Arbitration - Turkey

Court of Appeals rules on parties' right to appoint arbitrators

Contributed by **Cerrahoğlu Law Firm**

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In Turkey, the Civil Procedure Law(1) and the International Arbitration Law(2) are the two statutory mechanisms for the settlement of disputes in arbitration. The International Arbitration Law governs international arbitration, while disputes that fall outside its scope are subject to the Civil Procedure Law.

First instance decision

In a decision of the General Assembly of the Civil Chambers of the Turkish Court of Appeals dated March 19 2003 (E2003/15-142, K2003/182), the agreement which was the subject matter of the dispute was executed before the entry into force of the International Arbitration Law; thus, the dispute was reviewed on the basis of Article 520 of the Civil Procedure Law.

According to Article 520 of the Civil Procedure Law:

"*Unless an explicit provision to the contrary is agreed in the agreement, three arbitrators shall be appointed by the judge of the competent court, if one of the two parties fails to make the appointment as per the explicit provision provided for under the agreement within seven days as of the date of the formal notice to make such an appointment, such arbitrator shall also be appointed by the judge*."

The agreement which was the subject matter of the decision included the following arbitration clause:

"*The arbitral tribunal constitutes of three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third arbitrator. If the two arbitrators fail to agree on the third arbitrator or if a party fails to appoint its arbitrator within one month, then the appointment of the third arbitrator or the second and third arbitrators shall be made by the authorized commercial court of first instance*."

The claimant filed a lawsuit before the Ankara Commercial Court of First Instance requesting a ruling that the second and third arbitrators be appointed by the first instance court since the respondent had failed to appoint the second arbitrator within one month of receipt of a request to do so from the claimant as stipulated in the above-mentioned article of the agreement between the parties.

In response to such claim, the respondent stated that it had appointed its arbitrator during the lawsuit initiated by the claimant for the appointment of arbitrators. Thus, the claimant's arbitrator, as well as the respondent's appointed arbitrator, should appoint the third arbitrator.

The first instance court accepted the claimant's request on the grounds that the respondent had failed to appoint an arbitrator within the timeframe specified in the agreement, and that because of such failure, the respondent had lost its right to appoint its arbitrator. Accordingly, the first instance court appointed the second and third arbitrators.

Court of Appeals decision

The respondent requested an appeal of the first instance court's decision and the 15th Chamber of the Court of Appeals annulled the decision.

The Court of Appeals decided that under Article 520 of the Civil Procedure Law, the purpose of the lawsuit is to facilitate the arbitration proceedings, and that due to the principle of party autonomy in arbitration, the respondent

should be authorized to appoint its arbitrator before the court renders a decision regarding the lawsuit for the appointment of the arbitrators.

When the case was returned to the first instance court following the decision of the 15th Chamber of the Court of Appeals, the first instance court insisted on its former decision and consequently the issue was brought before the General Assembly of the Civil Chambers of the Court of Appeals.

The general assembly upheld the first instance court's decision and ruled that the second and third arbitrators should be appointed by the first instance court according to Article 520 of the Civil Procedure Law and the explicit arbitration clause of the agreement between the parties. According to the general assembly, if one of the parties to the arbitration does not appoint an arbitrator within the specified timeframe, such party loses its right to make such an appointment. The general assembly maintained that in the event that a party fails to appoint its arbitrator within the specified timeframe, the appointment of the second and third arbitrators shall be made by the court.

According to the general assembly, the appointment of such arbitrators shall be made by the court even if the party that failed to appoint the arbitrator within the specified timeframe appoints an arbitrator during the lawsuit for the appointment of the arbitrators.

Dissenting opinion

According to the opinion of the judges who dissented to the general assembly's decision, the legal problem reviewed in the lawsuit was whether the court should take into consideration a party's autonomy in the appointment of the arbitrator even if such party had failed to appoint its arbitrator within the specified timeframe.

The dissenting judges stated that Article 520 of the Civil Procedure Law is not a mandatory provision and that it provides for the possibility for the parties to regulate the appointment of the arbitrator in a manner other than that provided for under Article 520. Accordingly, the main issue to be reviewed in the case at hand was whether the party which had not appointed its arbitrator within the specified timeframe had the right to appoint the arbitrator before the court.

The dissenting judges further argued that according to the practice of the Court of Appeals, the purpose of providing for a hearing in the lawsuit for the appointment of the arbitrators is to implement the principle of fair trial and to grant the right to the party which has not appointed its arbitrator within the specified timeframe to declare its intent regarding the arbitrator to be appointed by the court.

In this respect, the dissenting judges were of the opinion that the court should first take into account the proposal made by the party which has not appointed its arbitrator within the specified timeframe during the lawsuit for the appointment of the arbitrators and evaluate whether such proposal is in compliance with provisions of law and the arbitration agreement. According to the dissenting judges, such proposal should be rejected only by giving justification for such rejection. Only then does the court become the competent authority which may appoint the arbitrator *ex officio*.

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Endnotes

(1) The Civil Procedure Law was published in the *Official Gazette* on July 2, 3 and 4 1927, numbers 622, 623 and 624, respectively. It entered into force three months after its publication.

(2) The International Arbitration Law (4686) entered into force on July 5 2001. Agreements which were executed before July 5 2001 are subject to the Civil Procedure Law.