Turkish Court of Appeals: The Arbitral Tribunal's Failure to Obtain an Expert Report Does Not Constitute a Violation of Public Policy

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An arbitration-friendly decision was rendered by the 11th Civil Chamber of the Turkish Court of Appeals ("**Court of Appeals**") on 22 June 2016 [File no. 2016/4931, Decision no. 2016/6886]. The decision deals with the question as to whether the arbitral tribunal's failure to refer the calculation of damages to experts constitutes a violation of public policy. Success in an arbitration proceeding depends highly on the evidence that impacts the substance of an arbitral award. Historically, public policy has been and still is a delicate notion in Turkey. The Court of Appeals' recent decision is particularly important, as the Court of Appeals examined the discretionary power of the arbitral tribunal to take evidence in respect of the public policy ground for setting aside the award.

Article 439 of the Turkish Code of Civil Procedure ("**CCP**") stipulates the grounds for setting aside a national arbitral award, which are in line with the UNCITRAL Model Law. According to this article, the award may be set aside upon one of the parties' request if,

> (i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing any indication regarding the law applicable, the arbitration agreement is invalid under Turkish law;
> (ii) the composition of the arbitral tribunal is not in line with the parties' agreement or with the procedure provided in the CCP;
> (iii) the arbitral award was not rendered within the term of arbitration;
> (iv) the arbitrator or arbitral tribunal unlawfully found itself competent or incompetent;
> (v) the arbitrator or arbitral tribunal decided on a matter beyond the scope of the arbitration agreement or did not decide on all of the matters claimed or exceeded its competence;
> (vi) the arbitral proceedings were not conducted in accordance with the parties' agreement or failing such agreement, with the CCP, and such non-compliance affected the substance of the award; and
> (viii) the parties were not treated with equality or were otherwise unable to present their case. The award may be set aside ex officio by the court examining the file if, (i) the subject matter of the dispute is not capable of resolution by arbitration under Turkish law,

or (ii) the award is in conflict with public policy.

As the grounds listed in Article 439 of the CCP are exhaustive and awards are not subject to judicial review on their merits, violation of public policy is the most preferred ground in Turkey for making an application to set aside an arbitral award.

In the present case, although the arbitrators were not experts in the field of accounting and finance, they rendered an award without obtaining an expert report regarding the calculation of damages arising out of unjust termination of an agreement. The plaintiff, invoking Article 431 of the CCP, which provides an arbitral tribunal with the authority to decide to refer issues to experts when necessary, filed a claim to set aside the award before the competent first instance court, claiming that the award violated public policy and the CCP's provisions. The first instance court decided to set aside the award based on violations of public policy and the CCP provisions. According to the first instance court, as per Article 431 of the CCP, the arbitral tribunal should have referred the calculation of damages to experts, and obtaining an expert report regarding the calculation of damages is a matter relating to public policy. However, the Court of Appeals reversed the first instance court's decision by adopting an arbitration-friendly approach and emphasizing the fundamental principles of commercial arbitration.

Firstly, the Court of Appeals held that the application of applicable law is not listed as one of the grounds for setting aside an award under Article 431 of the CCP, and therefore this matter cannot be examined during an action for setting aside. This conclusion complies with the standards of arbitration-friendly jurisdictions, where it is well established that an arbitral tribunal does not exceed its authority merely because it reaches an incorrect substantive result as regards the application of law. Doing so is not an excess of mandate or authority, and is not contrary to public policy, but a substantive mistake on an issue within the tribunal's jurisdiction. The English High Court held in a recent decision that the tribunal's failure to reach the correct decision cannot constitute a ground for challenge under the English Arbitration Act [B v. A [2010] 2 Lloyd's Rep 681, [2010] EWHC 1626 (QB) (Comm)]. A recent U.S. decision is to the same effect, holding that courts are limited to determining whether the arbitrator acted within the scope of his powers and not whether he did it well, correctly or reasonably [AmerixCorp v. Jones, 457 F. Appx. 287, 291 (US Ct of Apps (4th Cir), 2011)].

Secondly, the Court of Appeals held that the arbitral tribunal had discretionary power to obtain an expert report and the arbitral tribunal's failure to refer the calculation of damages to experts does not constitute a violation of public policy. It seems plausible to suggest that this conclusion is consistent with the wording of Article 431 of the CCP, as it stipulates that the arbitral tribunal "may" decide to appoint experts to report on issues determined by the tribunal. In other words, pursuant to Article 431 of the CCP, arbitrators are competent but they have discretion to request or exclude expert evidence. This conclusion is also in line with the provisions of the IBA Rules on Taking of Evidence in International Arbitration. Under Article 9 of the IBA Rules on Taking of Evidence in International Arbitration, the arbitral tribunal may exclude any evidence due to lack of sufficient relevance to the case or materiality to its outcome.

Furthermore, the conclusion reached by the Court of Appeals, according to which arbitral tribunals possess broad authority over evidentiary matters, is reflected in national arbitration legislation and judicial decisions of arbitration-friendly jurisdictions. For instance, according to section 34(1) of the English Arbitration Act, an arbitral tribunal shall decide all procedural and evidentiary matters, subject to the right of the parties to agree any matter. Similarly, courts generally refuse to set aside particular awards based on allegedly incorrect refusals to admit or exclude evidence. In this respect, the French Court of Appeals upheld an award which refused to consider evidence provided by one party, reasoning that arbitral tribunals' evidentiary decisions cannot ordinarily be reviewed [Judgment of

Paris Court of Appeals, 2001 Rev. Arb. 731, 16 November 2000].

In conclusion, the Court of Appeals' decision is pleasing, as it emphasizes essential principles that have already been accepted in arbitration-friendly jurisdictions. One issue worth noting is that this Court of Appeals decision concerns an award rendered in domestic arbitration, so arbitration lawyers have good reason to hope that the same approach will be adopted in relation to awards rendered in international arbitration proceedings. It is expected that the Court of Appeals' arbitration-friendly interpretation will positively influence the public policy understanding of Turkish courts in national and international arbitration practice.