the London Court of International Arbitration (the "LCIA") are also frequently used institutions.

Within Turkey, the Istanbul Arbitration Center ("ISTAC") has become a prominent institution over the past few years. The ISTAC also contributed to the increase of arbitration awareness in Turkey. The ISTAC is a neutral institution established by law ("Istanbul Arbitration Center Law")[35] in 2015, as part of a wider project of the Istanbul Finance Centre ("IFC"). The ISTAC has its own set of arbitration rules, the ISTAC Arbitration and Mediation Rules[36], which entered into force on 26 October 2016.

According to ISTAC Arbitration Rules, unless otherwise agreed by the parties, the seat of arbitration shall be Istanbul (Art. 23/1) and the parties can determine the language of the arbitration (Art. 24/1). According to Art. 24/II, "*In the absence of such agreement between the Parties, the Sole Arbitrator or Arbitral Tribunal shall determine the language of the arbitration considering all circumstances and conditions.*"

According to Art. 13, "*The parties are free to agree on the number of arbitrators. In cases where the parties agree on more than one arbitrator, the number of arbitrators must be an odd number*. *In cases where the parties have not agreed on the number of arbitrators, the Board of Arbitration shall … decide that the dispute be resolved by either a sole arbitrator or by an arbitral tribunal consisting of three arbitrators*."

As for applicable law, according to Art. 25/1, "*The Sole Arbitrator or Arbitral Tribunal shall make their decision in accordance with the rules of law chosen by the parties as applicable to the merits of the dispute. In the absence of such agreement by the Parties, the Sole Arbitrator or Arbitral Tribunal shall apply the rules of law that is deemed to be appropriate.*"

The Union of Chambers and Commodity Exchanges of Turkey[37], situated in Ankara, also serves as an arbitral institution and administers the resolution of commercial disputes. The Istanbul Chamber of Commerce Arbitration Centre ("ITOTAM")[38], is

34 For the website of the Istanbul Chamber of Commerce see https://www.ito.org.tr/en

35 OG, 20.11.2014/29190.

36 For the ISTAC Arbitration and Mediation Rules, see https://istac.org.tr/wp-content/uploads/2023/01/istac_tahkim_kurallari_v3_tr-3.pdf

37 For the website of the Union of Chambers and Commodity Exchanges of Turkey, see https://www.tobb.org.tr/Sayfalar/Eng/AnaSayfa.php

38 For the website of the Istanbul Chamber of Commerce, see https://www.ito.org.tr/en

another arbitration institution; however, it can solely be activated when at least one of the parties is a member of the Chamber.

Regardless of the pandemic and online hearings, there was no obligation to hold a hearing even in the pre-COVID-19 period. The arbitration rules provide that a hearing may be held upon the request of one of the parties or when the arbitrator or the arbitral tribunal deems it necessary, although the parties do not request it. In line with the IAL Art. 11, the CCP Art. 429, the UNCITRAL Model Law Art. 24, and the ISTAC Arbitration Rules Art. 30, a hearing is not mandatory. A party, however, may request a hearing to be held, in which case the arbitral tribunal must hold a hearing unless there is an agreement to the contrary (IAL Art. 11/A/1; CCP Art. 429/1). The ISTAC Arbitration Rules give the right to decide whether to hold a hearing to the arbitral tribunal. If a party fails to attend a hearing, the arbitral tribunal may nevertheless proceed and render an award (IAL Art. 11/C/4; CCP Art. 430/1/c).

B. Online Hearings in Arbitration

1. General

In international commercial arbitration, the parties are usually able to present their claims and defenses in face-to-face hearings during the oral proceedings. Until the COVID-19 pandemic, arbitration rules and practices were based on face-to-face hearings. Following the World Health Organization's ("WHO") declaration of a pandemic, arbitral institutions have also taken several measures to maintain proceedings during the pandemic. Arbitration institutions have started to amend their rules and prepare guidelines to enable online hearings, thus encouraging video conferencing.

The most important concepts when it comes to online hearings are fairness and efficiency. The International Council for Online Dispute Resolution ("ICODR") has proposed additional standards[39] that online dispute processes should be accessible, accountable, competent, confidential, equitable, fair, impartial, neutral, protect all relevant laws, secure and transparent, and each of which can be considered a subset of fairness or efficiency.[40]

2. Online Hearing Rules

Upon the announcement of the COVID-19 pandemic, arbitration institutions provided certain guidelines related to the procedures and principles to be applied in online hearings. Based on these principles, the participants of the cases have the opportunity to hold hearings through teleconference or video conference methods.

39 For the International Council for Online Dispute Resolution Standards, see https://icodr.org/standards/

40 Jeffrey M. Waincymer, 'Online Arbitration' (2020) 9(1) Indian Journal Arbitration Law 1, 3.

The ICC promulgated an ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic on April 9, 2020,[41]. Guidelines are advisory and their use is at the discretion of the parties. According to Article 21 of the ICC Guidelines, if the parties agree or the arbitral tribunal decides to hold an online hearing, the parties and the arbitral tribunal will make some planning and the Secretariat is available to assist. Article 22 provides that if the arbitral tribunal decides to proceed with an online hearing without the agreement of the parties or despite a party's objection, it must justify its decision. The tribunal should do so by the principles of the right to be heard and the principle of equality. Article 28 of the Guidelines sets out procedural matters. Accordingly, to ensure that the parties are treated equally and that each party is allowed to present its case in an online hearing, the tribunal should take into account different time zones, the total number of participants, the location of participants, remote participants, the use of a real-time transcript or other forms of recording, the use of translators, the use of visual evidence, including screen sharing in determining the hearing dates, start and end times, and the length of the hearing day.

In addition, Article 26 of the ICC Arbitration Rules[42] was amended in 2021 to regulate online hearings and authorizes the arbitral tribunal to decide, after consulting the parties as appropriate, whether the hearings should be held face-to-face, by video conference, by telephone or by other means of communication appropriate for the purpose.

Similarly, after the global COVID-19 outbreak, ISTAC has introduced rules and procedures for conducting online hearings, ISTAC Online Hearing Rules and Procedures[43], - hearings via telephone or video conference - in arbitration proceedings conducted under the ISTAC Arbitration Rules. The online hearing rules and procedures consist of a total of 10 articles very simply addressing the main issues involved in conducting online hearings to serve as a guideline to parties and arbitrators. Under Art. 1/2 of these Rules, "*At the request of any party, or upon its own initiative, the Sole Arbitrator or the Arbitral Tribunal, may designate rules and procedures other than those provided herein."* According to Art. 2, "*At the request of any party or in cases where the Sole Arbitrator or the Arbitral Tribunal deems appropriate, hearings or meetings may be conducted through video conference or teleconference."* Therefore, the Article authorizes the arbitral tribunal to hold an online hearing if "*the sole Arbitrator or the Arbitral Tribunal deems appropriate*", even in the absence of agreement between the parties.

41 For the ICC COVID-19 Guidance (Guidance Note Possible Measures Mitigating Effects COVID-19), see https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/

42 For the ICC Arbitration Rules, see https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/

43 For the ISTAC Online Hearing Rules and Procedures, see https://istac.org.tr/en/dispute-resolution/arbitration/istac-online-hearing-rules-and-procedures/

The technical infrastructure and preparation shall be completed before the conduct of the online hearing. Such include technical details such as the software to be used, dial-in information, usernames, and passwords to participate in the online hearing, as well as taking necessary measures to maintain confidentiality and security of the hearing. ISTAC Secretariat offers its technical support to parties and arbitrators in these respects. Parties shall provide a list of participants to the arbitrator or the arbitral tribunal before the online hearing; no additional third party shall be allowed to participate in the online hearing. During the online hearing, only one participant shall be allowed to speak at one time and the others shall mute their microphones to maintain audio and video quality. Parties may submit documents electronically during the online hearing upon approval of the arbitrator or the arbitral tribunal. According to Article 8 of the Rules, witnesses and experts may also participate in the online hearing provided that they are situated in front of their computers to allow the rest of the participants to see their faces. Witnesses and experts may be questioned based on documents shown to them electronically upon approval of the arbitrator or the arbitral tribunal. Interpreters may also be present during the online hearing either separately or together with the person requiring interpretation. The arbitrator or the arbitral tribunal may, upon informing the parties, decide to record the online hearing to be circulated after the hearing. The arbitrator or the arbitral tribunal may also, at the expense of the parties, decide to have the audio recording turned into written minutes of the hearing. It is forbidden to make a private recording of any part of the online hearing without the permission of the arbitrator or arbitral tribunal.

ICSID published a brief guideline regarding online hearings on its website on March 24, 2020. ICSID's videoconferencing platform does not require specialized hardware or software, so participants can participate from anywhere.[44] According to the other guide regarding online hearings of ICSID, "Virtual Hearing", all ICSID online hearings use end-to-end encryption, and a technical expert and court secretary are present throughout the hearing to ensure the smooth running of the hearing. ICSID also offers a range of options for simultaneous interpretation in multiple languages.[45]

Online hearings are also possible in ad hoc arbitration. Since there is no regulatory body in ad hoc arbitration, the process is governed by the law of the seat of arbitration, unless the parties have agreed otherwise, and the arbitral tribunal may amend the procedural rules of the arbitration.

44 For "A Brief Guide to Online Hearings at ICSID", see https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid

45 For "Virtual Hearings", see https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid

3. Advantages of Online Hearings

The main advantage of online hearing is it eliminates barriers of location and distance. With the removal of these barriers, many experts, regardless of their location, can participate in the hearings, which allows for a wide range of professional knowledge to be accessed. Another advantage of online hearings is the simplicity and convenience of the process.[46] In this context, the process also saves a lot of time and reduces costs. For example, there is no need to find and rent any place for the hearings. In addition, there is no need for printed documents, it is easier for the parties to find relevant documents and information they need which will save time. Personalized links and passwords also prevent unauthorized persons from attending hearings. Audio and video recording of hearings is also an advantage in terms of the transcripts that will be sent to the parties so that they can review the process. All of these increase the speed and efficiency of the arbitration process.

4. Disadvantages of Online Hearings

Information security is important in online hearings and parties may be concerned about the confidentiality and security of electronic documents, witness and expert testimony, and the defense. In March 2020, the Seoul Protocol on Videoconferencing in International Arbitration (Seoul Protocol) was published, which provides Guidelines to suggest that parties may provide teleconferencing or alternative video/audio methods and to eliminate technical and legal risks associated with the planning and conduct of videoconferencing.[47] This Protocol is a short document containing regulations on the questioning of witnesses, observers, presentation of documents, technical requirements, translation, recording, etc. Overall, although there are some disadvantages such as confidentiality, connectivity problems, difficulties in scheduling hearings due to the presence of arbitrators, lawyers, clients, experts, or witnesses from different locations, how cross-examination can be carried out, good hearing preparation, preparing cyber protocols or taking necessary precautions within the framework of confidentiality, using the most appropriate video conferencing platforms to avoid technical problems will eliminate these disadvantages and ensure that arbitration proceedings can be concluded quickly and at less cost without delay.[48]

46 AE Manav Özdemir and B Vural Çelenk, 'Virtual Hearings in Arbitration and Evaluation of Virtual Hearings in the Context of the Right to be Heard and Principle of Equal Treatment' (2022) 42 (1) Public and Private International Law Bulletin 224-225.

47 For the Seoul Protocol on Video Conferencing in International Arbitration, see http://www.sidrc.org/static_root/userUpload/data/%5BFINAL%5D%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf

48 Manav Özdemir and Vural Çelenk (n 47) 24.

5. Online Hearings in the Light of the Right to be Heard and Principle of Equality of the Parties

Whether the arbitration proceedings are conducted in ad hoc or institutional arbitration, the arbitrator, or the arbitral tribunal, as a rule, has the right of discretion in matters of arbitration procedure. The arbitral tribunal's discretion is limited by the principle of equality of the parties and the right to be heard.[49] Article 18 of the UNCITRAL Model Law and Article 8, Paragraph B of the IAL refer to the parties' "assertion of their claims and defenses" and both articles regulate the parties' equal exercise of their rights of claim and defense in arbitration proceedings. Under these provisions, the principle of equality of the parties undoubtedly extends to virtually every stage of the arbitration process. It is possible that the party challenging the arbitrator's or tribunal's decision to hold an online hearing may seek to dismiss the arbitral tribunal while the proceedings are pending or if the relevant proceedings are unfavorable to it, seek to set aside the award or to prevent its enforcement in a country where enforcement is sought. If the arbitration agreement stipulates that the hearings may be held online, the arbitral tribunal may enforce this provision in the agreement. If the parties have not agreed in the arbitration agreement that the hearing will be held online or face-to-face, if the claimant requests an online hearing in the request for arbitration and the respondent accepts this request in its response to the request for arbitration, the parties agreement on this issue will still be realized. If, contrary to the will of the parties, the arbitrators decide to hold an online hearing and insist on it, they must justify to the parties why the hearing should be online rather than physical. In ISTAC practice, Article 2 of the ISTAC Online Hearing Rules and Procedures, taken together with Article 7, provides that the arbitrator must stop the hearing if the parties clearly state that their right to be heard has been violated during the online hearing. Otherwise, the arbitral award rendered in such a case may be subject to a setting aside procedure, which will be discussed below. In practice, one of the reasons why parties tend to object to online hearings is that there is inequality between the parties due to the time zone difference between the locations of the parties, lawyers, arbitrators, witnesses, and experts. In the context of equality of the parties, the time difference should be considered when determining the time of the hearing, and the time interval that is most convenient for both parties should be determined.[50]

The decision of the Austrian Supreme Court is important as it is the first known court decision in continental Europe to consider online hearings and fair trial guarantees in arbitration together. On July 23, 2020, the Austrian Supreme Court (Oberster Gerichtshof, OGH), in a case concerning a motion to dismiss an arbitral tribunal due to online hearings, considered whether the conduct of arbitration proceedings through online hearings, despite the party's objection, violates the right to a fair trial

49 Waincymer (n 41) 4-5.

50 Waincymer (n 41) 17

(Case No. 18 ONc 3/20s)[51]. The Court emphasized that considering the particularities of the concrete case, holding a hearing solely online would not be considered a direct violation of the right to be heard, and may even serve the right to be heard under certain circumstances.

The respondent, who lives in Vienna, requested the dismissal of the arbitral tribunal in the arbitration proceedings held at the Vienna International Arbitration Center (VIAC) because the arbitral tribunal had decided to hold the evidentiary hearing online. After the VIAC rejected this request, the case was brought before the OGH. The Court rejected the request because the fact that the arbitral tribunal decided to hold an online hearing against the party's consent was not a procedural violation of sufficient gravity to warrant the recusal of the arbitrator. At the same time, the Court emphasized that under Austrian law, the arbitral tribunal has broad discretion over the procedure and organization of the arbitration. On the merits, the OGH emphasized that fair trial guarantees must be observed by the arbitral tribunal at all stages of the proceedings and, in particular, that equal opportunities for both parties to participate in the hearings are part of this right. The Court held that the fact that the arbitral tribunal did not postpone the hearing under the existing COVID-19 measures to hold a physical hearing and decided to hold it online did not violate the principle of equality of the parties. The Court also rejected the claimant's argument that they had not been notified of the hearing at the appropriate time.

In the Austrian Supreme Court decision, it is emphasized that the interest in online hearings in both arbitration and court proceedings increased all over the world, especially during the pandemic period. In the decision, it was also stated by the court that online hearings contributed to the realization of the proceedings. In its decision, the Court stated that online hearings serve the right to access justice and the right to be heard in terms of fair trial guarantees, especially as they prevent the suspension of the proceedings. In the case at hand, the court rejected the parties' request for the dismissal of the arbitral tribunal because the parties could not prove their claims in terms of the principle of equality of the parties in terms of fair trial rights, especially the principle of equality of the parties.

6. Impacts of Online Hearings in Turkey

a. Setting Aside Procedure of the Arbitral Award

The first recourse against an arbitral award rendered through an arbitration might be the setting aside of the arbitral award. Article 15 of the IAL provides a setting aside procedure. According to the Article, set aside action against an arbitral award

51 For the original German version of the Austrian Supreme Court Decision, see ttps://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf

can be filed before the competent regional appellate court within 30 days from the notification of the award or any revision of/interpretation on/addition to the award by the arbitral tribunal. the competent court for a setting aside action is the civil court of first instance with jurisdiction. Article 15 (A) codifies the same grounds as provided in Article 34 of the UNCITRAL Model Law. The grounds for setting aside listed in Article 15 are exhaustive.[52]

If at least one party objects to the online conduct of the hearing, the award may be set aside on the two grounds listed in Article 15. First, Article 15 (A) 1/g provides, that an arbitral award may be set aside based on the fact that the parties to the arbitral proceedings were not treated equally. The principle of equality of the parties also refers to the equal treatment of the parties in terms of procedural law during the proceedings. It should be considered in terms of the parties' ability to assert their claims and defenses.[53]

Second, according to Article 15 (A) 2/b, an arbitral award may be set aside if the award conflicts with public policy. Since there is no precise definition of public order and it changes according to time and place, it will be necessary to recognize the judges' right of discretion. For this reason, it would be appropriate for the judges to decide in line with the understanding of public order in international arbitration rather than the public order in domestic law. The contravention of public order may be raised in the decision on the merits of the dispute or about the arbitration procedure. The cases of violation of public policy that may be raised about the merits of the dispute will be extremely limited. In particular, provisions that eliminate the right of defense, even if agreed by the parties or by the rules applicable to the arbitration procedure, may constitute a violation of public policy.[54] Arbitrability and public order issues are considered *ex officio* by Turkish courts, whereas the other grounds should be proven by the party requesting the setting aside.

An example of a situation where an arbitral award may be set aside based on Article 15 as a result of an online arbitration hearing is where one of the parties objects to the arbitral tribunal because it considers itself to be in a disadvantaged position, particularly concerning the hearing of witnesses. The objection is rejected, and the hearing continues to be conducted online. If one party is heard physically by the arbitral tribunal while the other party is heard online against its consent, the arbitral award may also be subject to challenge. By the principle of equality of the parties, it would be appropriate for the arbitral tribunal to hear both parties in the same manner[55]. Yet, it appears that each case might be considered according to its own merits.

52 Akıncı (n 30) 401.

53 Ibid 501.

54 Ibid, 273.

55 Manav Özdemir and Vural Çelenk (n 47) 33-39; Aysel Çelikel and Bahadır Erdem, *Milletlerarası Özel Hukuk,* (2021) 844.

This issue is also closely related to the right to a fair trial. Although there is a clear provision as a ground for setting aside in the CCP, which is explicitly regulated as a violation of the right to a fair trial, such violation is not explicitly mentioned among the grounds for setting aside in the IAL. The fact that it is not explicitly mentioned does not mean that this right is not protected within the framework of the IAL and cannot be a ground for setting aside an arbitral award. As for the legal basis for protecting the right to a fair trial, there are various opinions on the doctrine. First of all, Article 8 of the IAL, titled "Determination of Procedural Rules, Equality and Representation of the Parties," states that parties must be allowed to present their claims and defenses. This regulation is a mandatory rule. In doctrine, some authors consider compliance with the right to a fair trial in arbitration proceedings as a mandatory component of compliance with the principle of equality of the parties, which is envisaged as a ground for setting aside in Article 15 of the IAL.[56] Moreover, it is also stated in the doctrine that the guarantees of a fair trial provided in the European Convention on Human Rights (ECHR)[57] can be used as a basis for setting aside an arbitral award on the grounds of public policy to the extent that they are compatible with arbitration.[58]

b. Recognition and Enforcement of Arbitral Awards

The recognition and enforcement of arbitral awards are regulated under the Turkish Private International Law and International Civil Procedure Code. ("PIL Code").[59] However, by Article 1/2 of the PIL Code, if there is an international treaty on this matter, it shall be applied primarily. Turkey, like most States today, is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[60] since its entrance into force on 25 September 1992. As of January 2023, the convention has 172 state parties. Therefore, in most of the cases New York Convention will be applied. It is important to note that provisions on recognition of arbitral awards in the PIL Code are implemented from the New York Convention, therefore, the recognition conditions listed in Article 62 of the PIL Code comply with provisions of the New York Convention.[61]

In line with Article I/3, Turkey has made two common reservations about the New York Convention[62], which have little impact on the enforceability of nearly all

56 Turgut Kalpsüz, *Türkiye'de Milletlerarası Tahkim* (2nd edn, Yetkin 2010) 140-142; Vahit Doğan, *Milletlerarası Ticaret Hukuku* (1st edn, Savaş Yayınevi 2020) 1208.

57 For the European Convention on Human Rights, see https://www.echr.coe.int/documents/convention_eng.pdf

58 Hatice Özdemir Kocasakal, 'Avrupa İnsan Hakları Mahkemesi'nin Pecshtein Kararı Çerçevesinde CAS'ın Tarafsızlığı ve Bağımsızlığı', (2020) 40 (1) Public and Private International Law Bulletin 89-90; Manav Özdemir and Vural Çelenk (n 47) 33.

59 OG, 12.12.2007/26728.

60 For the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf

61 C Şanlı and E Esen and İ Ataman Figanmeşe, *Milletlerarası Özel Hukuk,* (9th edn, Beta 2021) 838.

62 For Turkey's reservations to the New York Convention, see https://uncitral.un.org/en/texts/arbitration/conventions/

awards. Turkey declared that it would apply the New York Convention only if the award was granted in a State that is a signatory to the New York Convention and has limited the applicability of the New York Convention to conflicts arising from relationships that are categorized as commercial under Turkish law. [63] However, since the number of states party to the New York Convention is now 172, it can be said that Turkey's reservation on reciprocity has lost its importance and effect.

Based on Article V 1 (b) of the New York Convention, enforcement of an arbitral award can be refused due to infringement of the right to be heard of the parties. The New York Convention explicitly mentions the right to be heard in this provision, stating that "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or." According to this provision, the burden of proof falls on the party making the claim. The right to a fair trial in this convention also covers the principle of equality of the parties in Article 8 of the ICC.[64] Article 62, paragraph 1 (ç) and (d) of the PIL Code regulates that failure to respect the right to proper notice constitutes an obstacle to enforcement. Therefore, if one of the parties has not been properly represented before the arbitrators and has not explicitly accepted the proceedings carried out later, and if the party against whom the arbitrator's decision is enforced has not been notified of the arbitrator's appointment or has been deprived of the opportunity to claim and defend, the court is regulated to reject the request for enforcement of the foreign arbitrator's decision.[65]

Both the New York Convention and the PIL Code have regulated the violation of public policy as one of the obstacles to the enforcement of an arbitral award. Article V, paragraph 2 (b) of the New York Convention and Article 62, paragraph 1 (b) of the PIL Code state that the enforcement of a foreign arbitral award may be refused if it is contrary to the public policy of the country where enforcement is sought. The violation of the right to a fair trial is closely related to the violation of public policy, but these two grounds are regulated separately in both regulations. Unlike the specific ground for refusal of the right to be heard explained above, this ground for refusal may be considered ex officio by the court.[66] In addition, the party requesting the refusal of enforcement on the grounds of the right to a fair trial in the enforcement case must have objected to the right to a fair trial before the arbitrator promptly. If the necessary objections were made before the arbitrator promptly, but this did not affect the merits of the award, only in this case enforcement may be challenged.[67]

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foreign_arbitral_awards/status2

63 Akıncı (n 30) 527-528; Aysel Çelikel and Bahadır Erdem (n 31), 823.

64 Akıncı (n 30) 574.

65 Şanlı and Esen and Ataman Figanmeşe (n 62) 838; Mehmet Akif Gül, *New York Sözleşmesi Bağlamında Usuli Tenfiz Engelleri* (1st edn, Oniki Levha 2018), 33, 34.

66 Manav Özdemir and Vural Çelenk (n 47) 37. Çelikel and Erdem (n 39) 844.

67 Akıncı (n 30) 581.

Unlike the IAL, the principle of equality of the parties is not explicitly mentioned in either of the two legislations. Especially in the discussions considering the purpose of the New York Convention, it is accepted that this principle is a principle that is observed throughout the convention and even if it is not explicitly mentioned, it will be protected within the scope of the provisions mentioned above.[68]

IV. Conclusion

Although the use of online techniques is accepted and provided in Turkish civil and criminal procedure law, in light of the decisions of ECHR and the Turkish Constitutional Court and relevant doctrine that have been set forth above, it may be concluded that the judges in deciding to make use of these online technologies can not merely rely on the fact that the law permits the use of them. The courts shall make sure and demonstrate that denial of physical presence to one of the parties does not infringe his/her right to a fair trial and does not put him/her in a disadvantageous position compared to the other party in presenting his/her case.

To make conclusions concerning the enforcement of arbitral awards made within a procedure where online hearings were held, it must first be said that arbitral tribunals should act cautiously upon deciding to conduct arbitration hearings online, especially if one of the parties objects to the online hearing. Since arbitration is a dispute resolution method based on the will of the parties, there will be no concern unless both parties agree to the hearing being conducted online. The main objective of the arbitral tribunal is to render an award that will not be set aside and will be enforceable in the future. At this point, the arbitral tribunal needs to justify its decisions during the arbitration process, especially in cases where one of the parties objects. Therefore, when making decisions regarding the online hearing and the procedure, they must be justified. The holding of an online hearing does not in itself constitute a ground for setting aside or an obstacle to recognition and enforcement. The greatest risk of conducting hearings online is the possibility of violations of the parties' right to be heard and the principle of equality of the parties. In this case, the disadvantaged party will be able to challenge the award and eventually, this could lead to the setting aside of the award or the refusal of recognition and enforcement. Therefore, arbitral tribunals should evaluate every individual circumstance of the case and the parties; they should evaluate separately whether there is a violation of the principle of equality of the parties and the right to be heard. When the arbitral tribunal decides on having the hearing online it must set forth valid and substantial grounds for the use of an online hearing instead of a physical hearing. Overall, to overcome the challenges arbitral tribunals must act in line with the aforementioned Austrian Supreme Court decision,

68 Ferda Nur Güvenalp, *Milletlerarası Ticari Tahkimde İddia ve Savunma Hakkının İhlali* (1st edn, Oniki Levha 2018) 113; Manav Özdemir and Vural Çelenk (n 47) 38

guidelines of the prominent arbitral institutions, and provisions of the related laws and conventions. Under these conditions, we believe that the use of online hearings will not be an obstacle to the enforcement of arbitral awards under Turkish law.

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