

## Arbitration - Turkey

### Court of Appeals finds ICC decision contrary to public policy

Contributed by **Cerrahoğlu Law Firm**

September 05 2013

On April 17 2012 the Court of Appeals annulled an arbitral award issued by the International Chamber of Commerce for being contrary to Turkish public policy.<sup>(1)</sup>

#### Facts

The dispute arose out of a concession agreement subject to Turkish law signed in 1998 and finally amended in 2005 by and between the relevant Turkish authority and a mobile phone operator. According to the agreement, the operator should pay a treasury share and contribute to the authority's expenses *pro rata* to the realised gross sales.

Although the operator paid these shares for some time, it claimed that the discounts on wholesale prices given to distributors should not have been included in the gross sales based on which these shares were calculated. The operator initiated arbitration under the agreement. The arbitral tribunal ruled in favour of the operator.

The authority filed an annulment action of the final award before the first instance court based on two of the grounds set out under Article 15 of the Turkish International Arbitration Act,<sup>(2)</sup> claiming that:

- the arbitral tribunal had exceeded its authority (Article 15(A)(1)(e));<sup>(3)</sup> and
- the award was contrary to Turkish public policy (Article 15(A)(2)(b)).<sup>(4)</sup>

The first instance court dismissed the annulment action and ruled that the arbitral tribunal did not exceed its authority and the award was not contrary to Turkish public policy.

The authority appealed the first instance decision before the Court of Appeals. The appellate court overruled the decision of the first instance court and annulled the arbitral award on public policy grounds.

#### Decision

In its decision, the Court of Appeals adopted the definition of public policy used in the Turkish legal doctrine, which defines 'public policy' as:

*"the entire set of rules and institutions, which protects the fundamental interests of society and designates the fundamental structure of society from the political, social, economic, ethical and legal perspectives within a specific time period."*

The court additionally stated that "fundamental principles, which states cannot waive, are related to public policy". The court set forth that:

*"the intervention of public policy is essential when there is violation of mandatory provisions of law, which aim to protect the public interest and public policy, morality and fundamental rights and freedoms. For instance, since customs codes and tax legislations are related to public policy, a final arbitral award which resolves a debt owed contrary to tax legislation, encounters the intervention of public policy for it is not in line with the basic principles that are considered essential in Turkish law."*

The court also declared that "decisions that are in violation of the laws which are related to the economic structure of society can also be accepted as violation of public policy".

The court distinguished public policy in domestic law from public policy in private international law, stating that:

*"in domestic law, public policy is a complete set of rules, which protects the fundamental structure and interests of Turkish society. The notion of international public policy is more limited than its scope under domestic law."*

Author

Emine Eda Cerrahoğlu Balsse



*Accordingly, a situation considered as a violation of public policy in domestic law may not be accepted as violation of public policy in international law."*

According to the court:

*"if the parties have chosen the applicable law in the arbitration agreement, it is accepted that they have chosen also the public policy of such applicable law. In other words, public policy should be considered within the boundaries of the applicable law."*

The court also determined that:

*"in order to evaluate the public policy objection, it may sometimes be necessary to review the merits. Otherwise, it is impossible to evaluate the objection of violation of public policy. In such cases, reviewing the merits of the case does not necessarily mean the technical review of the merits of the case."*

Based on these general insights, the court discussed the case as follows:

*"Although the due treasury share and contribution to the Authority's expenses agreed in the Agreement are not taxes, it is an important and continuous item of income arising out of delegation of public service by the state. In the case, the exclusion of discount in wholesales from the gross sales amount... which is the basis for the payment of treasury shares and contribution to the Authority's expenses, results in a decrease in the treasury shares and contribution to the Authority's expenses, which aim to provide regular income. It also disrupts the budget balance. Hence, it is obvious that it is going to deteriorate economic balance and public policy."*

Accordingly, the court decided that such exclusion was against the aim of revenue generation and mandatory provisions of law, which rendered the final arbitral award enabling such exclusion contrary to Turkish public policy.

#### **Comment**

This decision is noteworthy due to the broad definition and scope of public policy adopted by the court. Public policy is still an open-ended obstacle to the enforcement of arbitral awards.

*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](mailto:eda.cerrahoglu@cerrahoglu.av.tr)).*

#### **Endnotes**

(1) Decision of the 13th Civil Chamber of the Court of Appeals, E2012/8426, K2012/10349.

(2) The International Arbitration Act (2001/4686) is applicable to the annulment since the seat of arbitration was in Turkey.

(3) Article 15(A)(1)(e) states:

*"1 - If the requesting party proves that: ... e) The award is not related to the subject matter of the arbitration agreement or the award does not embrace all issues that were referred to arbitration, or was made in excess of authority by arbitrator or arbitral tribunal." (Emphasis added.)*

(4) Article 15(A)(2)(b) states: *"2 - If the court ascertains that: ... b) The award is contrary to public policy." (Emphasis added.)*

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).