INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER NO. 4
on
WITNESS ANONYMITY

Members of the Tribunal
Professor Campbell McLachlan QC, President of the Tribunal
The Hon. L. Yves Fortier QC, Arbitrator
Dr Laurent Lévy, Arbitrator

Secretary of the Tribunal
Ms Jara Mínguez Almeida

Date of dispatch to the Parties: 12 August 2019

Whereas:

(1) Paragraph 17.3 of Procedural Order No. 1 dated 19 November 2018 ("**PO No 1**") provides that if a Party wishes to request leave for the Tribunal to authorise a witness or expert to testify anonymously, it must apply no later than 60 days before the witness or expert's testimony is due to be filed on the record. In that event, the Tribunal, having consulted the Parties, will determine the appropriate procedure by which to decide the application.

(2) Paragraph 17.4 further provides that the Parties shall confer regarding the confidentiality arrangements that would need to be put in place in the event that a witness or expert were to testify anonymously and shall report the outcome of their consultations to the Tribunal.

(3) By Procedural Order No. 2 dated 21 December 2018 (**"PO No 2"**), the Tribunal decided that an exhibit (C–42) that had been filed by Claimant in support of its application for provisional measures containing an anonymous witness statement of Witness A (**"Witness A Statement"**) must be excluded from the arbitration record. The Witness A Statement had been originally prepared and admitted anonymously before the Westminster Magistrates' Court in connection with the extradition proceedings concerning Mr Akin Ipek. The Tribunal ordered that, if the Claimant wished to adduce the evidence of Witness A, it must adduce his/her statement as a witness statement in the proceedings. If the Claimant wished to apply to give that evidence anonymously, it must make a separate application for that purpose. The provisions of PO No 1 would continue to apply (save for the variations provided in this specific case by PO No 2).

(4) In accordance with the timetable prescribed by the Tribunal in PO No 2, on 7 January 2019 the Claimant notified its request that the Witness A Statement be treated as a witness statement in this arbitration. On 14 January 2019, the Claimant further applied for leave that this evidence be given anonymously.

(5) The Parties exchanged two rounds of written pleadings on that application. The Respondent submitted its Response on 28 January 2019, which was accompanied by an Expert Report of Jeffrey Waincymer (**"Waincymer Report"**). The Claimant filed a Reply on 4 February 2019 and the Respondent filed a Rejoinder on 7 February 2019.

(6) By Procedural Order No. 3 dated 13 March 2019 (**"PO No 3"**), the Tribunal decided that application. For the reasons there set out (at [14]–[31]), it held that it was entitled to review the Witness A Statement for the purpose of deciding its admissibility as evidence on the arbitration record. Upon review, the Tribunal found that the Witness A Statement (which had been originally prepared for the purpose of the defence of Mr Akin Ipek to extradition proceedings brought against him by the Respondent in the English Court) was directed to the likely treatment of Mr Ipek and other defendants if they were extradited to Turkey.

(7) The Tribunal found that, although the Claimant's application for provisional measures in this arbitration had sought relief in relation to any such extradition, this issue was moot as a result of the judgment of the Westminster Magistrates' Court dated 28 November 2018 (**"Extradition Judgment"**). Accordingly, as it was not at that stage necessary to decide

the application for witness anonymity, the application would be adjourned, with leave to renew in the event there were material developments regarding any appeal from the Extradition Judgment. The Tribunal observed (at [45]) that the question of witness anonymity "*raises important points of principle. At the same time, both Parties accept that a decision on it must be taken in light of the specific circumstances of the particular case and witness*."

(8) On 17 June 2019, in accordance with the time limits prescribed in PO No 1, the Claimant filed the present Application for Witness Anonymity together with exhibits C-0110 to C-0114 (the "**Application**"). The Claimant requested that four witnesses– Witnesses 1, 2 and 3 and Witness A – be allowed to submit anonymised witness evidence and proposed the conditions for anonymity. The Claimant intended to submit the anonymous witness evidence in support of the Claimant's Statement of Defence on Preliminary Objections (the "**Claimant's Statement of Defence**").

(9) By letter dated 20 June 2019, the Tribunal invited the Respondent's comments on the Application. The Tribunal also invited the Parties' comments on the procedure, and in particular, on whether oral argument on the Application could be heard during the forthcoming hearing, at the pre-hearing organizational conference call that was scheduled to take place on 16 July 2019.

(10) By the established deadline, 15 July 2019, the Respondent submitted its Response to the Claimant's Application for Witness Anonymity, (the "**Response**"), requesting that the Tribunal refuse the Application in its entirety.

(11) A pre-hearing organizational conference call took place between the Parties and the Tribunal on 16 July 2019. During the call, the Parties informed the Tribunal that they had agreed to present oral argument on the Application during the hearing that would take place between 24 and 26 July 2019.

(12) As agreed, the Parties presented oral argument and answered the Tribunal's questions on the Application during the hearing.

The Tribunal, having deliberated, now decides as follows:

The Application

1. By its present Application, the Claimant seeks leave to adduce the evidence of four witnesses into the arbitration record on an anonymous basis:
   (a) **Witness 1**, a fact witness testifying on the preparation and execution of the alleged Share Purchase Agreement of 7 June 2015 (**"SPA",** RfA Ex 4);
   (b) **Witness 2,** an expert witness testifying on issues of Turkish commercial law and the legal effect of the endorsement of shares;
   (c) **Witness 3,** a further expert witness dealing with the same issues as Witness 2; and,
   (d) **Witness A** (being the same witness whose evidence had been the subject of the applications considered by the Tribunal in PO Nos 2 & 3), an expert witness on Turkish criminal offences that formed the basis of the Extradition Proceedings and

June 2016 Indictment (R–85) and Article 133 of the Turkish Criminal Procedure Code.

2. The conditions that the Claimant proposes should apply to the giving of evidence by these witnesses were modified to some extent in the course of submissions. As finally advanced at the hearing (T3/230/2–234/4), the Claimant proposed the following conditions:

   (a) The Witnesses' evidence would be given before the Tribunal without anonymity;

   (b) They would be subject to cross-examination by two named English-law qualified counsel for the Respondent ("**Respondent's English counsel**");

   (c) The Respondent's other counsel and party representatives would be excluded from this part of the hearing, the location of which would be disclosed only to the Tribunal and to the Respondent's English counsel;

   (d) The identity of the witnesses would remain confidential to the Tribunal and to Respondent's English counsel and could not be disclosed to the Respondent itself or to its other counsel; and

   (e) The relevant parts of the transcript would be anonymised before any wider circulation.

The test: general considerations

3. The Parties do not contest that the Tribunal has the power to make orders in relation to witness anonymity in appropriate cases and subject to suitable conditions. This is reflected in the agreed terms of paragraph 17 of PO No 1 cited above, which makes specific provision for such applications.

4. Nevertheless, in the Tribunal's view, an application for witness anonymity is and must remain an exceptional procedural step, to be granted only in cases where a tribunal is satisfied that it is essential in the interests of justice and for the protection of the witness herself and that the due process rights of both parties can be adequately protected.

5. Acknowledging the paucity of reported investment arbitration jurisprudence on the issue,[1] the Parties nevertheless helpfully agree on the test that the Tribunal should apply in the determination of the Application, which comprises the following three requirements:

   (a) The Witnesses' testimony must be relevant and material;

   (b) There is a compelling reason to find risk or danger to the Witnesses if anonymity is denied; and,

   (c) The Tribunal must balance the Parties' due process rights, finding that the balance is in the Claimant's favour: Application, [4]; Response, [7].

6. In short, the Claimant submits that the testimony that it wishes to adduce from all four witnesses meets these requirements. In particular counsel submits that, without the protection of anonymity, none of the four witnesses will be prepared to testify, as they

[1] The only reported decision making provision for witness anonymity is: *Vladislav Kim and others v. Republic of Uzbekistan* (Decision on Jurisdiction) ICSID Case No. ARB/13/6 (8 March 2017) (*Kim v Uzbekistan*) (CL-30).

fear for the consequences for themselves and their families were their identity to be known to the Respondent.

7. In reply, the Respondent argues that the Claimant has not adduced sufficient compelling evidence of the risk or danger to the witnesses: T3/261–7. It alleges that the conditions proposed by the Claimant would place it at a significant disadvantage, since Respondent's English counsel would be unable to take instructions as to matters relevant to the witnesses, which may go to their credibility. So far as concerns Witness 1, it submits that the Application is premature, as the Tribunal does not know the content of the evidence to be given and is asked to make an assessment of relevance prior to the Claimant's document production: T3/271–272. The Respondent concedes that a necessary consequence of its submission is that it could not object on grounds of tardiness were the Claimant to reapply for witness anonymity at the second round of written submissions once these steps had been completed: T3/272/10–274/5.

8. The Tribunal acknowledges the assistance that it has derived from the Waincymer Report and the authorities annexed thereto, which was admitted as part of the Respondent's submissions as useful but non-binding guidance (T3/247–248). It was also assisted by the oral testimony of Sir Jeffrey Jowell (expert witness for the Claimant) in response to specific questions from the Tribunal on this Application: T2/149–151.

9. At the same time, the contexts in which evidence has been permitted to be given anonymously in municipal cases vary considerably. As the Parties accept, the Tribunal's determination "*must be taken in light of the specific circumstances of the particular case and witness*."

10. The Tribunal has an overriding responsibility to ensure that the proceedings before it are fair, which includes the principle embodied in Article 18 of the UNCITRAL Model Law that: "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*." The cardinal importance of this principle in investment arbitration is indisputable.[2]

11. Nevertheless, in the context of the present Application, as the Parties acknowledge, the application of this principle requires the Tribunal to *balance* the respective rights of each Party. On the one hand, it must seek to ensure that a Party who wishes to adduce evidence before the Tribunal in support of its case is "given a full opportunity" of doing so. At the same time, the principle of equality includes the right of the other Party to defend itself by meeting the case against it: the "*principe de la contradiction*."[3]

12. In the case of witness testimony, this principle includes ensuring an effective right to challenge the evidence proffered. An important mode of such challenge is provision for effective cross-examination, including as to the credibility of the witness. Ensuring that evidence can be challenged in this way serves both the interests of equality of the parties

[2] *Methanex Corp v USA* (Decision on Amici Curiae Interveners) (15 January 2001) 7 ICSID Rep 208, [26]; *Amco Asia Corp v Indonesia* (Decision on Annulment) ICSID Case No ARB/81/1 (16 May 1986) 1 ICSID Rep 509, [88]; *Wena Hotels Ltd v Egypt* (Decision on Annulment) ICSID Case No ARB/98/4 (5 February 2002) 6 ICSID Rep 129 (CL-25), [57].

[3] *Fraport AG Frankfurt Airport Services Worldwide v The Philippines* (Decision on Annulment) ICSID Case No ARB/03/25 (23 December 2010) (JW-9), [200].

and the general interests of a fair trial, since as Lord Kerr has rightly observed: "*Evidence which has been insulated from challenge may positively mislead*."[4]

13. There is one other general principle that is applicable to the present arbitration by virtue of the international convention that governs its proceedings, namely the ICSID Convention.[5] By Article 22 of that Convention (read together with Article 21): "*parties, agents, counsel, advocates, witnesses or experts...shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions*."

14. This provision constitutes an important element in the self-contained system for the settlement of investment disputes that the Contracting States parties to the ICSID Convention (which includes the Republic of Turkey as well as the United Kingdom) agreed to establish. It ensures that, inter alios, counsel, witnesses and experts are not exposed, by virtue of the performance of their functions in, respectively, representing parties and giving evidence in support of a Party, to legal process in any Contracting State. In performance of those functions, such persons "*are immune from lawsuits or criminal prosecution as well as administrative proceedings*."[6]

15. In light of these general considerations, the Tribunal now proceeds to evaluate the specific case for witness anonymity advanced before it. It will be most convenient to consider the position separately in relation to:

    (a) The expert witnesses; and,

    (b) Witness 1 (the witness of fact).

The proposed expert witnesses

16. The Tribunal considers that the position of the three proposed expert witnesses on Turkish law (Witness 2, Witness 3 together with Witness A) must be considered in light of the role of municipal law in ICSID arbitration.

17. The Claimant's claims are advanced under and by virtue of an international treaty,[7] an instrument that is governed by international law.

18. At the same time, both Parties raise in their pleadings issues of Turkish law, as the law of the Contracting State party to the dispute. In common with other international investment tribunals, this Tribunal will have to give careful consideration to the interpretation and application of the relevant provisions of municipal law as well as the applicable rules of international law in arriving at its decision. This it is specifically empowered to do by virtue of Article 42 of the ICSID Convention.[8]

19. Where the issue is one of international law, the Tribunal may be presumed to know the law. Where the issue is one of municipal law, this is not the case. The Tribunal will

[4] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 (HL), [93].

[5] Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

[6] Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, Cambridge UP, 2009), 63.

[7] Agreement for the Promotion and Protection of Investments (United Kingdom–Republic of Turkey) (signed 15 March 1991, entered into force 22 October 1996) UKTS No 13 (1997).

[8] *MTD Equity Sdn Bhd v Chile* (Decision on Annulment) ICSID Case No. ARB/01/7 (21 March 2007), [72].

require the assistance of the submissions of counsel and provision of the relevant primary and secondary sources. However this does not convert issues of municipal law into questions of fact that can only be proved by reference to expert evidence.

20. Counsel for the Parties are entitled to advance legal submissions on the content and interpretation of the relevant municipal law and to adduce the pertinent material sources as legal exhibits to their written pleadings.[9]

21. As a result, the Claimant in the present case is fully entitled—as is the Respondent—to advance detailed submissions as to the alleged content, interpretation and effect of Turkish law in its memorials and to annex relevant legal authorities.

22. At this stage in the proceedings, the Tribunal does not consider, as regards questions of Turkish law, that the protection of due process requires it to grant the Claimant the right to adduce anonymous expert evidence. On the contrary, the Claimant is fully entitled to advance its submissions on Turkish law and to adduce authorities in support. By contrast, there would likely be a significant impairment of the Respondent's due process rights were this part of the Claimant's Application to be granted. Respondent's English counsel would be unable to take instructions from Turkish counsel or from the Republic's party representatives as to the Claimant's experts, who would be giving evidence on the law of the Respondent State.

23. Following the first round of written pleadings on jurisdiction, if the Claimant can establish that there are specific issues of Turkish law that cannot be ascertained from other sources and only be established by expert testimony, and if it can satisfy the Tribunal that, despite its diligent efforts, no suitably qualified expert can be found who is prepared to testify on anything other than an anonymous basis, it is at liberty to reapply.

Witness 1

24. Witness 1 raises a different set of issues. The Claimant submits that Witness 1 can give relevant evidence of fact as to the conclusion of the SPA.

25. On any view, the circumstances surrounding the conclusion of the SPA are of significant material relevance to the issues in this case, including at the jurisdictional stage. The Claimant alleges in its Request for Arbitration that it acquired the right to the Ipek family shares in the Koza Group "through the SPA" on 7 June 2015.[10]

26. By contrast, the Respondent asserts in its Memorial on Preliminary Objections that "[t]he SPA is a sham" and that "no SPA was signed as at 7 June 2015." On this basis, the Respondent alleges that the Tribunal lacks jurisdiction, because the Claimant is not an Investor and there is no investment at the relevant time or at all.[11]

27. Mr Akin Ipek, the Claimant's director, testified in evidence before the Tribunal that he signed the SPA on 7 June 2015 in reliance on legal advice that he had received on either 6 or 7 June 2015 from Witness 1: T1/133/3-7. The Claimant has confirmed that, if the

[9] See. e.g. the approach adopted by the ILA Committee on International Commercial Arbitration in its final report on 'Ascertaining the contents of applicable law in international commercial arbitration' (2008) 73 ILA Conf Rep 850, 882, Recommendation 9.

[10] RfA, [31].

[11] Respondent's Preliminary Objections Memorial, Pt III.

evidence of Witness 1 were admitted, he would testify without reservation as to legal professional privilege: T3/239/2–9.

28. In the Tribunal's view, evidence from Witness 1 on the circumstances surrounding the alleged conclusion of the SPA on 7 June 2015 could be highly relevant. Indeed, on the information currently on the record, counsel for the Respondent did not contend otherwise: T3/271/10–14. Rather he argues that the Claimant's Application is premature, coming before document production and in the absence of an indication as to the content of Witness 1's evidence: T3/271/16–25; 277/6–17.

29. Nevertheless, relevance is not the end of the enquiry. The Tribunal must also be satisfied as to the risk to the witness and as to the effect on the due process of the arbitration in the event that his/her evidence were permitted to be given anonymously.

30. The Respondent's counsel fairly points out that the risk to the witness has been dealt with so far as a matter of submission and that the Tribunal does not have the benefit of direct evidence from the witness as to those risks.

31. Counsel further submits that the potential materiality of the evidence to the issues in the case underscores the importance of ensuring the Respondent's ability to challenge that evidence under cross-examination, including as to credit. Otherwise, he contends the Respondents' due process rights would be adversely affected.

32. Balancing the due process concerns on both sides, the Tribunal has decided that the most appropriate approach in relation to Witness 1 is as follows:

    (a) The Claimant may serve and file with its Statement of Defence a written statement of the evidence of Witness 1 in anonymised form;

    (b) Any such statement will be available for review by counsel and party representatives for the Respondent and by the Tribunal and may be referred to for any subsequent application for witness anonymity that may be made. It will not however form part of the record in this arbitration unless and until either:

        (i) Witness 1 appears to give evidence in the ordinary way; or,

        (ii) The Claimant makes a subsequent application for leave to adduce his/her evidence on an anonymised basis and that application is granted by the Tribunal, any such application to be made 60 days before service of the Claimant's Rejoinder.

33. The consequence of this approach is that the Claimant will be in a position to put before the Tribunal the precise detail of the evidence the Witness 1 wishes to give (and of the risks that Witness 1 states she/he would run unless their evidence can be given anonymously), without Witness 1 running any risk as to the disclosure of his/her identity.

34. At the same time, the Respondent will be able to assess that evidence, together with any pertinent documents disclosed in the document production phase, prior to any renewed application for anonymity. The Respondent is not prejudiced by this approach, since, as the Tribunal had cause to observe in PO No 3 at [28]:

> The review of a statement or other document that a party has adduced in order to decide whether or not it is admissible, and if so on what terms, is a necessary part of that process. If the statement or document is excluded from the record, the Tribunal will disregard it, neither Party will be entitled to advance submissions based upon it, and it will form no part of the Tribunal's decisional process.

35. Indeed, as noted above, the Respondent's counsel submitted that he would be prejudiced unless he knew the precise content of Witness 1's evidence: T3/277/3. Professor Waincymer also opines that the Tribunal should have "clear particulars of the proposed evidence" before it prior to making any decision as to witness anonymity: Waincymer Report, 3, M(iii). The Tribunal agrees.

Order

36. **Now therefore the Tribunal orders:**

(1) The Claimant's Application to adduce expert evidence on an anonymised basis from Witness 2, Witness 3 and Witness A in support of the Claimant's Statement of Defence is denied;

(2) The Claimant's Application to adduce fact evidence from Witness 1 on an anonymised basis is determined as follows:

(a) The Claimant may serve and file with its Statement of Defence a written statement of the evidence of Witness 1 in anonymised form;

(b) Any such statement will be available for review by counsel and party representatives for the Respondent and by the Tribunal and may be referred to for any subsequent application for witness anonymity that may be made.

(c) Such a statement will not form part of the record in this arbitration unless and until either:

(i) Witness 1 appears to give evidence in the ordinary way; or,

(ii) The Claimant makes a subsequent application for leave to adduce his/her evidence on an anonymised basis and that application is granted by the Tribunal,

(iii) Any such application is to be made at the latest 60 days before service of the Claimant's Rejoinder;

(3) Costs reserved.

Professor Campbell McLachlan QC
President of the Tribunal
12 August 2019