

DUE PROCESS AND THE PROCEDURAL DECISIONS: HOW PARANOID YOU SHOULD BE WHEN IT COMES TO THE TURKISH COURTS?

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International arbitrators often grapple with a challenging decision: is a procedural request a legitimate exercise of rights, or is it an unreasonable tactic to delay proceedings? This concern stems from the fear that an award might be challenged due to perceived due process violations. Such "due process paranoia" can lead arbitrators to grant unreasonable requests, unnecessarily prolonging the proceedings and undermining the efficiency of international arbitration.

However, a recent judgment by the Turkish courts highlights that these concerns about due process violations are often unwarranted.¹

Summary of the Dispute

The dispute arose out of the delivery, installation, and commissioning of electromagnetic equipment in a hydroelectric power plant. Upon delivery of the equipment, the claimant realized it was defective. Accordingly, the claimant notified the respondent about these alleged defects and foreclosed the respondent's security. The respondent rejected the claim that the goods were defective and the claimant referred the matter to arbitration.

During the arbitration, the parties agreed on the procedural timetable, i.e., the dates on which each party would present evidence. They agreed to produce all documents and reports they relied on in their submissions and set a specific cut-off date for the submission of evidence.

When the respondent filed its statement of defence, it repeatedly referred to an expert report but not submitted along with the defence. The sole arbitrator reacted quickly and requested the respondent to file the expert report on the same day. The respondent suggested that the report was drafted in German and that translation required time, proposing to file the report by the cut-off date.

The sole arbitrator rejected this approach. Instead, the arbitrator granted the respondent additional time, earlier than the cut-off date, to file the expert report together with its translation. The respondent failed to submit the report or its English translation within the granted time but filed a different report and its translation a

¹ Court of Cassation, 6th Civil Chamber, Case No. 2023/1646, Decision No. 2024/546, dated 8.2.2024.

day before the cut-off date, which was not the expert report referenced in the statement of defence.

The sole arbitrator proceeded based on the available evidence, found no need for an evidentiary hearing, and upheld the claimant's claims. Upon the claimant's enforcement application before the Turkish courts, the respondent resisted, arguing that the strict time limits imposed by the sole arbitrator for the submission of the expert report violated the respondent's due process rights and the equality of the parties. The first instance court argued that the sole arbitrator had explained in detail which evidence must be presented on which date in the procedural timetable, which was agreed upon by the parties. Given that the respondent failed to comply with this timetable and did not file the expert report referenced in the statement of defence, the respondent's argument of a breach of due process was unfounded. The court concluded that the respondent was given a reasonable opportunity to present its case. This decision was upheld by the Regional Appellate Court and the Court of Cassation.

Conclusion

Participants in arbitration strongly desire arbitrators who decisively manage proceedings. This expectation is well-founded, as arbitration surveys consistently show a preference for proactive case management. A hands-on approach helps save time and costs, key concerns for arbitration users. National courts rarely support complaints about procedural management decisions, providing little reason for arbitrators to succumb to due process paranoia.

Therefore, an arbitrator's primary concern should not be the parties' requests made in the heat of conflict but rather what is reasonable under the circumstances and what promotes the efficient resolution of the dispute. This was the parties' intention at the outset of the proceedings. An arbitrator who acts with this mindset, steering the proceedings in the interest of all parties while safeguarding due process rights, demonstrates true procedural skill and judgment. Thus, the real test of an arbitrator's capability lies in managing delicate procedural challenges decisively, free from undue hesitation or irrational fears of due process violations.

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