ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

TURKEY

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the* lex arbitri *of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

Domestic and international arbitration are governed by separate laws. The Code of Civil Procedure[1] (hereinafter "CCP") applies to domestic arbitration when there is no foreign element and the seat of arbitration is Turkey,[2] whereas international arbitration is subject to the International Arbitration Law (hereinafter "IAL").[3] The IAL applies if the arbitration has foreign elements and the seat is determined to be in Turkey or the parties or the arbitral tribunal have selected the IAL as applicable law.[4]

The IAL is enacted based on the UNCITRAL Model Law on International Commercial Arbitration (hereinafter "Model Law").[5] Therefore, some provisions reflect the wording of Articles 18 ("Equal treatment of parties"), 19 ("Determination of rules of procedure"), 20 ("Place of arbitration"), and 24 ("Hearings and written proceedings") of the Model Law. Other than the tribunal's discretion and the party's autonomy to decide

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[1] 6100 Code of Civil Procedure [Hukuk Muhakemeleri Kanunu] of 12 November 2011, Official Gazette [Resmi Gazete] No 27836 dated 4 February 2011, available at <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6100.pdf> (last accessed 22 November 2020).

[2] Article 407 (1) CCP provides that: "The provisions under this Section shall be applied to disputes that do not have a foreign element as defined by the International Arbitration Law numbered 4686 and dated 21/6/2001, and to the disputes where the seat of arbitration is determined as Turkey". (free translation by the Author).

[3] 4686 Code of Civil Procedure [Milletlerarası Tahkim Kanunu] of 21 June 2001, Official Gazette [Resmi Gazete] No 24453 dated 5 July 2001, available at <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4686.pdf> (last accessed 22 November 2020).

[4] Article 1, paragraph 2, IAL provides that: "This Law applies to the disputes with foreign elements and the seat of arbitration is determined as Turkey, or to the disputes if the provisions of this Law are selected by the parties, the arbitrator or the arbitral tribunal" (free translation by the Author).

[5] UNCITRAL, Model Law on International Commercial Arbitration, available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> (last accessed 22 November 2020).

on the issues regarding the hearing, there is no explicit rule that requires physical hearings.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's* lex arbitri *(e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: By way of interpretation, the right to a physical hearing can be excluded unless parties had agreed otherwise.

Under Turkish law, the right to a physical hearing is not provided by the laws governing domestic and international arbitration. Additionally, there are no provisions regarding the formalities to follow during arbitration hearings as opposed to litigation procedures.[6]

As further illustrated below, the parties' agreement and, failing such agreement, tribunal's orders are the key to regulate the way the hearings are conducted. Through interpretation, it could be argued that the right to a physical hearing can be excluded unless there is a parties' agreement to the contrary.

Article 8 (A) IAL echoes Article 19 of the Model Law giving the parties autonomy to determine the rules of procedure. Similarly, in lack of an agreement, the tribunal has the discretion to conduct the proceedings in accordance with the provisions of the IAL.[7] Article 8 (B) IAL provides that the parties shall be treated with equality during the arbitration proceedings and be given the full opportunity to present their case.[8]

[6] For instance, in terms of litigation proceedings, Article 157 (1) CCP requires court clerk to be present during hearings; Article 153 CCP prohibits video or audio recordings; Article 151 CCP gives the judge the authority to establish the discipline in the courtroom and may lead the disturbing persons out of the courtroom considering the circumstances.

[7] Article 8 (A) IAL provides that: "Subject to the mandatory provisions of this Law, the parties are free to determine the rules of procedure or by means of referral to international or institutional arbitration rules agree on the procedure to be followed by the arbitrator or the arbitral tribunal in conducting the proceedings. If there is no such agreement between the parties, the arbitrator or the arbitral tribunal shall conduct the arbitration subject to the provisions of this Law" (free translation by the Author).

[8] Article 8 (B) IAL provides that: "The parties shall have equal rights and discretion during arbitration proceedings. The parties shall be given the opportunity to assert their claims and defences". On the other hand, Article 423 (1)(1) CCP has a slightly different wording. Instead of "parties shall be given the opportunity to assert their claims and defences", it provides that "parties shall have an opportunity to enjoy the right to be heard" (free translations by the Author). It is suggested that the difference in wording does not lead to any discrepancy between the substantive meaning of these two provisions when it comes to the corresponding

Article 9 IAL allows parties or an arbitration institution selected by the parties to determine the place of arbitration. In lack of an agreement, the tribunal has the discretion to determine the place in consideration of the circumstances of the case.[9] The Article further provides that the tribunal may meet in another place given that the parties are duly notified beforehand.[10]

Article 11 (A) gives discretion to the tribunal to decide whether to hold a hearing for reasons such as presentation of evidence, oral argument, and requesting an explanation from an expert or whether to conduct proceedings based on documents and other materials before it.[11] Consistently with Article 19 of the Model Law, Article 11 (A) mandates that the tribunal holds a hearing at an appropriate stage of the proceedings if requested by a party, unless the parties have agreed that no hearings shall be held.[12]

Article 11 (C) (4) of the IAL, which is in line with Article 25 (c) of the Model Law, states that if any party fails to appear at a hearing, the tribunal may continue the

ground for setting aside the award. Hakan PEKCANITEZ, "Tahkim Usulü ile İlgili İptal Sebepleri" in Hakan PEKCANITEZ, ed., *Makaleler* (On İki Levha Yayıncılık 2016) p.731 at pp. 747.

[9] Article 9, paragraph 1, IAL provides that: "The parties or an arbitration institution chosen by the parties are free to determine the place of arbitration. Failing such an agreement, the seat of arbitration shall be determined by the arbitrator or the arbitral tribunal having regard to the circumstances of the case" (free translation by the Author).

[10] Article 9, paragraph 2, IAL provides that: "The arbitrator or the arbitral tribunal may meet at another place under the circumstances required by the proceedings provided that the parties are given prior notice" (free translation by the Author).

[11] Article 11 (A), sentence 1, IAL provides that: "The arbitrator or the arbitral tribunal may decide to hold hearings for reasons such as presentation of evidence, oral statements, and requesting an explanation from an expert or may decide to conduct the proceedings based on the case file" (free translation by the Author).

[12] Article 11 (A), sentence 2, IAL provides that: "Unless parties agreed that no hearings shall be held, the arbitrator or the arbitral tribunal shall hold a hearing at an appropriate stage of the proceedings, if so requested by a party" (free translation by the Author). In an annulment case, the court set aside the award because the tribunal had ruled without any hearings despite the party's request. Istanbul 10th Commercial Court of First Instance [İstanbul 10. Asliye Ticaret Mahkemesi] File No 2016/1259 E., Decision No 2018/217 K., 19 February 2018. In an enforcement action, a party argued that the award should not be enforced because the tribunal had not held any hearings violating its right to be heard. The court ruled for the enforcement of the award considering that (i) the tribunal has the discretion not to have any hearings under the institutional rules adopted by the parties, the IAL and the CCP and (ii) the party failed to show how its right to be heard was violated. In this case, there was no indication whether the parties had any agreement on hearings or the party resisting the enforcement requested to have a hearing. Istanbul 17th Commercial Court of First Instance [İstanbul 17. Asliye Ticaret Mahkemesi] File No 2017/332 E., Decision No 2019/65 K., 13 February 2019. These cases, however, should be regarded with the caveat that they are rendered by the courts of first instance; consequently, they may be subject to an appeal.

proceedings and make the award on the evidence before it.[13] This article indicates that it is not a must for parties to physically (*or possibly by any other means*) appear before the tribunal. If the documents and information on file are sufficient, the arbitrators may decide without any hearings.[14] Therefore, the arbitrators do not need to physically meet and may conduct hearings via teleconference or email.[15]

Physical hearings are also not required for examining expert witnesses. Pursuant to Article 12, unless otherwise agreed, experts attend the hearing upon the request of one of the parties or if the tribunal requests to examine the experts.[16] The parties may decide not to hear any experts. Examining experts during a hearing is not mandatory either.

These rules can be interpreted collectively in the sense that holding a physical hearing is not a requirement since the conduct of the hearings can be arranged by the parties' agreement or tribunal's decisions and most importantly it could be decided not to have any hearings at all.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. In case the lex arbitri *does not offer a conclusive answer to the question of whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: No.

The CCP is the main legislation governing civil procedure. In litigation, oral proceedings are considered to be the default procedure. As a rule, courts cannot decide without holding a hearing unless otherwise provided by the law.[17] Pursuant to Article

[13] Article 11 (C) (4) provides that: "If any party fails to appear at a hearing or to produce evidence without showing sufficient cause, the arbitral tribunal may continue the proceedings and render an award based on the evidence before it" (free translation by the Author).

[14] Ziya AKINCI, *Milletlerarası Tahkim*, 5th edn. (Vedat Kitapçılık 2020) pp. 241, 284. See sub-paragraph b.3 below for comparison with court proceedings.

[15] Ziya AKINCI, "Elektronik Tahkim, Uluslararası İnternet Hukuku Sempozyumu (21-22 May 2001)", Dokuz Eylül Üniversitesi Yayınları (2002) p.429 at pp. 429-437.

[16] Article 12 (A), paragraph 2, IAL provides that: "Unless otherwise agreed, upon the request of one of the parties or as deemed appropriate by the arbitrator or arbitral tribunal, experts attend the hearing that they are invited after their written or oral statements. During this hearing, parties may ask questions to the experts or may have the tribunal to hear party-appointed experts about the dispute" (free translation by the Author).

[17] Baki KURU, Ramazan ARSLAN and Ejder YILMAZ, *Medeni Usul Hukuku*, 2nd edn. (Yetkin Yayınları 2014) p. 331. This rule is an extension of the right to be heard that is also expressed by Article 27 CCP.

147 of the CCP, after preliminary investigation[18] parties are invited to a hearing for oral proceedings.

Since 2011, the CCP includes a provision that allows parties to attend hearings via teleconference or videoconference. The provision was amended in 2020.[19] Article 149 CCP, as amended, provides that the court may allow the party or its proxy, upon its request, to attend the hearing or take procedural steps by teleconference or videoconference from a different location.[20] The previous version of the article provided that the court could allow participation in hearings remotely given that *the parties gave their consent*.[21] Now, if one of the parties requests to attend virtually, the other party's consent is not necessary.

The court also on its motion or upon the request by one of the parties may decide to hear witnesses and experts by teleconference and videoconference.[22] The previous version of the Article required the consent of both parties[23] whereas now the court can decide *ex officio*.

The court may also decide on its motion to hear the parties or other relevant persons remotely if the dispute concerns acts or proceedings that are not at the parties' disposal.[24]

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[18] In Turkish litigation, there is a preliminary phase where certain procedural requirements are investigated before actual hearings. For instance, during this phase, parties may raise their jurisdictional objections that there is an arbitration agreement and that the court does not have jurisdiction. The literal translation of this phase is "preliminary investigation". There is no single translation of this term. Other expressions used by legal scholars are: "preliminary examination"; "preliminary proceedings"; "pre-examination".

[19] 7251 Law Amending the Code of Civil Procedure and Certain Laws [Hukuk Muhakemeleri Kanunu ile Bazı Kanunlarda Değişiklik Yapılması Hakkında Kanun] of 22 July 2020, Official Gazette [Resmi Gazete] No 31199 dated 28 July 2020, available at <https://www.resmigazete.gov.tr/eskiler/2020/07/20200728-14.htm> (last accessed 27 November 2020).

[20] Article 149 (1) CCP provides that: "Upon request of any party, the court may decide that the requesting party or its proxy is allowed to attend the hearing and take procedural steps from the place where he/she is located by transfer of audio and video simultaneously" (free translation by the Author).

[21] Article 149 (1) CCP (repealed) provided that: "Provided that the parties have consented, the court may allow the parties or their proxies to attend the hearing and take procedural steps from the place where they are located by transfer of audio and video simultaneously" (free translation by the Author).

[22] Article 149 (2) CCP provides that: "Upon request of any party, the court may decide to hear a witness, an expert or a specialist from the place where they are located by transfer of audio and video simultaneously" (free translation by the Author).

[23] Article 149 (2) CCP (repealed) provided that: "Provided that the parties have consented, the court may allow a witness, expert, specialist or any party to be present at another location during their statement. The statement shall be transferred to the hearing room simultaneously as audio and video" (free translation by the Author).

[24] Article 149 (3) CCP provides: "The court may decide *ex officio* to hear the relevant persons from the place where they are located by transfer of audio and video simultaneously in cases

Pursuant to Article 149 (5) CCP, secondary legislation will be enacted to regulate the application of this Article.

The procedures of interrogation (*isticvap*)[25] and taking an oath (*yemin*)[26] are also available by teleconference and videoconference.

These provisions suggest that the parties do not need to physically appear before the court but most importantly that the parties do not necessarily have the right to a physical hearing as the court may decide *ex officio* to conduct the proceedings remotely.[27]

4. *If yes, does such a right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

Article 149 CCP applies only to court proceedings. There is no reference or indication of its application to domestic arbitration, which is also governed by the CCP.

As to international arbitration, Article 17 IAL explicitly provides that the CCP shall not apply to the subject matters regulated by the IAL, unless otherwise provided. There is no provision in the IAL regarding the conduct of hearings that refers to the CCP. Thus,

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or transactions that are not at parties' free disposal" (free translation by the Author). A case is at parties' disposal if they have a say in initiation and termination of the proceedings or in determining the subject matter. Consequently, a judge cannot decide a case *ex officio* and unless otherwise provided by law, nobody can be forced to initiate proceedings to their advantage. For instance, cases with significant public policy concerns (such as protection of personal rights, divorce or separation proceedings, and paternity cases) are considered as cases that are not at parties' disposal.

[25] Article 172 (1) CCP provides that: "The person to be interrogated shall appear in person. However, if the person to be interrogated resides out of the city of the court and if it is not possible to interrogate by the transfer of audio and video, then that person shall be interrogated by the assistance of another court" (free translation by the Author).

[26] Article 236 CCP provides that: "The person that has to take an oath shall appear in person. However, if the person to be interrogated resides out of the city of the court and if it is not possible to interrogate examine him/her by the transfer of audio and video, then that person shall be interrogated by the assistance of another court" (free translation by the Author).

[27] The amendments to the provision that allows the court to decide to have a remote hearing on its motion or upon the request of only one party are severely criticized by scholars. The amendments are considered to be against the fundamental principles of civil procedure including the right to be heard and equality of the parties. Hakan PEKCANITEZ, Oğuz ATALAY and Muhammet ÖZEKES, "Hukuk Muhakemeleri Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Teklifinin (2020) Değerlendirilmesi", Lexpera Blog (30 March 2020) at <https://blog.lexpera.com.tr/hmk-ile-bazi-kanunlarda-degisiklik-yapilmasina-dair-kanun-teklifinin-2020-degerlendirilmesi/> (last accessed 1 February 2021) p.16.

it is highly unlikely that arbitral tribunals will apply the CCP to international arbitration proceedings unless parties selected the CCP as the law applicable to the procedure.

It is possible, however, that arbitral tribunals may construe the CCP provisions as an index that the physical hearing is not an issue of public policy or that remote hearings do not violate any fundamental principles or requirements of procedural rules since domestic courts are keen on having remote hearings.[28]

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?

Short answer: N/A

As explained above,[29] under Turkish law there is no right to a physical hearing in arbitration. On the other hand, parties are free to agree on remote hearings or opt for institutional rules that allow parties to conduct proceedings remotely such as the Istanbul Arbitration Centre ("ISTAC") Arbitration Rules[30] or Online Hearing Rules and Procedures.[31]

6. To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?

Short answer: It depends.

[28] See sub-paragraph f.11 below for recent developments in remote court proceedings. It should be considered, however, that although remote hearings are not frowned upon in and of itself, yet the recent amendments to the CCP are considered to be against the fundamental principles of civil procedure as stated in fn. 27 above.

[29] See paragraphs a and b above.

[30] Article 30 of the ISTAC Arbitration Rules provides that: "[…] (3) All parties have the right to attend the hearing. The Parties may attend the hearing in person and/or through their representatives or counsel. (4) The Sole Arbitrator or Arbitral Tribunal shall be in full charge of the conduct of hearings". English text available at <https://istac.org.tr/wp-content/uploads/2016/02/ISTAC-ARBITRATION-RULES.pdf> (last accessed 1 February 2021).

[31] See sub-paragraph f.11 below for further explanation.

Turkish legal system does not require arbitration hearings to be physical[32] but the parties may agree to have physical hearings. According to Article 8 (A) IAL, parties may freely agree on the procedural rules. There is no temporal restriction as to when parties may choose procedural rules. The parties may determine a certain procedural rule during the proceedings.

In the absence of a parties' agreement, the tribunal applies IAL.[33] However, party autonomy is restricted by the mandatory rules provided by the IAL.[34] If the agreement is found to be against the mandatory rules, the tribunal should give precedence to the mandatory rules over the parties' agreement because the tribunal should render enforceable awards or awards that do not face the risk of an annulment.[35]

If the parties agreed to have physical hearings, the tribunal is expected to respect the parties' agreement. The IAL does not provide for either physical or remote hearings; hence, there is not a mandatory rule covering this matter.

On the other hand, Article 15 (A) (1) (f) IAL lists non-compliance with parties' agreement on procedural rules as one of the grounds for annulment.[36] Therefore, it is likely that a tribunal would hold physical hearings if the parties so agreed. If the tribunal does not hold physical hearings against the agreement of the parties, the award may be annulled.

d. Setting Aside Proceedings

7. If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?

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[32] See paragraphs a and b above.

[33] See Article 8 (A) IAL, fn. 7 above.

[34] Ekin HACIBEKİROĞLU, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi* (On İki Levha Yayıncılık 2012) p. 31; Z. AKINCI, *Milletlerarası Tahkim*, fn. 14 above, p. 231, citing Yavuz KAPLAN, *Milletlerarası Tahkimde Usule Aykırılık* (Seçkin 2002) p. 45. The agreement on the arbitration procedure that is concluded after the proceedings start would be effective for the rest of the proceedings. However, it is also argued that the parties in such agreement may decide that the new procedural rules to apply retrospectively.

[35] Hypothetically, the result of non-compliance with the mandatory rules of *lex arbitri* may not be annulment. In such instances, the tribunal may choose to apply the parties' agreement even if it is against the mandatory rules. Z. AKINCI, *Milletlerarası Tahkim,* fn. 14 above, p. 418. Of course, this is not the case if *lex arbitri* is IAL.

[36] Article 15 (A) (1) (f) IAL provides that: "Arbitral awards may be set aside based on following grounds: 1. If the requesting party proves that […] f) Arbitration proceedings had not been conducted following the parties' agreement as to the procedure or failing such agreement, under the provisions of this Law and such non-compliance affected the substance of the award" (free translation by the Author).

Short answer: Yes.

As explained above, the right to a physical hearing in arbitration is not provided by Turkish law.[37] Assuming, however, that such a right was recognized in a specific case, a party is expected to object during the arbitration proceedings to the tribunal's decision of conducting the hearing remotely. Although this is not a rule provided by the IAL, it is submitted by Turkish scholarship that if a party does not object to the conduct of the tribunal during the proceedings, it would be against good faith to raise such objections at the setting aside stage.[38]

The courts share the same view. For instance, in a case, the party seeking to set aside the award appealed the decision of a court of first instance denying the annulment of an award.[39] The Court of Cassation found that such party was not acting in good faith since he/she had not raised any objections during the arbitration proceedings even though the tribunal asked whether the parties had any objections, and the first time he/she raised a red flag concerning the independence of the arbitrators was at the annulment proceedings.[40]

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute* per se *a ground for setting aside (e.g., does it constitute* per se *a violation of public policy or the due process principle), or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

It is not possible to answer this question since the right to a physical hearing in arbitration is not provided by Turkish law, as shown under paragraphs a and b above.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: It depends.

A failure to conduct physical hearings on itself does not lead to the annulment of the award.

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[37] See paragraphs a and b above.
[38] Z. AKINCI, *Milletlerarası Tahkim,* fn. 14 above, p. 427.
[39] 11th Civil Chamber of Court of Cassation [Yargıtay 11. HD], File No 2018/3264 E., Decision No 2018/7408 K., 27 November 2018.
[40] *Ibid.*

The grounds for setting aside an arbitral award are listed under Article 15 (A) IAL. As per Article 15 (A) (1) (f),[41] one of the grounds for annulment is non-compliance with the parties' agreement as to the procedure unless their agreement is against the mandatory rules of the IAL.[42] If the tribunal does not respect the parties' agreement or failing such agreement the tribunal does not apply the IAL, the award may be annulled.

Similarly, if a party proves that the tribunal did not treat the parties equally, the award may face annulment.

As provided by Article 8 (A), in case the IAL is silent on the issue, the tribunal may decide the procedural rules; accordingly may hold remote hearings. When issuing such an order, the tribunal should consider the equality of parties and make sure that they are given equal opportunity to assert their claims and defences.

Provided that the parties did not have an agreement on procedural rules, the party seeking for an annulment should show that the tribunal did not conduct the proceedings in accordance with the provisions of the IAL and that this affected the substance of the award. It is important to note that a simple violation of the law is not sufficient for an annulment. The party should prove that there is a serious violation of law, which substantially impacted the award.[43] Whether such violation has affected the substance of the award is determined on a case-by-case basis.[44] Examples of violations that may affect the outcome of an award are the violation of the right to be heard, due process, and equal treatment of the parties.[45] These rights are embodied in Article 8 (B) IAL.[46]

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[41] See fn. 36 above.

[42] See sub-paragraph c.6 above for further information as to the consequence of such an agreement.

[43] Ali YEŞİLIRMAK, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri* (On İki Levha 2011) p. 127; Turgut KALPSÜZ, *Türkiye'de Milletlerarası Tahkim*, 2nd edn. (Seçkin Yayıncılık 2010) p. 139; Z. AKINCI, *Milletlerarası Tahkim,* fn. 14 above, p. 528.

[44] Z. AKINCI, *Milletlerarası Tahkim,* fn. 14 above, p. 421.

[45] These principles are considered as components of the right to a fair trial as provided by Article 6 of the European Convention on Human Rights ("ECHR"), which is echoed by Article 36 of the Turkish Constitution. The ECHR is not directly applicable to arbitration but arbitral tribunals observe and try to comply with the right to a fair trial provided by the convention. Julian D.M. LEW, Loukas A. MISTELIS and Stefan KRÖLL, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) p. 96. See also Ferda N. GÜVENALP, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali* (On İki Levha Yayıncılık 2018) pp. 11-15 (explaining different perspectives on the applicability of Article 6 ECHR to arbitration proceedings).

[46] See fn. 8 above. Article 27 (2) CCP expressly provides for the right to be heard: "This right includes a) being informed about the proceedings, b) right to make statements and present evidence, c) court to make its evaluations in light of the [parties'] statements, and reason its judgments concretely and clearly" (free translation by the Author). Although the IAL does

As part of due process, the parties should be free to present their cases in their entirety before the tribunal. This includes the presentation of evidence and making statements about the case.[47] If it is found that one of the parties could not prove its case because he/she was denied the right to present evidence, the award will likely be set aside due to the violation of procedure that substantially affected the award. Similarly, the recognition and enforcement of the award, which is found to have violated the party's right to present its case, may be denied pursuant to Article (V)(1)(b) of the New York Convention.[48]

Rendering an award in a timely manner is a due process requirement. Furthermore, failing to render an award within the term of the arbitration is a ground for setting aside the award under Article 15 (A) (1) (c). Accordingly, if an award is not rendered within the term of the arbitration proceedings and the term is not extended a party may request its annulment.[49] To observe due process and to prevent an award from annulment, the

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not have a similar wording, these rights are unconditionally applied in arbitration. Cemile Demir GÖKYAYLA, "Milletlerarası Tahkimde İspat Hakkı ve Sınırlarına Uygulanacak Hukuk", 40 Public and Private International Law Bulletin (2020), p. 748 at p. 783. The right to be heard should be observed in every judicial proceeding and at all stages. This includes arbitration and other alternative dispute resolution proceedings. 21st Civil Chamber of Court of Cassation [Yargıtay 21. HD], File No 2015/18686 E., Decision No 2015/22027 K., 8 December 2015; 21st Civil Chamber of Court of Cassation [Yargıtay 21. HD], File No 2019/4716 E., Decision No 2019/5490 K., 25 September 2019; 21st Civil Chamber of Court of Cassation [Yargıtay 21. HD], File No 2014/13566 E., Decision No 2014/28211 K., 23 December 2014. It should be noted, however, that the courts adopt a different approach in terms of holding hearings and giving reasoned judgments in litigation proceedings. See sub-paragraph b.3 above for information on hearings in litigation. In terms of giving reasons for decisions, it is found that although public policy requires all court judgments to have reasons, the awards without reasons should not be denied enforcement based on public policy. Grand General Assembly on the Unification of Judgments of Court of Cassation [Yargıtay İçtihadı Birleştirme Büyük Genel Kurulu], File No 2010/1 E., Decision No 2012/1 K., 10 February 2012. See Bilgin TİRYAKİOĞLU, "Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzenine Aykırılık" in Süheyla BALKAR BOZKURT, ed., *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler* (On İki Levha Yayıncılık 2018) p. 89 at pp. 83-94 (criticizing the decision not requiring the awards to have reasons).

[47] E. HACIBEKİROĞLU, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, fn. 34 above, p. 41; Cemal ŞANLI, Emre ESEN and İnci ATAMAN-FİGANMEŞE, *Milletlerarası Özel Hukuk*, 8th edn. (Beta 2020) p.727; B. KURU, R. ARSLAN and E. YILMAZ, *Medeni Usul Hukuku*, fn. 17 above, p. 353 (emphasizing that although the presentation of evidence is generally considered as a burden, it is also a right.)

[48] See sub-paragraph e.10 below.

[49] As provided by Article 10 (b) IAL, the term of the arbitration proceedings is one year unless parties agree otherwise. This provision is criticized as it would not be efficient to annul an award only because the term has ended. Z. AKINCI, *Milletlerarası Tahkim,* fn. 14 above, p. 407. Indeed, the parties will have to start their proceedings all over but before state courts

tribunal may consider having remote hearings if, otherwise, the proceedings would be constantly postponed.

As mentioned above, another ground for setting aside is the violation of equal treatment of parties. The parties may argue that they do not have equal opportunities in terms of participating in hearings remotely so that they do not have equality of arms and they are not treated equally. However, it is difficult to substantiate this assertion.[50] The party seeking an annulment based on this ground must clearly show with well-established evidence how the party was treated unequally and what procedural actions led to unequal treatment.[51]

In an annulment case, the court may also consider *ex officio* if an award is against public policy.[52] There is no uniform definition of public policy but it is widely accepted to construe this principle narrowly.[53] The court cannot investigate or decide on the merits of the award.[54]

Violation of one party's right to be heard or equal treatment is considered to be a breach of public policy; hence, it constitutes a ground for setting aside the award that should be considered by the judge.[55] If during the proceedings the right to be heard is ensured by written procedures, not giving parties an opportunity to present their case

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as it will not be possible to commence an arbitration after an award is annulled based on this ground. C. ŞANLI, E. ESEN and İ. ATAMAN-FİGANMEŞE, *Milletlerarası Özel Hukuk,* fn. 47 above, p. 705.

[50] H. PEKCANITEZ, *Makaleler,* fn. 8 above, p. 748. The Author observes that, in practice, the parties have not been able to successfully substantiate their claims under this ground so far.

[51] *Ibid*.

[52] Article 15 (A) (2) (b) provides that: "Arbitral awards may be set aside based on following grounds: 2. If the Regional Court of Appeals finds that […] b) The award is against public policy" (free translation by the Author).

[53] Nuray EKŞİ, "Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni", 40 Public and Private International Law Bulletin (2020), p. 154 at p. 201. See sub-paragraph e.10 below for discussion on Turkish courts' approach towards public policy.

[54] Ergin NOMER, *Devletler Hususi Hukuku* (Beta 2015) p. 555; N. EKŞİ, "Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni", fn. 53 above, p. 151. In a decision, the court interpreted public policy very narrowly and found that investigating possible violations of procedural rules that are not mandatory would be deciding on the merits of the award, and rejected the request for annulment. 15th Civil Chamber of Court of Cassation [Yargıtay 15. HD], File No 2019/2474 E., Decision No 2019/3640 K., 26 September 2019, stating that procedural issues such as failure to conduct on-site examination, translate the agreement to Turkish, and issue a terms of reference are not against mandatory rules. These were not listed under the grounds for annulment, considering them as such ground would be against the legislator's objective.

[55] H. PEKCANITEZ, *Makaleler,* fn. 8 above, p. 750.

orally does not constitute a violation *per se*.[56] The arbitrators would not violate the parties' right to be heard solely because they did not hold a hearing.[57] Consequently, whether not having physical hearings is a ground for setting aside the award or not is an issue to be determined on a case-by-case basis considering parties' agreement on the procedural rules and how the proceedings were carried out by the arbitral tribunal.

e. Recognition/Enforcement

10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of the public policy of the country where enforcement is sought) of the New York Convention?

Short answer: It depends but likely not.

Recognition and enforcement of foreign arbitration awards are regulated by Articles 60-63 of the Code on International Private Law and Civil Procedure.[58] These Articles apply only if the New York Convention is not applicable to the relevant case and/or the award is not considered to be a national award.[59] In all other commercial arbitration awards that are rendered in a member state, the New York Convention applies.[60] In arbitration-friendly countries, the courts tend to construe the Convention narrowly and independently from national law by considering only very serious violations as a breach of the Convention to make the enforcement of foreign arbitral awards easier. Turkish

[56] *Ibid.*, p. 751.

[57] *Ibid.*, stressing also that not having oral statements from witnesses upon written questions should not be considered as a violation of the right to be heard.

[58] 5718 Code on Private International Law and Civil Procedure [Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun] of 27 November 2007, Official Gazette [Resmi Gazete] No 26728 dated 12 December 2007, available at <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5718.pdf> (last accessed 25 November 2020).

[59] Nuray EKŞİ, "Milletlerarası Tahkim Kanunu Hakkında Genel Bir Değerlendirme", 23 Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (2003) p. 336 at p. 338; Z. AKINCI, *Milletlerarası Tahkim*, fn. 14 above, p. 451. See also E. NOMER, *Devletler Hususi Hukuku*, fn. 54 above, p. 554, stating that parties are free to choose the New York Convention or Code on International Private Law and Civil Procedure to request recognition and enforcement of their award as they are not mutually exclusive.

[60] N. EKŞİ, "Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni", fn. 53 above, p. 147.

courts do not have any explicit statement or judgment in this respect but it is observed by Turkish scholars that courts have been adopting a friendly enforcement attitude.[61]

One of the issues regarding Article V(1)(b) of the Convention is determining the applicable law. It is generally accepted that the right of a party to present its case should be analyzed under the rules of *lex arbitri* rather than a specific national law or the law of the court where the enforcement is sought.[62]

The test or the law applied by the courts is not always clear. For instance, the court stated that not giving a party an opportunity to present its evidence would prevent enforcement of an award but, in that case, the court found no violation of the right to present one's case because the party objecting to the enforcement on this ground was able to file the written statement of its witness and the tribunal considered the statement.[63] The court found that the party had an opportunity to present its case even if the tribunal did not examine the witness orally.[64]

Regardless, this right should be respected at every stage of the proceedings and each party should be given the equal opportunity to enjoy this right.[65]

The courts require that a party, in order to object to the enforcement of the award based on this ground, should have raised this issue during the proceedings. If they do not raise their objections or if such violation is cured during the proceedings without any harm to the party, then the court denies these objections.[66] It is also considered that the right to present one's case has strong ties with public policy.[67]

Turkish literature emphasize that private international law and national law have different understandings of public policy. The New York Convention does not distinguish private international public policy and public policy in national jurisdictions.[68] To find a violation of public policy, the courts consider whether the award violates fundamental values of the society, fundamental rights and freedoms granted by the Constitution and the violation should exceed the contractual obligations

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[61] *Ibid.*, p. 145. See also Nuray EKŞİ, "Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi", Ankara Barosu Dergisi (2009) p. 68 at p. 74, evaluating earlier decisions of Turkish courts regarding non-enforcement of foreign awards and how this led to Turkey's image as an "arbitration-unfriendly" country.

[62] Mehmet A. GÜL, "New York Sözleşmesi Bağlamında Hukukî Dinlenilme Hakkının İhlâli", 7 Türkiye Adalet Akademisi Dergisi (2017) p. 396 at p. 406.

[63] 19th Civil Chamber of Court of Cassation [Yargıtay 19. HD], File No 2000/7171 E., Decision No 2000/7602 K., 9 November 2000.

[64] *Ibid.*

[65] 20th Civil Chamber of Court of Cassation [Yargıtay 15. HD], File No 2018/2303 E., Decision No 2018/6174 K., 2 October 2018.

[66] See the case cited under fn. 39 above.

[67] E. NOMER, *Devletler Hususi Hukuku*, fn. 54 above, p. 562.

[68] N. EKŞİ, "Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni", fn. 53 above, p. 153.

of the parties, should have a societal impact that cannot be tolerated by the society, should irritate and hamper the conscience of the society.[69]

There may be some provisions in the parties' agreement that might be against public policy. Court of Cassation found that the award can still be enforced if arbitral tribunal did not render the award based on such provisions, or these provisions do not constitute the reasons of the award.[70] In other words, if such an agreement is not taken into account by the tribunal, the award will not be considered against public policy.[71] The courts may also investigate whether the award will have any consequences that may be against public policy once it is enforced.[72]

As a general rule, the courts do not investigate the merits of the award during enforcement or setting aside proceedings.[73] Investigation of public policy violations may require courts to look into the substantive issues of the award.[74] In earlier cases, courts found that extending their analysis to the merits in order to verify a possible violation of public policy does not necessarily mean that the court is deciding on the merits of the case.[75]

As stated above, the right to present one's case is also considered a public policy issue and Turkish courts investigate a violation of public policy *ex officio*. Courts may look at whether the right to present a case is violated or not without allegations by any party.[76]

Similarly, with regards to the application of V(1)(d) to determine irregularity in the procedure, courts do not look at how substantive laws are applied to the merits of the case. As per Article V(1)(d) of the Convention, the parties' agreement as to the procedure

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[69] 15th Civil Chamber of Court of Cassation [Yargıtay 15. HD], File No 2019/2474 E., Decision No 2019/3640 K., 26 September 2019; 15th Civil Chamber of Court of Cassation [Yargıtay 15. HD], File No 2016/895 E., Decision No 2016/2050 K., 31 March 2016. Public policy requires an award to be in compliance with the enforcing state's mandatory rules on protection of competition and consumers, prohibitions regarding foreign currency and import. Measures to fight against the COVID-19 pandemic are also mandatory rules. Consequently, it is argued that enforcement of an award that does not consider COVID-19 as force majeure may be denied due to public policy concerns, if such award is against the measures to prevent the pandemic. N. EKŞİ, "Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni", fn. 53 above, p. 159.

[70] General Assembly of Civil Chambers of Court of Cassation [Yargıtay Hukuk Genel Kurulu], File No 2011/568 E., Decision No 2012/47 K., 8 February 2012.

[71] *Ibid.*

[72] General Assembly of Civil Chambers of Court of Cassation [Yargıtay Hukuk Genel Kurulu] File No 2013/1847 E., Decision No 2015/2020 K., 30 September 2015.

[73] E. NOMER, *Devletler Hususi Hukuku*, fn. 54 above, p. 555; N. EKŞİ, "Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni", fn. 53 above, p. 151.

[74] 13th Civil Chamber of Court of Cassation [Yargıtay 13. HD], File No 2014/27460 E., Decision No 2015/23707 K., 9 July 2015.

[75] See the case cited under fn. 70 above.

[76] 11th Civil Chamber of Court of Cassation [Yargıtay 11. HD], File No 2002/13265 E., Decision No 2003/5759 K., 2 June 2003.

is attributed the utmost importance. In case the parties did not determine the rules of the procedure, the seat of arbitration will become significant.[77] In case the parties' agreement is silent on having a physical or remote hearing, it is uncertain whether the court will look whether a right to a physical hearing existed at the seat since there is no case law on the issue yet. Even if the courts will find that such right does exist, it is more likely that they will not deny enforcement based on its violation *per se*. The courts will likely enforce the award if the violation does not affect the outcome of the award.[78] Whether the violation has such an impact will be determined on a case-by-case basis.[79] It is also suggested that if such violation is cured during the arbitration proceedings so that the violation does not affect the outcome of the arbitration, then the so-called irregularity in the procedure should not prevent the enforcement of the award.[80]

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: N/A

Since 2000, through the National Judiciary Informatics System (*Ulusal Yargı Ağı Bilişim Sistemi*, "UYAP") filings have being made electronically. The system also provides several other services such as tracking notices and case files.[81] For criminal proceedings, voice and visual informatics system has been available for several years. Pursuant to the provisions in the CCP as detailed in sub-paragraph b.3 above, teleconference and videoconference can be used during civil proceedings.

After the COVID-19 pandemic, the Ministry of Justice and the Turkish Bar Association have initiated an electronic hearing (e-hearing) portal. For the time being, e-hearing is being tested in selected courts. As announced by the Ministry, the attorneys will need to send a request for e-hearing until 24 hours before the time of the hearing. After the judge accepts the requests on UYAP, the attorneys will be able to attend the hearing by using their e-signatures through the portal. There will be a formal requirement

[77] C. ŞANLI, E. ESEN and İ. ATAMAN-FİGANMEŞE, *Milletlerarası Özel Hukuk,* fn. 47 above, p. 733.
[78] See Z. AKINCI, *Milletlerarası Tahkim,* fn. 14 above, p. 528.
[79] *Ibid.*
[80] *Ibid.*
[81] National Judiciary Informatics System [Ulusal Yargı Ağı Bilişim Sistemi], available at <https://www.e-justice.gov.tr/> (last accessed 21 November 2020).

for attorneys to wear their gowns.[82] This application is expected to reduce individuals' mobility during the pandemic and also the litigation expenses in the long run.[83]

Another measure that was taken during the pandemic regarded the suspension of time limits. On March 25, 2020, with a provisional Article, some time limitations in legal proceedings were suspended until April 30, 2020, to prevent any extinction of rights.[84] The deadline was then extended to June 15, 2020.[85] The legal proceedings that were listed by the Article included mainly litigation and enforcement proceedings with an exception to interim measures.[86]

Time limits with regards to mediation and conciliation proceedings were also suspended; however, there was no reference to arbitration. Therefore, it was interpreted that the arbitration proceedings would remain unaffected by this provision.[87]

On the other hand, if the parties had opted for an *ad hoc* arbitration, which may require a court action such as the appointment of arbitrators, or as per the IAL if the parties requested court assistance, then such proceedings would have been subject to

[82] Republic of Turkey Ministry of Justice, "E-hearings in Judiciary Has Started" [Yargıda e-Duruşma Dönemi Başladı], available at <https://basin.adalet.gov.tr/yargida-e-durusma-donemi-basladi> (last accessed 21 November 2020).

[83] Union of Turkish Bar Associations, "Online Hearings Begin for Law Profession" [Avukatlık Mesleğinde Online Duruşma Dönemi Başladı] available at <https://www.barobirlik.org.tr/Haberler/avukatlik-mesleginde-online-durusma-donemi-basladi-81335> (last accessed 21 November 2020).

[84] 7226 Law Amending Certain Laws [Bazı Kanunlarda Değişiklik Yapılması Hakkında Kanun] of 25 March 2020, Official Gazette [Resmi Gazete] No 31080-*bis* dated 26 March 2020, available at <https://www.resmigazete.gov.tr/eskiler/2020/03/20200326M1-1.htm> (last accessed 22 November 2020).

[85] 2480 Resolution of the President Extending the Suspension Periods that Aims to Prevent Loss of Rights in Judiciary [Yargı Alanındaki Hak Kayıplarının Önlenmesi Amacıyla Getirilen Durma Süresinin Uzatılmasına Dair Cumhurbaşkanı Kararı] of 29 April 2020, Official Gazette [Resmi Gazete] No 31114 dated 30 April 2020, available at <https://www.mevzuat.gov.tr/MevzuatMetin/20.5.2480.pdf> (last accessed 22 November 2020).

[86] Article 10 (A) IAL provides that: "[…] If a party has obtained interim injunction or interim attachment from a court, that party shall commence arbitration proceedings within thirty days. Otherwise, the interim injunction or interim attachment shall automatically be lifted" (free translation by the Author). Due to the exception under the law, the thirty-day time limit was not suspended, and the party was expected to commence the arbitration.

[87] See, generally, Berk DEMİRKOL, "COVID-19 Salgınının Tahkim Yargılamasındaki Sürelere Etkisi", Lexpera Blog (13 April 2020) at <https://blog.lexpera.com.tr/covid-19-salgininin-tahkim-yargilamalarindaki-surelere-etkisi/> (last accessed 25 November 2020) for suspension of time limits in arbitration procedure as well as prescription periods applicable to the merits of the dispute.

suspension.[88] The term to bring an action to set aside the award as per Article 15 (A) IAL would have been suspended as well.

Despite the suspension of time limits in arbitration is not provided by the provisional Article, the Arbitration Court of one of the main arbitration institutions in Turkey, Istanbul Chamber of Commerce Arbitration and Mediation Center ("ITOTAM")[89] has published two resolutions in line with the provisional Article. The Arbitration Court of ITOTAM has suspended all time limits pertaining to arbitration and mediation proceedings before ITOTAM, which were set by arbitrators, mediators, or the Secretariat until April 30, 2020.[90] The suspension was then extended until June 15, 2020 by second resolution.[91]

ISTAC, on the other hand, did not provide for a global suspension for all proceedings administered by the Centre but left the decision to parties and tribunals.

Although the suspension is lifted for the time being, its effects on arbitration may still be relevant in case similar measures are re-adopted depending on the pandemic's progress.

Amidst the pandemic, ISTAC came up with Online Hearing Rules and Procedures ("OHRP").[92] These rules enable parties to conduct hearings without physical attendance through teleconference or videoconference during arbitration proceedings subject to

[88] Under Article 3 IAL, the courts may intervene with the arbitration only in situations provided by the IAL. For instance, parties may request the national court to order an interim injunction (Article 6), the court may appoint arbitrators if the parties fail to appoint them and the parties may challenge the arbitrators (Article 7), the court may extend the term of the arbitration (Article 10), the court may assist with gathering evidence (Article 12).

[89] ITOTAM has its own institutional rules of arbitration. The Rules apply to commercial disputes and where at least one of the parties to the dispute is a member of the Istanbul Chamber of Commerce. ITOTAM Rules of Arbitration (2017), available at <https://www.itotam.com/Dosyalar/2018/ITOTAM%20Tahkim%20Kurallari-%202017.pdf> (last accessed 21 November 2020).

[90] ITOTAM, Resolution of the Arbitration Court [Divan Kararı] dated 30 March 2020, available at <https://www.itotam.com/Dosyalar/2020/Divan%20Karar%C4%B1%2030.03.2020.pdf> (last accessed 21 November 2020).

[91] ITOTAM, Resolution of the Arbitration Court [Divan Kararı] dated 30 April 2020, available at <https://www.itotam.com/Dosyalar/2020/Divan%20Karar%C4%B1%2030.04.2020.pdf> (last accessed 21 November 2020).

[92] ISTAC, Online Hearing Rules and Procedures, available at <https://istac.org.tr/en/dispute-resolution/arbitration/istac-online-hearing-rules-and-procedures/> (last accessed 21 November 2020). The Rules provide flexibility to parties and the tribunal to designate rules and procedures other than those provided therein.

ISTAC Rules.[93] Article 7 of the OHRP puts an emphasis on the right to be heard and obliges the tribunal to make every effort necessary to ensure that the parties and any others concerned have the opportunity to attend the hearings and that their right to be heard is not violated. The Rules also provide that the tribunal may end the hearing at any stage if it is convinced during the hearing that the right to be heard has been violated.[94]

[93] ISTAC, Arbitration Rules, available at <https://istac.org.tr/en/dispute-resolution/arbitration/arbitration-rules/> (last accessed 21 November 2020).

[94] See fn. 92 above. Article 7 of the OHRP provides that: "(1) The Sole Arbitrator or the Arbitral Tribunal shall make every effort necessary to ensure that the parties and any others concerned have the opportunity to attend the hearings and that their right to be heard is not violated. (2) The Sole Arbitrator or the Arbitral Tribunal, in cases where it is convinced during the hearing that right to be heard, has been violated, may end the hearing at any time and give its reasons for doing so".