Arbitration Agreements Concluded by Agents and the Specific Authority Issue

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Introduction

In order to conclude an enforceable arbitration agreement, various validity conditions are required. The authority of the signatory agent to conclude an arbitration agreement on behalf of the principal is one of these requirements. In some jurisdictions, an explicit/specific authority is also required. An agent authorized with a general power of attorney, but without an explicit statement on the authority to conclude an arbitration agreement, is not entitled to conclude so on behalf of the principal. If an arbitration agreement is concluded by an agent who lacks specific authority, the arbitral tribunal's jurisdiction may be challenged, the award may be annulled, or the enforcement of the award may be rejected.

Specific Authority Requirement in Different Jurisdictions

The legislations of different jurisdictions may vary. For instance, Article 396/3 of the Swiss Code of Obligations, Article 1989 of the French Civil Code, Article 1989 of the Belgian Civil Code, Article 1008 of the Austrian Civil Code, Article 702 of the Egyptian Civil Code, Article 1713 of the Spanish Civil Code require agents to have specific authority in order to conclude an arbitration agreement on behalf of the principal. Contrary to the provisions of these states, Italian, British, German, Swedish, American and Dutch laws do not require such specific authority.

According to Article 504/3 of the Turkish Code of Obligations, and Article 74 of the Code of Civil Procedure, the agent is required to be specifically and/or explicitly authorized to conclude an arbitration agreement on behalf of the principal.

Within this context, the Turkish Court of Appeal ("**TCA**") discussed the specific authority requirement, and in some decisions, it rendered arbitration agreements signed by agents who lack specific authority null and void. In some cases, the TCA attached the specific authority rule to the public order.[fn]Civil Chambers Assembly of TCA dated, 11.10.2000, numbered 2000/19-1122 E., 2000/1256 K.; the decision of the 19th Civil Chamber of the TCA dated 01.05.2003, numbered 2002/3763 E., 2003/4764 K.[/fn] Notwithstanding this consideration, in other cases, the TCA rejected claims for invalidity raised from lacking specific authority, by ruling that these claims were not made in good faith.[fn]The decision of the 11th Civil Chamber of TCA dated 09.04.2004 and numbered 2003/6774 E., 2004/3751 K.; The decision of 11th Civil Chamber of TCA dated 26.05.1999 and numbered 1998/9679 E., 1999/4500 K.[/fn]

Form Requirements for Specific Authorization to Conclude an Arbitration Agreement

The method of authorization of the agent to act on behalf of the principal is another issue to be examined. One may ask whether the written form requirement for validity of arbitration agreements is required for the specific authorization of the agent to conclude an arbitration agreement.

Comparative law has varying solutions on the matter. For instance, Article 217/2 of the Greek Code of Procedure requires the same form for the authorization and the transaction to be used. While Article 1008 of the Austrian Civil Code does not require written form for the authorization in order to conclude an arbitration agreement, the doctrine and case law accept the need of the written form.[fn]For a recent decision of Austrian Supreme Court, please see Mirando Mako, "Form Requirements For Authorisations To Enter Into An Arbitration Agreement: The Austrian Perspective".[/fn] According to Article 1985 of the French Civil Code, and Article 110/3 of the French Commercial Code, the authorization to conclude an arbitration agreement is not subject to a form requirement in line with the British, Swedish, Finnish and Italian laws. Article 167/2 of the German Civil Code explicitly regulates that authorization is neither subject to any form requirement, nor must it be in line with the form requirement of the transaction. In Turkish Law, apart from the conclusion of arbitration agreements, the matter is discussed for other transactions related to specific authorization. However, there is no legal regulation or a consensus among the scholars related to this discussion.

In international arbitration practice, there are varying opinions as well. According to some, the written form requirement as regulated under the New York Convention for an arbitration agreement shall be applicable merely to the arbitration agreement, and should not be applied to the specific authorization.[fn]Andreas Reiner, "The Form of the Agent's Power to Sign an Arbitration Agreement and Article II(2) of the New York Convention", ICCA Congress Series No: 9, 1998, p. 90; Gary Born, International Commercial Arbitration, Kluwer Law International, 2014, p. 663.[/fn] An opposing view defends that the written form requirement regulated under the New York Convention should be extended to the authorization.[fn]For the scholars of this view, please see Reiner, p. 83, fn. 8 and p. 84, fn. 12.[/fn] The third view on this issue affirms that non-regulation of this issue at the New York Convention shall not be interpreted as it failing to require any form for authorization. Hence, the form requirement on authorization is to be determined by national laws that may require specific methods for authorization.[fn]Jean François Poudret / Sebastien Besson, Comparative Law of International Arbitration, translated by Stephen V. Berti and Annette Ponti, 2. Edition, Sweet & Maxwell, London 2007, p. 236.[/fn]

Law Governing the Requirement of Specific Authority

Neither national nor international legislation has an explicit answer as to which law governs the requirement of specific authority. In other words, none of the stated legislations answer whether or not the issue shall be governed by the "*law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*," or "*the law applicable to them* (to the parties)."

In order to ascertain the law governing the authority, a qualification on this issue must be made.[fn]For the discussions, please see: Fatih Isik, Authority to Conclude Arbitration Agreement in International Commercial Arbitration and the Law Applicable to this Authority, On Iki Levha Publications, Istanbul 2015, p. 8-17.[/fn] According to one view, the invalidity of the arbitration agreement which was signed by an agent who lacks specific authority shall be evaluated under the scope of the merits or material validity of the arbitration agreement. This opinion defends that the principal who did not grant authority to the agent to conclude an arbitration agreement never had the intent to enter into an arbitration agreement, which causes the invalidity of the agreement based on

its merits. Another view associates this issue with the capacity of the parties, and interprets Article V/1(a) of the New York Convention in a wider scope by including the authority. The last view on this issue affirms that the conclusion of an arbitration agreement through an agent is a matter of representation, and the issue shall be determined as per the law governing the representation/agency relationship or the effects of representation authority.

As the scholars have no consensus as to the qualification of authority, the court decisions and arbitral awards given on the authority to conclude an arbitration agreement do not provide explicit argumentation as to this qualification either. However, it is possible to make a classification departing from the conclusions drawn in these decisions.[fn]

For arbitral awards evaluating the authority issue (i) within the material validity of the arbitration agreements, please see ICC Case no. 5730, ICC Case no. 6850, ICC Case no. 5065, ICC Case no. 7047; (ii) within the capacity of the parties, please see ICC Case no. 12073, ICC Case no. 6474, ICC Case no. 7373, ICC Case no. 6850; and (iii) within the representation doctrine, please see ICC Case no. 6268, ICC Case no. 5832, ICC Case no. 10329.[/fn]

In some disputes[fn]*Agrimpex S.A. v. J. F. Braun & Sons, Inc., Areios Pagos* decision of the Supreme Court of Greece dated 14 January 1977; *Société CTIP v. Société Ferich International* decision of the Paris Court of Appeal dated 21 March 1986; *Bargues Agro Industrie SA (France) v. Young Pecan Company (US)* decision of the Paris Court of Appeal dated 10 June 2004.[/fn], judges and arbitrators directly apply substantive rules of *lex fori* without raising any argument as to the law applicable to the authority to conclude an arbitration agreement. The implementation of international practice and internationally acknowledged principles, such as the good faith principle on authority[fn]ICC Case no. 5080, ICC Case no. 5065, ICC Case no. 4667, ICC Case no. 6268, ICC Case no. 7047, ICC Case no. 10982, ICC Case no. 5730, ICC Case no. 4381.[/fn], was also applied in some cases. The TCA has also rendered some decisions which disregarded the discussions on applicable law, and has granted its decision by merely focusing on the good faith principle.[fn]Please see fn. 2 above.[/fn]

Conclusion

The issue of specific authority triggers several discussions. Although this old-fashioned rule was sometimes disregarded by arbitral tribunals and local courts by applying internationally accepted rules, such requirement for the arbitration agreements by the agent remain as an important pitfall of Turkish arbitration law, which should be revised as per international commercial practices.