DUE PROCESS OF LAW AND INTERNATIONAL COMMERCIAL ARBITRATION (NOTES ON THE “CASE OF ERN MAKİNA SANAYİ VE TİCARET A.Ş. AGAINST TURKY, OF 3 MAY 2007)¹

Ethem Akıllıoğlu

Investigador en la University of London (Reino Unido)

SUMMARY


KEY WORDS

Fair trial rights; International commercial arbitration; Right to arbitrate; Proper notice; Right to present his case.

ABSTRACT

It is common view that arbitral awards are not in the rationae materiae competence of the Court under Article 6 (1) of the Convention. In Stran Greek Refineries case² (1994) the Court has stated that a monetary obligation arising from an arbitral sentence should be respected as a judgment entailing finality. In the present judgment it is believed that the Court can entertain legal problems arising under international commercial arbitration procedure within the framework of fair trial rights under Article 6 (1).

¹ Application No: 70830/01, judgment of 3rd of May 2007
² Case of Stran Greek Refineries and Stratis Andreadis v. Greece, Court (Chamber), (Application no. 13427/87), Strasbourg, 09 December 1994.
I. INTRODUCTION

On 3rd of May 2007 the European Court of Human Rights (the Court) handed down an important judgment on Article 6 (1) of the European Convention on Human Rights (“the Convention”)\(^3\). As is famously known the first paragraph of the said article regulates fair trial rights where the determination of a civil right or an obligation is at stake\(^4\). It is true that Article 6 (1) is applicable to state court procedures when the conditions are met and calls for state responsibility. However, the applicability of Article 6 (1) to international commercial arbitration is a question that belongs to a shady area. With this judgment it is believed that this could be the case on a small scale. It is small because the Court did not directly divulge in the question of applicability of fair trial rights to arbitration procedures. Rather, it analysed the question by applying Article 6 (1) to the procedure employed by the state court at which enforcement of the award is sought.

Another important aspect of this judgment along with others such as Stran Greek Refineries is the fact that Article 6 (1) is in fact an important fundamental part of international public law. Article 14 (1) of United Nations International Covenant on Civil and Political Rights and Article 8 of the American Convention on Human Rights provides more or less similar provisions resembling Article 6 (1) of the Convention coupled with domestic provisions point to the fact that fair trial rights are no longer an issue that should be discussed within the closed borders of the Convention\(^5\). On the other hand, international commercial arbitration diffuses a certain degree of counter reaction to Article 6 (1) flowing from its dominantly private law nature. Firstly, arbitration is the product of an agreement between private parties by which they acquire maximum privacy in the resolution of their difference and also a total control over substantive and procedural matters governing the resolution of their dispute. This has led commentators to hold that parties to an arbitration agreement could decide to agree on a low level of procedural security and in fact this could be realized\(^6\). This reasoning is materialized to a certain degree with the waiver of rights theory under Article 6 (1) and under the Convention. Even this may be the

---

\(^3\) Application No: 70830/01, judgment of 3\(^{rd}\) of May 2007


\(^6\) *Ibidem*, pp. 110-165.
case, the present judgment and the arguments of the applicant show that fair trial rights should be an important procedural issue and that it should always be fully scrutinized by arbitral tribunals and that right to arbitrate, counterpart being the “right to a court”, cannot be waived at all as the present judgment shows.

At institutional level, legal framework for the operation of international commercial arbitration should now more than ever pay attention to the requirements of fair trial rights which in our opinion lacked in the text of CIAC arbitration rules. Finally, the Court must directly address claims regarding violations of fair trial rights to contribute to the development of fair trial rights protection in the sphere of international commercial arbitration.

II. FACTUAL BACKGROUND OF THE JUDGMENT

Ern Makine Sanayi ve Ticaret A.Ş. (“the applicant”) lodged a complaint on the basis of an alleged violation of Article 6 of the Convention to the Court on 30.01.2001 via Article 34 of the Convention against Turkey. This application flows from a sales contract concluded by the applicant with a Russian company. According to the original clause of the sales contract the disputes arising out of it would be settled before Stockholm Chamber of Commerce Arbitration Institute. Later in 11.09.2001 parties amended this clause and stipulated that the differences that would arise under sales contract could also be resolved before International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (“ICAC”) according to the relevant Russian law.

The applicant on 30.10.2005 decided to move its registered headquarters to another location effective from 14.11.2005 and completed the necessary notification procedures with the Ankara Commercial Registration Office (“Registrar”). Also, the applicant notified neighbourhood executive officer on 22.11.1995. Registrar issued an official document testifying the change of address of headquarters and officially delivered the document to the applicant on 18.12.1995.

Russian company applied to ICAC for the determination of the applicant’s due on 26.12.1995. ICAC arbitrator(s) granted the Russian company’s request on 19.10.1996 as a result of a procedure in which the applicant did not have the chance to participate. Russian company afterwards applied to

---

Ankara Commercial Court for the exequatur of the ICAC arbitral award of 19.10.1996. Ankara Commercial Court notified the applicant regarding the exequatur request of the Russian company on 20.05.1997 and also officially notified the applicant that the exequatur hearing is fixed on 29.05.1997. On 20.05.1997 Ankara Commercial Court noticed that the applicant did not receive any notification regarding the hearing on exequatur request of the Russian company and accordingly made an official notification based on the Turkish Law on Official Communication Article 35 and also addressed an information request about the new address headquarters of the applicant from Registrar.

On 11.08.1997 Registrar notified Ankara Commercial Court that the file of the applicant was not found and sent a document enclosed with the old address of the applicant’s headquarters.

On 25.02.1998 Ankara Commercial Court rejected the Russian company’s exequatur request by stating that the clause in the sales contract regarding the arbitration is invalid due to the fact that the clause confer jurisdiction for the resolution of disputes arising under the sales contract to two arbitration institutions and also the fact that the sole right of the Russian company’s on the appointment of arbitrators ran counter to Turkish public order. Moreover, Ankara Commercial Court also held that the decision of ICAC had not been proved to be final.

Russian company lodged an appeal against the decision of 25.02.1998 Court to Court of Cassation. On 08.07.1998 the Court of Cassation quashed Ankara Commercial Court’s decision of 25.02.1998 by stating that the conferment of jurisdiction on two arbitration institutions was valid; also it held that the possibility exists for parties on the appointment of arbitrators and this in fact was not contrary to the Turkish public order. Cassation Court also stated that according to the arbitration clause between the parties any decision given by arbitrator(s) is deemed final, binding and directly enforceable.

Ankara Commercial Court rejected to abide by the Cassation Court’s decision on the same grounds in its original judgment and added that the applicant did not have the possibility to participate in the arbitration hearing before ICAC. Highest Chamber of the Cassation Court quashed this decision on 09.06.1999. Upon the decision of Highest Chamber of the Cassation Court, Ankara Commercial Court granted exequatur request of the Russian company. The applicant requested for the rectification of this judgment and appealed on 08.12.1999 but to no avail, its request turned down by the Court of Cassation.

III. EVALUATION OF THE COURT

The Court indirectly took the legal problem on the point of whether an
arbitral award taken in absentia of a party to a dispute can be enforceable in the host state of the applicant? The answer of the Court is in the negative due to the violation of “the right to a court” under Article 6 (1) of the Convention. The Court in reaching this conclusion depart from the fact that the applicant cannot be held liable for the fault on the part of Registrar that has failed to inform Ankara Commercial Court about the new address of the headquarters of the applicant. The Court also stressed the fact that the applicant did not have the chance to participate in any stage of the resolution of the legal dispute neither before ICAC nor before Ankara Commercial Court.

1. Evaluation as regards arbitration

Russian company initiated arbitration before ICAC following eight days after the change of address of applicant’s headquarters and requested from ICAC to determine the applicant’s due under the sales contract. ICAC accepted Russian company’s request in a hearing in which the applicant was not present. It is obvious from the judgment of the Court that this request was not a mere issuance of a provisional measure. It is evident that the decision of ICAC directly affected the material positions of the parties because right after the decision of ICAC, Russian company requested for exequatur of it in the host state of the applicant. The applicant on the other hand found out by its own endeavours of this situation almost over two years of time. On this point it is immensely suitable to mention some of the relevant provisions and rationale behind them contained in the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (“the Rules”). It is clear that there is an obligation upon the Secretariat of the ICAC to ascertain that all documents in a case are forwarded to the parties. They shall be sent to the addresses indicated by the parties. The parties are under an obligation to immediately notify ICAC about any changes in their previously given addresses. It is also highly possible that the applicant did notify ICAC about the change that occurred in its headquarters address. Because, the core defence of the applicant stems from the fact that it did not have the possibility to participate in the first hearing on 26.12.1995 that took place before ICAC. Rule 12 (5) places an obligation on ICAC to exhaust all necessary avenues in making sure that the parties receive an official notification of documents relevant to arbitration by making a reasonable inquiry. Also, Rule 12 (5) places an obligation on ICAC to provide the applicant with a written communication that could have been received that is sent to the last-known place of business, permanent residence or mailing address of the party by registered letter or any other means which provides a written record of the attempt of ICAC that it
has satisfied the necessities of a *reasonable inquiry*.

On hearing the Rules have necessary safeguards for disputants to be on equal procedural footing. But the applicant lost this equal footing starting from the first hearing before ICAC and onwards. Put in the language of Article 6 (1) of the Convention the applicant did not have the right to arbitrate and the possibility to present its counter arguments. It did have during the appellate stages before state court but in the end it was time barred.

Related with the applicable law the Rules provide the following which is of interest regarding the substantial application of the arbitral agreement. There is an obligation on arbitrators to make sure that the parties are treated equally and have procedural opportunities to properly defend their case. However, the Rules make no reference to international law unlike for example Rule 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

---

8 Rule 23: “The parties shall be notified of the time and place of a hearing by notices which shall be forwarded to them so as to enable each party to have at least 30 days at his disposal to prepare for and to appear at the hearing. Upon agreement of the parties this period may be reduced. Should there be a need be to conduct further hearings, their dates shall be set by the arbitral tribunal with consideration of particular circumstances.” Rule 27: “Any hearing is conducted to enable the parties to express their stands on the base of the presented evidence and to hold debates. The hearing of the case shall be conducted in private. With permission of the arbitral tribunal and with the consent of the parties persons not participating in the proceedings may be present at the hearing.” Rule 12 (1) & (5): “The Secretariat of the ICAC shall see that all documents in a case are forwarded to the parties. They shall be sent to the addresses indicated by the parties. The parties shall immediately notify the ICAC about any changes in the earlier indicated addresses. Any written communication is deemed to have been received if it is delivered to the party personally or if it is delivered at his place of business, permanent residence or mailing address. If none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the last-known place of business, permanent residence or mailing address of the party by registered letter or any other means which provides a record of the attempt to deliver it.”

9 Rule 13: “The ICAC shall settle disputes on the basis of the applicable rules of substantive law determined by an agreement of the parties. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. The ICAC shall apply to the proceedings the provisions of the present Rules. When resolving questions regulated neither by the present Rules nor by the parties’ agreement, the ICAC being abided by the provisions of the Russian law relating to international commercial arbitration shall carry out the proceedings in such a manner as it thinks fit, subject to the condition that the parties shall be treated equally and that each party shall have the opportunity to properly defend his interests.” Compare with Rule 42 (1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which provides: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”
2. Evaluation As Regards Turkish Code on International Private and Procedural Law

Turkish Code on International Private and Procedural Law ("Turkish Code") regulates the exequatur requests and enumerates grounds upon which an exequatur request might be turned down. According to Article 60 (1) only those arbitral awards which are final and binding can be the subject of an exequatur request. According to Article 61 (1) (b) the request holder for exequatur has to prove that the arbitral decision is final and binding. Article 62 (1) (ç) states that if one of the parties to arbitration proceedings did not have the chance to present his case, exequatur request can not be granted.

In other words, if one of the parties did not have the opportunity to have access to any hearing conducted by arbitrator(s) the court at which the exequatur request is sought is under an obligation to ascertain that the right to arbitrate secured. This is also the rooted view and reasoning of Turkish courts when they are asked to give effect to foreign arbitral awards exequatur status. When they omit to take into account of procedural violations of this kind then the reviewing Cassation Court overturn the judgment solely on this procedural violation. The burden of proof here rests on the party against whom the request for exequatur is sought. In the present case, the applicant alleged and sufficiently proved that it did not have the means to present its case both before CIAC and Ankara Commercial Court.

IV. HUMAN RIGHTS CONSIDERATIONS AND ARBITRATION

The Court’s case law on the application of fair trial rights to arbitration proceedings differs between compulsory and voluntary arbitration. As regards the former in 1982 the European Commission of Human Rights (the Commission) held that if the parties to a dispute have no other revenues but to take their dispute before an arbitral tribunal then this tribunal is under an obligation to provide fair trial rights under Article 6 (1). As

---


12 See the Commission’s report of 12 December 1983 in Brameld and Malström Case.
regards the latter the Commission relied on the waiver of rights and was of the view that an inclusion of an arbitration clause should taken as a partial renunciation of the rights under Article 6 (1). The Court joined the Commission in the Deweer case and held that the waiver of the rights contained in Article 6 (1) does not in principle run counter to the Convention.

The issue was again before the Court in which one of the parties argued that the award had been given by arbitrators lacking impartiality. The Court did not give any clear indication on what kind of rights can be waived or put it simply whether the waiver could be construed as a total waiver of the rights under Article 6 (1). This is a question open for debate and some argued that the core rights of Article 6 can not be waived at all and some other rights which are dispensable can be waived like “public hearing”\(^\text{13}\). On the other hand it should be argued that “independence and impartiality”; “equality of arms”; “right to a court” and “reasonable time” are important core rights in all of these kinds of proceedings and could not be waived in an arbitration proceeding before an arbitral tribunal.

Same issue can be discussed from a different perspective. This concerns whether a state can incur liability under the Convention due to the violations of Article 6 (1) in arbitration proceedings. The case law of the Court permits an indirect responsibility of member states to be born in the following way: In Matthew judgment the Court held that the Convention does not in any way exclude the possibility of a transfer of competence to an international organization as long as fair trial rights are protected. The Court confirmed its view in Waite and Kennedy judgment by stating that “…where states establish international organizations in order to pursue or strengthen their cooperation in certain fields or activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if the Contracting States were thereby absolved from their responsibility under the Convention…”.

The applicability of fair trial rights to international commercial arbitration depends on whether the text giving legal force to the international tribunal and its judicial acts contains necessary safeguards vis-à-vis the protection of fair trial rights. In Naletilić case concerning ICTY, the Court endorsed this view by stating that “…in view of the content of its Statute and Rules of Procedure ICTY offers all the necessary guarantees…”\(^\text{14}\). This

---


\(^{14}\) *Naletilić v. Croatia* (dec.), no. 51891/99, ECHR 2000-V.
is called “equivalent protection” doctrine developed in the case law of the Commission in which the Commission stated that the transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection. The Commission in earlier case law stated that the legislative framework of a member state must contain safeguards to check whether the arbitral tribunal’s conduct of proceedings is compatible with Article 6 of the Convention. This can be construed as another way of saying that an arbitral tribunal is bound by fair trial rights that are of core importance as regards the Convention. But this has not yet been put forward. Rather indirect arguments are being forwarded.

Bearing in mind the foregoing a state may incur international liability when state courts accept to enforce or recognize an arbitral award within their jurisdiction issued in violation of Article 6 (1). This is the clear outcome of the present case as Turkey incurred international responsibility for the violation of Article 6 (1) by ICAC arbitral tribunal and local state courts. But this outcome overshadows in our opinion the international clout of Article 6 (1). Fair trial rights has to be regarded as a principle of international public law and this requires international commercial arbitration with its legal and institutional framework to raise its standards of protection of fair trial rights. This could be accomplished by the “equivalent protection doctrine” developed by the Commission and by the Court with a more active participation in the analysis of fair trial rights’ violations that occur before international arbitral tribunals and with the inclusion of fair trial rights provisions within the legislative and institutional framework embodying international commercial arbitration.

TÍTULO

DERECHO AL PROCESO DEBIDO Y ARBITRAJE COMERCIAL INTERNACIONAL (A PROPÓSITO DEL CASO ERN MAKİNA SANAYİ VE TİCARET A.Ş. CONTRA TURQUÍA DE 2007 DEL TEDH)

SUMARIO

I. INTRODUCCIÓN.- II. ELEMENTOS FÁCTICOS DE LA SENTENCIA.- III. EL ANÁLISIS EFECTUADO POR EL TRIBUNAL: 1. El análisis bajo el ángulo del


_16_ Kuijer (op.cit.), p. 145; Petrochilos (op.cit.), pp. 110-111.
arbitraje. 2. El análisis con respecto al Código turco sobre Derecho procesal internacional privado.- IV. CONSIDERACIONES SOBRE DERECHOS HUMANOS Y ARBITRAJE.

PALABRAS CLAVE
Derechos de defensa; Arbitraje comercial internacional; Derecho al arbitraje; Notificación en tiempo y forma; Derecho de acceso a la jurisdicción.

RESUMEN
Comúnmente se viene afirmando que los asuntos sobre arbitraje no entran ratione materiae en el ámbito competencial del Tribunal Europeo bajo el ángulo del artículo 6.1 del Convenio. En el caso Stran Greek Refineries (1994) el Tribunal ya afirmó que una obligación monetaria derivada de una sentencia arbitral debía ser considerada como un pronunciamiento final. Del caso objeto del presente trabajo se desprende que el Tribunal Europeo puede abordar los problemas jurídicos que se deriven de un procedimiento de arbitraje comercial internacional en el marco de los derechos de defensa reconocidos en el artículo 6.1 del Convenio Europeo.