RECENT DEVELOPMENTS IN ARBITRATION PRACTICE

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INTERIM INJUNCTION UNDER THE TURKISH INTERNATIONAL ARBITRATION LAW

DECISION OF THE 15TH CIVIL CHAMBER OF THE ISTANBUL REGIONAL COURT OF APPEALS DATED 27.03.2024 AND NUMBERED 2024/294 E., 2024/268 K.

The claimant applied to the court for an interim injunction to prevent the encashment of the letters of guarantee pursuant to the work contract signed between the parties, which contains an arbitration clause. The court of first instance accepted the request for interim injunction. Regarding the opposing party's objection to the interim injunction, the court of first instance ruled that the objection to the interim injunction should be evaluated by the arbitral tribunal, stating that the parties had applied to the Vienna International Arbitration Center pursuant to the arbitration clause and that the arbitration proceedings were ongoing. The opposing party filed an appeal on the grounds that the court lacked jurisdiction and that the interim injunction decision was procedurally and legally against the law.

In the referenced matter, the Court of Appeal discussed whether, where an interim injunction was granted by a Turkish court prior to the commencement of arbitration proceedings, the court has jurisdiction to hear an objection to the injunction after the commencement of the arbitration proceedings.

The applicability of the Turkish International Arbitration Act ("**IAA**") and the issue of jurisdiction were discussed. Pursuant to Article 1 of the IAA, this law shall apply in cases that have a foreign element and where the place of arbitration is determined as Türkiye. Since the place of arbitration was not designated as Türkiye and the IAA was not chosen by the parties, the Court noted that it is not possible to directly apply the IAA to the case *per se*. However, since it is explicitly stipulated in the IAA and its Articles 5 and 6 are applied in cases where the place of arbitration is determined outside Türkiye, the court, nevertheless, applied Article 6 of the IAA on the requests for interim injunctions.

Yet, Article 6 of the IAA does not provide an explicit provision on whether the objection to interim injunctions granted by the court may be considered by the court or the arbitral tribunal hearing the merits of the dispute. However, the court noted that the general nature of international arbitration, the nature of provisional measures of legal protection and the content of Article 6 of the IAA should be considered as a whole. Thus, the court underlined that under the IAA, arbitral tribunals cannot grant injunctions or interim attachments which must be enforced by enforcement bodies or executed by other public authorities. The court also referred to the reasoning of Article 6 of the ICC.

Taking all these points into account, the court concluded that interim injunction could be sought from the Turkish courts before or during arbitration proceedings under the IAA and that the Turkish courts had jurisdiction to consider objections to interim injunctions.

This decision of the Regional Court of Appeal reinforces a similar decision of the Court of Cassation given in 2022 (see the decision of the 6th Civil Chamber of the Court of Cassation numbered E. 2022/3529 K. 2022/4699, dated 12.10.2022). In the decision of the 6th Civil Chamber of the Court of Cassation, it is emphasized that the Turkish courts should evaluate the objections to the interim injunction decisions issued by the Turkish courts in disputes subject to arbitration involving a foreign element.

The previous practice of the Court of Cassation provided that the Turkish courts would refer the file to the arbitral tribunal in the relevant arbitration proceedings in order to evaluate the objections filed after the commencement of the arbitration proceedings against the interim injunction order issued by the Turkish courts prior to the arbitration proceedings.

In an arbitration proceeding under the IAA in which Boden Law acted as counsel, the Turkish courts referred the file to the arbitral tribunal for the consideration of the objection to the interim injunction. Boden Law, on the other hand, argued that the arbitral tribunal lacked jurisdiction pursuant to the IAA and that the objection should be considered by the Turkish Courts that granted the interim injunction, and the arbitral tribunal ruled that it lacked jurisdiction.

EFFECT OF LAW NO. 805 ON THE ARBITRATION CLAUSE

DECISION OF THE 11TH CIVIL CHAMBER OF THE COURT OF CASSATION DATED 24.04.2023 AND NUMBERED 2021/8414 E., 2023/2361 K.

The claimant insurance company, stating that the insured cargoes were damaged during transportation and therefore paid compensation to its insured, requested the annulment of the objection to the enforcement proceeding initiated against the defendant for the compensation. The defendant argued that the dispute should be resolved through arbitration and requested the dismissal of the case.

The court of first instance dismissed the case on procedural grounds due to the existence of an arbitration clause. The court held that the arbitration clause of the contract of carriage (bill of lading) was valid and that the dispute should be settled by arbitration in London. Upon an appeal filed by the claimant, the Regional Court of Appeal upheld the decision of the court of first instance and dismissed the appeal on the merits. The court stated that the arbitration clause in the bill of lading also binds the claimant insurance company, and the dispute should be resolved through arbitration.

Upon the appeal of the claimant, the 11th Civil Chamber of the Court of Cassation annulled the decision of the Regional Court of Appeal and reversed the decision of the court of first instance, stating that the Law No. 805 on the Compulsory Use of Turkish in Economic Enterprises ("**Law No. 805**") was not taken into consideration while evaluating the validity of the arbitration clause. The Court of Cassation ruled that the validity of the arbitration clause should be re-evaluated since the charter party agreement containing the arbitration clause between the Turkish parties was drafted in a foreign language. In its decision, the Court of Cassation also referred to Article 4 of Law No. 805, which stipulates that contracts in a foreign language shall not be taken into account in favor of the company.

Law No. 805 stipulates the obligation to use Turkish language in the contracts concluded between Turkish parties. "*Not being taken into consideration*" is the main legal consequence of contracts concluded in violation of Law No. 805. However, courts apply different interpretations and definitions.

Although there are court decisions recognizing that the provisions of Law No. 805 relate to the evidential value of contracts, there is no uniform case law regarding the legal consequences of non-compliance with Law No. 805. It has also been observed that courts tend not to apply Law No. 805 to contracts containing arbitration clauses. However, the Court of Cassation's decision that the validity of the arbitration clause should be evaluated in accordance with Law No. 805 shows that there is still no uniformity in the application of Law No. 805.

VALIDITY OF THE ARBITRATION AGREEMENT

DECISION OF THE 11TH CIVIL CHAMBER OF THE COURT OF CASSATION DATED 24.04.2023 AND NUMBERED 2021/8414 E., 2023/2361 K.

The case is related to the distributorship relationship between the parties. The claimant alleged that it fulfilled its obligations, yet the respondent failed to provide after-sales services and spare parts. Therefore, the claimant stated that the distributorship relationship was terminated for just cause and requested compensation.

The Court of First Instance dismissed the case on procedural grounds referencing the existence of the arbitration clause in the expired distributorship agreement between the parties. The court accepted that the parties *de facto* continued the distributorship relationship and therefore the arbitration clause was valid. The claimant filed an appeal against this decision. The Regional Court of Appeal rejected the claimant's appeal on the merits.

The Court of Cassation reversed the decisions of the Court of First Instance and the Regional Court of Appeal. In its grounds for reversal, the Court of Cassation stated that the distributorship agreement between the parties had expired, and that the arbitration clause did not remain valid even if the parties continued the distributorship relationship after this period. The Court of Cassation emphasized that the arbitration agreement must be based on the express will of the parties and that the arbitration clause expires upon the termination of the agreement.

The Court of First Instance resisted the Court of Cassation's reversal decision, arguing that the arbitration clause was valid. The court stated that the parties' de facto continuation of the contractual relationship extended the arbitration clause.

The General Assembly of Civil Chambers reversed the decision of the Court of First Instance, stating that the distributorship agreement between the parties had expired and that the arbitration clause of an expired agreement could not be valid. The General Assembly emphasized that for the existence of an arbitration agreement, the parties must have a clear and definite will, and this will must be expressed in writing and in a clear manner.

In the decision of the General Assembly of Civil Chambers, a dissenting vote was also submitted. In this dissenting vote, different assessments were made on how to evaluate the will of the parties regarding the existence and validity of the arbitration agreement. While the General Assembly of Civil Chambers emphasized that a clear and unequivocal declaration of will is required for the validity of the arbitration agreement, the dissenting vote argued that the actual will of the parties is sufficient to maintain the arbitration clause. This situation reveals differences in legal interpretation regarding the validity of arbitration agreements and the determination of the parties' will.

ANNULMENT OF ARBITRAL AWARD / PUBLIC POLICY

DECISION OF THE 11TH CIVIL CHAMBER OF THE COURT OF CASSATION DATED 3.4.2023 AND NUMBERED 2022/7424 E., 2023/1983 K.

The dispute between the parties is on the annulment of the arbitral award rendered pursuant to the Arbitration Rules of the Istanbul Chamber of Commerce ("**ITOTAM**"). The claimant claimed that the same material facts were evaluated in two different arbitration proceedings and that the arbitrator in the proceeding in which the award sought to be annulled was rendered, should have deemed the other ongoing proceeding a preliminary issue. The Regional Court of Appeal dismissed the case on the grounds that the parties, claims and subjects of action were different in the two different arbitration proceedings.

In the decision before the Court of Cassation, it was stated that in both arbitration cases (2019/7 E. and 2019/9 E.), the same material facts were discussed by different arbitrators and the arbitrators reached different conclusions. In particular, the Court of Cassation emphasized that it is necessary to investigate whether the first arbitral award (2019/7 E.) and the related material facts constitute *res judicata*, and that it is contrary to public policy to render a decision without doing so. The Court of Cassation also stated that the results of the evaluation of the same material facts may lead to contradictory decisions, contradictory decisions will disrupt the principles of legal security, transparency and stability, and this situation will be contrary to public policy.

Conversely, the Court of Appeal emphasized that the arbitrators' assessments of the facts were relevant to their independence and that the conclusions of the awards were not inconsistent with each other and therefore did not violate public policy. Finally, the Court of Cassation considered the resisting decision and upheld the decision of the Court of Appeal.

The Court of Cassation did not provide any justification in its decision of confirmation. For this reason, it is not possible to determine which elements put forward by the Court of Appeal in the decision of the Court of Appeal to resist are evaluated by the Court of Cassation. However, it is understood that the characteristics of the case come to the forefront in the evaluation of the Court of Appeal. For this reason, it does not seem possible at this stage to confirm that the Court of Cassation will decide that there is no violation of public policy in future cases on the same issue.

TÜRKİYE'S GROWING INFLUENCE IN ICC ARBITRATION: 2023 INSIGHTS

In 2023, the ICC registered a total of 890 new cases, demonstrating a significant increase in international arbitration activity as per the recently published ICC Dispute Resolution 2023 Statistics. These cases involved parties from 141 countries, reflecting the diverse and global nature of disputes handled by the ICC.

TÜRKIYE IN ICC ARBITRATION

Türkiye has maintained a significant presence in ICC arbitration. In 2023, Turkish companies were significantly represented in ICC arbitrations, being involved in 56 new cases making Türkiye one of the most represented nationalities within the Central and South-East Europe region. Of these cases, Turkish parties acted as claimants in 30 instances and as respondents in 26 instances. These cases spanned various sectors, including energy, construction, and technology, indicating the diverse nature of disputes Turkish entities are engaged in. This active involvement signifies Turkish businesses' participation in international arbitration and their reliance on ICC mechanisms for dispute resolution.

In terms of applicable law, Turkish law was selected in 12 cases, reflecting its importance and acceptance in international contracts. Additionally, Türkiye was chosen as the seat of arbitration in 10 instances, further highlighting the country's strategic role in the arbitration landscape. The selection of Türkiye as both the applicable law and the seat of arbitration emphasizes the country's growing influence and attractiveness as a jurisdiction for resolving international disputes.

Turkish arbitrators were appointed in 15 cases, showcasing Türkiye's growing reputation for providing qualified professionals in the field of arbitration. Specifically, Turkish arbitrators served as sole arbitrators in 4 cases, co-arbitrators in 7 cases, and as presiding arbitrators in 4 cases.

The ICC's 2023 statistics highlight the continued relevance and growth of international arbitration, with Türkiye playing a crucial role both as a jurisdiction and through the involvement of its businesses. As arbitration continues to evolve, Türkiye's strategic position and legal framework are likely to attract even more international attention and participation in the coming years.

THE DECISION OF THE DIFC COURT ON THE ENFORCEABILITY OF INTERIM INJUNCTIONS

On 19 September 2023, the Dubai International Financial Center ("**DIFC**") Court of First Instance in *Muhallam v Muhafaf* case, considered whether an interim order imposing provisional measures could be enforceable in the DIFC as an "*award*". The dispute centered on whether interim awards are final awards enforceable under the New York Convention. The DIFC Court held that interim injunctions issued by arbitral tribunals are enforceable in the DIFC.

The DIFC is a free zone within the Emirate of Dubai and has its own legal framework. The DIFC Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration and applies international treaties to which the United Arab Emirates is a party, in particular the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The DIFC Arbitration Law provides that interim injunctions issued by arbitral tribunals in proceedings before both courts located in the DIFC and arbitral tribunals in which the DIFC is the place of arbitration, are enforceable by the DIFC Courts. The question that arises in this proceeding is whether interim injunctions issued by arbitral tribunals in proceedings where the place of arbitration is not the DIFC are enforceable under the DIFC Arbitration Act.

The claimant sought enforcement of the interim injunction pursuant to Article 42 of the DIFC Arbitration Law. The respondent argued that an interim injunction is not a "recognizable and enforceable award" and can only be enforced in proceedings where the DIFC has been selected as the place of arbitration.

The DIFC Tribunal held that, under the New York Convention and the UNCITAL Model Law, interim injunctions may be considered as "awards" and enforceable as such. Finally, the tribunal held that Article 24 of the DIFC Arbitration Act provides that interim injunctions granted by arbitral tribunals are "*awards or other forms*"" and, consequently, interim injunctions may be considered as *"awards*" under Articles 42, 43 and 44 of the DIFC Arbitration Act.

The court held that interim injunctions issued by arbitral tribunals are enforceable as final arbitral awards, regardless of whether the place of arbitration is the DIFC. Thus, a party in whose favor an interim injunction has been granted in any arbitration proceedings may apply directly to the DIFC for enforcement of the interim injunction, if the other party's assets are located in the DIFC.

DECISION OF THE SWITZERLAND FEDERAL COURT ON INTERNAL EU INVESTMENT ARBITRATION PROCEEDINGS

In Judgment No. 4A_244/2023, the Swiss Federal Court delivered an important judgment on the competence of arbitral tribunals in internal European Union (EU) investment disputes. The award concerns the annulment of an arbitral award rendered in an investment arbitration under the UNCITRAL Rules of Arbitration between the claimant, the French investor EDF, and the respondent, Spain, in which the seat of arbitration was Switzerland. The court rejected all of Spain's challenges to an arbitral award in favor of EDF on the grounds that the arbitral tribunal lacked jurisdiction.

In examining the jurisdiction of an arbitral tribunal in an arbitration proceeding in which the place of arbitration is in Switzerland, the court stated that it was not bound by the decision of the European Court of Justice ("**ECJ**") in the earlier *Komstroy* case that the Energy Charter Treaty ("**ECT**") does not apply to disputes between EU member states and EU resident investors. The court noted that Swiss courts generally defer to the highest court of the enacting country on the interpretation of a foreign law. Here, however, where there is a conflict between EU law and the ECT, the EU institution may be inclined to place its own law above an international treaty and thus rule in its favor.

The court found the ECJ's reasoning in the *Komstroy* case unconvincing. It stated that the ECJ had failed to take into account international law and the rules of treaty interpretation, relying on the special nature of EU law. Having thoroughly analyzed the various provisions of the ECT, EU law, international law and the Vienna Convention on the Law of Treaties, the court concluded that the unconditional consent to arbitration given by Spain in Article 26 of the ECT did not exclude internal EU disputes. Following the *Komstroy* judgment, the court rejected Spain's argument that internal EU disputes cannot be subject to arbitration.

Furthermore, rejecting Spain's argument that the tribunal had failed to take into account the earlier decision in *Green Power v Spain* in reaching its award, the court noted that Spain had never raised its objections to the impartiality of the presiding arbitrator during the arbitration proceedings and therefore could not raise this argument at a later stage.

Pursuant to this decision of the Swiss Federal Court, the competence of arbitral tribunals in disputes between investors resident in an EU member state and an EU member state where the place of arbitration is Switzerland, is not affected by the decisions of the ECJ. However, there are decisions of the courts of EU member states refusing to enforce an award in internal EU disputes. Therefore, there is still no uniformity in practice regarding the resolution of internal EU disputes and the enforcement of awards.