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Impartiality of a Sole Arbitrator v. Nationality in ICC Rules of Arbitration – A Turkish Law Take on the Issue

This brief study addresses the Turkish Law take on the impartialityⁱ of a sole arbitrator and its effects on the enforcement of an ICC award before the Turkish courts. The study relates to the decision of the 11th Civil Chamber of the Court of Cassationⁱⁱ dated 3 December 2016.

As Jean Flavien Lalive wrote “arbitration is only as good as its arbitratorsⁱⁱⁱ”. It is of crucial importance to have impartial and independent arbitrators to have a crystal-clear award in the end.

In the subject matter of this study, Parties have agreed on ICC arbitration as the dispute resolution mechanism under their supply contract. The arbitration clause did not contain a reference to the number of arbitrators. Appellant states that the sole arbitrator rendered a fair and just ICC award dated April 2014 and all conditions for the enforcement of foreign arbitral awards were met. Respondent contends otherwise. Respondent is of the opinion that the arbitral tribunal should have been consisted of three arbitrators. Furthermore, as the sole arbitrator was of the same nationality of the Appellant, the impartiality of the arbitrator was of questionable nature. Thus, the award cannot be enforced.

ICC Rules of Arbitration (“ICC Rules”) (current as of 1 March 2017- prior versions included the same concepts) set forth that “every arbitrator must be and remain impartial and independent of the parties involved in the arbitration”. As per the ICC Rules, “where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.” Enforcement of the arbitral awards however can be refused if the impartiality of the sole arbitrator is doubted. In principle and as per the ICC Rules “the sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national”.

In this case, we understand that Respondent has in fact objected to the appointment of a sole arbitrator who was chosen from a country that the Appellant was a national of. ICC Court has rejected this objection during the course of the arbitration proceedings. 11th Civil Chamber of the Court of Cassation ordered, as “(i) the Respondent has not presented solid evidence as to the impartiality of the sole arbitrator and (ii) their objection was rejected by the ICC Court”, the sole fact that the arbitrator was of the same nationality as Appellant would not lead to the challenge of an arbitrator.

We do agree with this outcome. In the end, there is no certainty that an arbitrator will be “more” impartial because of his/ her neutral nationality.

ⁱ For the purposes of this study, impartiality includes the term neutrality as well.

ⁱⁱ We refer to “Yargıtay” as the “Court of Cassation” and its “Hukuk Daireleri” as the Civil Chambers as suggested by the Directorate of Translation of the Ministry of Foreign Affairs. Please see <http://www.mfa.gov.tr/data/Terminoloji/yargi-kurumlari-liste-110615.pdf> for the terminology.

ⁱⁱⁱ J.F. Lalive, *Melanges en l’honneur de Nicholas Valticos: Droit et Justice* (1989).