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TRIBUNAL-APPOINTED EXPERTS: A GROUND TO SET-ASIDE?

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Arbitral tribunals have the authority to appoint their own experts to help them to evaluate the evidence. In practice, however, arbitral tribunals only rarely appoint experts to address technical or legal issues. This established practice occasionally catches parties off guard, leading to complaints that the tribunal did not fulfil expectations or requests to appoint its own expert. In some instances, tribunals may dismiss claims due to a lack of substantiation or proof, causing further dissatisfaction among the parties.

A recent decision by the Turkish Court of Cassation reiterated that such surprises do not warrant setting aside the award. This post aims to elucidate why.

Should the arbitral tribunals appoint their own experts?

It is trite to say that sometimes the parties carry over habits from their national courts when engaging in arbitration. The use of expert witnesses is one such area where disparities arise. The debate over whether arbitral tribunals should appoint their own experts arguably stems from differences in court procedural rules and practices in different legal systems.

As is known common law countries are subject to adversarial system in determining the facts. The adversarial system requires the parties to make their cases without the assistance from the judge. The assumption is that the parties know their cases best, and therefore, each party must put forward its position. As extension, the courts in the common law system expects the parties to furnish their own expert witnesses to support their positions, particularly in technical matters. The notion of the tribunal appointing its own experts is uncommon, especially if the parties have not appointed their own.

Conversely, civil law courts, following the inquisitorial system, actively involve the judge in the fact-finding process. The adversarial system requires the judge to adjudicate on the basis of his/her own investigations. In this system, tribunal-appointed experts are seen as more cost-effective and time-efficient than each party appointing its own. There is a belief that tribunal-appointed experts are more independent, impartial, and neutral. Parties appearing before civil law courts might expect the court to appoint its own experts, negating the need for parties to appoint their own.

Against this background, it is not surprise to see that some parties argue that they are puzzled by the arbitral tribunal's approach to not to appoint expert witnesses.

What did the Court of Cassation say?

In early 2023, the Court of Cassation reaffirmed that the arbitral tribunal's decision not to appoint experts does not necessitate setting aside the awards.[1]

The dispute arose out of a claim for compensation. The claimant-initiated execution proceedings against the defendant for the collection of TRY 56,143.18; and the respondent opposed to the payment order. As a result, the claimant initiated the arbitration proceedings before the Istanbul Arbitration Centre against the respondent. The sole arbitrator eventually upheld the claim and ordered the respondent to compensate the claimant. Unhappy with the outcome, the respondent sought to set aside the award, arguing that the tribunal's failure to appoint an expert violated the equality of parties and applicable procedural rules.

The Regional Appellate Court argued that the arbitral tribunal's decision to not to appoint its own experts related to the merits of the claim, and therefore the Turkish courts cannot examine these matters at the set aside actions. For the alleged violation of the equality of the parties, the Regional Appellate Court submitted that there is no evidence to indicate that the arbitrator violated the equality of the parties.

Evaluation

The Court of Cassation clarified in 2023 that arbitral tribunals have discretion in determining the necessity of appointing tribunal-appointed experts based on each case's circumstances.[2] Challenges to arbitration awards solely based on the tribunal's refusal or failure to appoint such experts are unlikely to succeed.

We acknowledge that some inexperienced counsel might be surprised by the arbitral tribunal's decision to not to appoint experts due to established practice in their home jurisdiction. Nevertheless, we believe that in the vast majority of the cases the counsel is not really surprised by such decisions. Rather we are of the view that cultural clashes are invoked to mask the real fight: that between the claimant and the respondent. Attempts to delay arbitration through procedural motions or inject fundamental errors into the process and invoking them at the set aside proceedings are tactical, not traditional. Labelling such tactics as cultural does not change their nature. Unmasked, they aim to delay or challenge an award – a strategy familiar to arbitrants worldwide.

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1 The Turkish Court of Cassation 6th Civil Chamber's decision numbered 2023/260 E., 2023/544 K. and dated 13.02.2013.

2 This is not only the case where the (one of the) parties decide not to appoint experts, but also where the (one of the) parties appoint their experts but asks the tribunal to appoint its own expert if the arbitral tribunal consider these expert reports insufficient.

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