



Belport Development Limited v Chimichanga Corporation: Turkish and BVI Courts Differ on Attorney Eyes Only Orders in Arbitral Proceedings

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This article is about an ICC award, the recognition and enforcement of which was (i) permitted by the High Court of Justice of the British Virgin Islands (the “BVI Decision”); but (ii) refused by the Turkish Court of Cassation (the “Turkish Decision”)². The central issue in both proceedings was whether the arbitral tribunal’s attorney eyes only (“AEO”) order resulted in (i) the inability of the losing party to present its case; and (ii) contradiction to Turkish and BVI public policies.

This article first summarizes the facts and core legal issues surrounding the dispute and then elaborates on the BVI and Turkish Decisions. It concludes that (i) while the BVI Decision provides a clear guideline on the AEO order-based challenges before the BVI courts, the Turkish Decision raises more questions than answers; (ii) the Turkish Decision does not categorically conclude that AEO orders made by arbitral tribunals hinder successful recognition and enforcement of the overarching arbitral award in Turkey and as such a case-by-case analysis should be made in other similar cases; yet (iii) because of the outcome of the Turkish Decision, it is likely that, even if Turkish law does not govern the arbitral proceedings, the arbitration practitioners will treat AEO orders with greater caution going forward if an arbitral award has the potential to be recognized and enforced in Turkey.

1. Facts

- Belde Liman İşletmeleri ve Depoculuk A.Ş. (“Belde”), a Turkish special purpose vehicle, enjoyed a concession to develop a container terminal on Turkey’s Marmara Sea.
- Belport Holding SARL (“Belport”), a Luxembourg company, held 95% of Belde’s shares, whereas the local municipality held the remaining 5%. Belport’s shares are equally owned by Belport Development Limited (“BDL”), a Cayman Islands company, and Chimichanga Corporation (“Chimichanga”), a Virgin Islands company.
- Ashmore Investment Management Limited (“AIML”) owned the entirety of BDL.
- BDL and Chimichanga signed a shareholders’ agreement on 16 January 2007 in respect of their shareholding in Belport (the “SHA”). The SHA is governed by English law.
- Having alleged that Chimichanga misappropriated Belport’s shares in Belde, BDL initiated arbitration proceedings in 2012 against Chimichanga based on the arbitration clause in the SHA which provides for a Geneva seated ICC arbitration. The arbitrators were Marc Lalonde (PC, OC, QC), Sir Simon Tuckey and Mr. Gary Born (the “Tribunal”).

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¹ The Eastern Caribbean Supreme Court in the High Court Of Justice, British Virgin Islands Claim No. BVIHC (COM) 235 of 2013.

² The decision of the 11th Civil Chamber of Court of Cassation numbered K. 2021/1051 K. and dated 10 February 2021.

³ This article mainly relies on the facts provided in the BVI Decision, as the Turkish Decision does not contain detailed factual background of the dispute. The author of this Article has not seen the Awards of the Tribunal, which seem to be confidential, nor he is in any way familiar with the dispute.

- On 13 December 2012, the Tribunal handed down its partial award on liability (the "Partial Award") and found that Chimichanga's conduct breached the SHA.
- In respect of the assessment of damages, the Tribunal decided not to rely on the reports of the party appointed valuation experts mainly because it did not accept their underlying assumptions. Instead, it referred to the reports prepared by third party advisors dated 18 March 2010 to AIML's Pricing Methodology Committee ("March 2010 Reports") as a starting point for its valuation of Belde's shares. The March 2010 Reports were part of the series of reports provided by such advisors to the said committee between April 2009 and April 2012 (the "Reports").
- It was Chimichanga which discovered the existence of the Reports and requested these from the BDL during the document production phase. The Tribunal ordered their disclosure. Having considered BDL's confidentiality concerns, however, it also ordered that (i) BDL can redact the identity of the valuers of the Reports, including the March 2010 Report; and (ii) the disclosure will be for the eyes' of Chimichanga's lawyers as well as its valuation and port experts only (the "AEO Order"). As such, Chimichanga officials were prohibited from accessing to the Reports.
- For the purposes of its final award on quantum dated 19 June 2013 (the "Final Award"), the Tribunal mainly considered the March 2010 Reports, and the risk factor in BDL's expert report. As a result, it awarded that Chimichanga shall (i) pay to BDL compensation in the amount of USD 60.5 million; and (ii) recover BDL's costs in the arbitration (i.e., USD 8,155,135.72) ⁴.
- Following this, Chimichanga challenged the (i) recognition and enforcement of the Final Award in the BVI; and (ii) recognition and enforcement of the Partial Award and Final Award (collectively the "Awards") in Turkey.

2. Decisions

Chimichanga's challenges before the BVI and Turkish courts revolved around the AEO Order.

For completeness, an AEO order is a "[...] device commonly used in American litigation [...] to permit confidential material to be seen by legal counsel on the condition that it is not disclosed to any other person including counsel's client."⁵ It is also referred to within the broader concept of "confidentiality clubs", which aim at limiting the distribution of sensitive documents to a limited number of select individuals (typically instructed counsel and experts, along with the arbitral tribunal) ⁶.

Before both courts, Chimichanga argued that (i) the AEO Order prevented it from presenting its case in respect of the March 2010 Report, which is the core document on which the Tribunal based its Final Award; and (ii) such a grave procedural violation contradicts to the BVI and Turkish public policies.

a. BVI Decision

The bases of the BVI court's justification for its decision to dismiss Chimichanga's arguments are as follows:

- While Chimichanga's counsel argued that his client was unable to cross-examine valuers of the March 2010 reports due to the AEO Order, Chimichanga "did not include among its objection [during the arbitral proceeding] the fact that [it] could not cross examine its author(s)." (par. 17).

⁴ This figure is extracted from the Turkish Decision.

⁵ Waincymer, Procedure and Evidence in International Arbitration, 2012, p. 877, pp 11.8.1

⁶ Baizeau and Richard, "Addressing the Issue of Confidentiality in Arbitration Proceedings, ASA Special Series No. 43 Confidential and Restricted Access Information in International Arbitration, p. 57.

- The issue at hand was not a matter of depriving a party of an opportunity to challenge a witness, after all. This is because, whilst relying on the March 2010 Reports, the Tribunal did not take “evidence in private from its anonymous author(s)” (par. 23) nor did it “introduced a new expert [...]” (par. 22). The Tribunal simply decided that “[...] out of all evidence which it had admitted, a contemporaneous document [i.e., March 2010 Reports] was the most reliable starting point for arriving at the value of BDL’s interest.” (par. 22)
- Chimichanga had the opportunity to present its case, notwithstanding the AEO Order. Indeed, Chimichanga’s valuation expert “commented upon and criticized certain of the conclusions reached in certain of the third-party valuation reports, including the 18 March 2010 valuation.” (par 8)

b. Turkish Decision

The 11th Civil Chamber of the Turkish Court of Cassation ruled, with a majority decision, to refuse enforcement of the Final Award on the grounds that it violated Articles V(1)[b] (“inability to present the case”) and V(2)[b] (“contradiction to public policy”) of the New York Convention.

By way of background, and interestingly, the same chamber of the Court of Cassation had initially decided for the recognition and enforcement of the Awards, while this initial decision had not contained a detailed reasoning as to why it had granted the enforcement.⁷ Nevertheless, it then changed this decision following its acceptance of Chimichanga’s application for correction of judgment (*karar düzeltme*), which was a tool that rarely worked in practice.⁸

Whilst refusing the recognition and enforcement of the Final Award, the court noted the following:

- BDL’s confidentiality concerns do not justify the AEO Order.
- Chimichanga could not cross examine the valuers of the March 2010 Reports.
- The AEO Order prevented Chimichanga’s access to the evidence and ability to challenge that evidence. Thereby it resulted in violation of Chimichanga’s right to defend itself.
- Such grave violation also contradicts to the Turkish public policy.

3. Observations

The BVI Decision echoes the pro-arbitration stance taken in other jurisdictions in respect of AEO orders such as Singapore High Court’s judgment in *China Machine v Jaguar Energy* where the court noted that (i) “AEO orders are rare in arbitration but not unheard of” (par. 130); (ii) an arbitral tribunal is empowered to issue an AEO order under the ICC rules (par. 133); and (iii) “the supervisory court cannot intervene merely because it might have made a different order from the Tribunal” (par. 147).

The Turkish Decision, on the other hand, raises more questions than answers. In particular:

⁷ The decision of the 11th Civil Chamber of Court of Cassation numbered K. 2018/7501 K. and dated 29 November 2018.

⁸ For completeness (i) it was possible to resort to the correction of judgement mechanism, among other grounds, when a Court of Cassation decision was in violation of “law and procedure”; (ii) some decisions adopted a restrictive approach towards this seemingly broad ground whereas others interpreted it narrowly; and (iii) this led Turkish Court of Cassation to accept to revisit the cases upon correction of judgement applications in considerable number of cases. Nevertheless, in most of the cases, Turkish Court of Cassation had not changed its initial decisions. Ultimately, Turkish law recently abandoned the correction of judgement mechanism. Please also note that the Turkish Decision does not explain on which grounds the correction of judgement application was based and why the Court of Cassation accepted this application.

- It provides that “[BDL], in order to strengthen its claim, relied on [the Reports] as evidence”. This contrasts with the facts described in the BVI Decision. According to this decision (i) BDL did not rely on the Reports; and in fact (ii) it was the Tribunal itself which declined to rely on both party-appointed expert reports and to take March 2010 Reports as a useful starting point for its Final Award on quantum.
- The Turkish Decision concludes that the AEO Order violated the agreed procedural framework. It does not discuss how it reached this conclusion notwithstanding Article 22(3) of the 2012 ICC Rules of Arbitration:

“Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.” (emphasis added)
- The decision is also silent on the position of the Swiss law, the law governing the conduct of the arbitral proceedings, on the AEO Order.
- It provides that “The Tribunal did not permit Chimichanga’s counsel to cross examine the valuers of the March 2010 Reports”. It does not discuss the factual background explained in the BVI Decision that, during the arbitration, Chimichanga “did not include among its objection the fact that [it] could not cross examine its author(s).”
- It notes that “the fact that these confidentiality [concerns] are not based on reasonable and legal bases raised doubts as to the impartiality of the arbitral tribunal”. The Turkish Decision, however, is silent on (i) the threshold for a confidentiality concern capable of justifying a protective order; and (ii) any coherent explanation as to how it ended up doubting the impartiality of such distinguished Tribunal.
- It lacks explanation on which circumstances a ground for refusal based on a party’s inability to present its case elevates to the level of contradiction to the Turkish public policy.

4. Going forward

It is accepted that an AEO order, by its very nature, might raise enforcement issues. Depending on the factual background, this might indeed be the case under Turkish law, particularly considering that the AEO concept does not exist in domestic Turkish disputes. However, the Turkish Decision does not categorically conclude that AEO orders made by arbitral tribunals hinder successful recognition and enforcement of the overarching arbitral award in Turkey. In other words, the Turkish Decision concludes that specific procedural issues in the particular dispute gave rise to significant procedural deficiencies which was capable of justifying the refusal of recognition and enforcement. As such, the Court of Cassation might grant the enforcement of an award with an AEO element in the future if the factual background is different from the Turkish Decision. That said, because of the outcome of the Turkish Decision, it is likely that, even if Turkish law does not govern the arbitral proceedings, arbitration practitioners will treat AEO orders with greater caution going forward if an arbitral award has the potential to be recognized and enforced in Turkey.