Arbitration - Turkey

Impact of obligatory use of Turkish on validity of arbitration agreements

Contributed by **Cerrahoğlu Law Firm**

May 30 2013

Author

Emine Eda Cerrahoğlu Balsse

Background

In a recent Court of Appeals decision(1) the court overruled an arbitration objection based on the Law on the Obligatory Use of Turkish (805), which stipulates that two Turkish companies should execute agreements in Turkey in Turkish.

Although the intention of the parties to arbitrate their disputes was clear in the agreement, the Court of Appeals ruled that the first instance court should have considered the effect of the law when evaluating the case.

Facts

The case related to a claim arising from a sub-contract signed in 2007 between the plaintiff and defendant. Although the plaintiff and the defendant were both companies incorporated under Turkish law, they executed the agreement in English.

The agreement included an arbitration clause stipulating that any disputes arising between the parties should be finally settled under the Rules of Arbitration of the International Chamber of Commerce, with London as the seat of arbitration.

Despite the arbitration clause in the agreement, the plaintiff claimed receivables arising from the costs of its performance that had not been paid by the defendant before the court of first instance. The defendant made an arbitration objection and claimed that the dispute should be resolved by an arbitral tribunal, as stated in the agreement.

The court of first instance accepted the defendant's arbitration objection and dismissed the case on procedural grounds.

The plaintiff appealed the decision and the Court of Appeals reversed the decision of the court of first instance.

Decision

The Court of Appeals ruled that it was not pertinent for the court of first instance to dismiss the case based on the arbitration clause in the agreement without taking into account whether:

- under the Law on the Obligatory Use of Turkish, two Turkish parties should execute their agreements in Turkey in Turkish;
- as a consequence of not being executed in Turkish, the agreement should be deemed to be invalid, or alternatively should be deemed valid but not considered as evidence; and
- the plaintiff's opposition to the defendant's arbitration objection constituted breach of good faith regulated under Article 2 of the Civil Code.(2)

Law on the Obligatory Use of Turkish

The law, which dates back to 1926 (shortly after the foundation of the Turkish Republic), was issued in order to promote and protect the use of Turkish. Article 1 of the law reads as follows:

> "*Any kind of companies and institutions having Turkish nationality shall execute*

any kinds of transactions, agreements, correspondence, accounts and books that are in Turkey in Turkish."

The penalty for failing to abide by the above provision is stipulated under Article 4 of the law:

"*Following the entry into force of this law; documents and papers issued contrary to the provisions of Articles 1 and 2 shall not be considered in favor of the companies and institutions.*"

Although the wording of Article 4 of the law is clear, there is still a debate on whether the penalty regulated by this article affects the validity of the agreements in question, or whether it relates only to the evidentiary value of the agreements.

The Court of Appeals in the case at hand has urged the court of first instance to discuss this matter.

Comment

The decision of the Court of Appeals is surprising and therefore noteworthy. Although it did not definitively rule on the validity of the agreement as a consequence of not being executed in Turkish under the law, it deemed that the issue should have been considered by the court of first instance, despite the arbitration clause in the agreement.

According to the text of the decision, it appears that the parties to the agreement clearly indicated their intent to resolve any disputes arising out of the agreement (which should also cover the question of validity) before an arbitral panel, rather than before state courts. It is therefore surprising that the Court of Appeals questioned this clear intention of the parties and ignored the principle of severability, one of the main principles in international arbitration.

For further information on this topic please contact Emine Eda Cerrahoğlu Balssen at Cerrahoğlu Law Firm by telephone (+90 212 355 3000), fax (+90 212 266 3900) or email (eda.cerrahoglu@cerrahoglu.av.tr).

Endnotes

(1) Court of Appeals, March 16 2012, E 2012/3122 - K 2012/4073.

(2) The Civil Code (4721), as published in the *Official Gazette 24607*, December 8 2001.