

Arbitration - Turkey

Choice of Turkish Laws

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March 05 2009

Decisions of the Turkish Court of Appeals have discussed whether the choice of Turkish law in an agreement including an arbitration clause to apply to disputes arising out of the agreement should be construed to refer only to the substantive law, or whether it should also cover Turkish procedural laws.

In one case⁽¹⁾ the 15th Chamber of the Court of Appeals considered an agreement in which the claimant undertook to construct a Soma thermal power plant for the defendant. The agreement stated that:

"The arbitral tribunal shall take into consideration in its decisions the provisions of the agreement and Turkish laws in force.

The place of arbitration shall be Zurich and the language of the arbitration shall be English unless otherwise agreed in the course of arbitration."

In the relevant arbitration, the arbitral tribunal held that only Turkish substantive laws shall be applied and that the applicable procedural laws shall be the procedural laws of the place of arbitration (ie, Swiss procedural law).

At first instance the Turkish court decided that since it was not clear in the agreement which procedural rules were applicable, the application of Swiss procedural laws could be accepted.

The 15th Chamber of the Court of Appeals held that the statement 'Turkish laws in force' in the agreement meant Turkish procedural laws as well as Turkish substantive laws. According to the court, if the parties had intended to refer only to Turkish substantive laws, they would have explicitly mentioned which specific procedural rules would apply to disputes arising out of the agreement, just as they had chosen English as the language of the arbitration and Zurich as the place of arbitration. Accordingly, the court held that the fact that they did not explicitly select the applicable foreign procedural rules indicated that they intended Turkish procedural laws to apply.

When the case was returned to the first instance court following the appeal court decision, the first instance court upheld its former decision and consequently the issue was brought before the General Assembly of the Turkish Court of Appeals.

In its decision⁽²⁾ the General Assembly upheld the decision of the appeal court to find that the statement 'Turkish laws in force' included both Turkish procedural laws and Turkish substantive laws.

In the doctrine, this interpretation has been criticized on the grounds that it exceeded the intention of the parties.

In a more recent decision,⁽³⁾ the 11th Chamber of the Turkish Court of Appeals held that a reference to 'Turkish laws' did not include procedural laws, but rather referred only to substantive laws. In that case Article 4 of the option agreement provided that:

"This agreement shall be governed and construed in accordance with the laws of the Republic of Turkey.

All disputes in connection with the agreement shall be resolved by the arbitrators in accordance with the Rules of Reconciliation and Arbitration of the International Chamber of Commerce."

In the relevant arbitration, the arbitral tribunal applied foreign procedural laws and the 11th Chamber confirmed this decision by ruling that Turkish procedural laws were not applicable since the parties did not explicitly state that Turkish procedural laws shall apply. The court held that by agreeing to submit the dispute to a foreign

authority (ie, the International Court of Arbitration of the International Chamber of Commerce), the parties were deemed to have accepted the procedural rules of such foreign authority.

The International Arbitration Act, which entered into force on July 5 2001, acknowledges the ambiguities regarding the interpretation of this issue and explicitly provides in Article 12 that in the event of the law of a particular jurisdiction being chosen, unless explicitly stated otherwise such choice of law shall not include the procedural rules of that jurisdiction.

Notwithstanding this change in the case law of the Turkish Court of Appeals and the explicit provision in the International Arbitration Act, even if a reference to Turkish laws in an agreement does not include Turkish procedural laws, in cases where Turkey has been chosen as the place of arbitration the foreign procedural laws applicable to disputes arising out of such agreement shall apply to the extent that such foreign procedural rules comply with the mandatory rules of Turkish procedural law.

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Endnotes

(1) Decision of December 25 1997, E1997/4213, K1997/5603.

(2) Decision of May 5 1999, E1999/15-235, K1999/273.

(3) Decision of May 26 2000, E2000/3992, K2000/4704.