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Can One Arbitrate with a Turkish Party Based on a Contract in a Language other than Turkish?

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Although parties to international transactions frequently agree to arbitrate, they sometimes reconsider that commitment when a dispute arises, and look to challenge the validity of the arbitration agreement. Thanks to the separability presumption, the courts and the tribunals insulate the arbitration agreements from attacks on the underlying contract and uphold arbitration. However, the separability presumption sometimes backfires; particularly if one is attempting to arbitrate with a Turkish party based on a contract in a language other than Turkish.

Law No. 805 on Compulsory Use of Turkish in Economic Enterprises ("Law No. 805")

Old-fashioned mandatory legislation under Turkish law opens a door for those who want to renounce their earlier decision to arbitrate, provided however that one of the parties is Turkish and that the contract was made in Turkey, but not drafted in Turkish.

The Law No. 805 is short and to the point. Accordingly, every contract has to be made in the Turkish language if one of the parties is Turkish and the contract itself was concluded in Turkey. Although there are some opinions suggesting that the Law No. 805 does not require foreign companies to comply with the Turkish language requirement when dealing with Turkish parties, the latest decisions of the Turkish Court of Cassation assert that the Turkish language has to be used in any type of contracts, documents, and accounting books where at least one party is Turkish and the contract was concluded in Turkey.[1)] The sanction of non-compliance with this law is as excessive as the obligation it imposes: Any agreement executed in violation of the Turkish language requirement cannot be taken into account for the benefit of the party invoking that agreement.

Turkish Courts Circumvention of the Law No. 805

The rationale behind the Law No. 805 is said to be the protection and the promotional use of the Turkish language. Going back as far as 1936, when the Law No. 805 was enacted, the law may have held more relevance since Turkey was actively promoting the use of the Turkish language as state policy back then. Coming back to the present day, however, it is hard to reconcile the

mandatory use of the Turkish language with the needs of globalised business.

It seems like Turkish courts also embrace the opinion that the application of the Law No. 805 is somewhat backward minded. When taking a look back at the decisions in which the Law No. 805 has been applied, it seems that Turkish courts are making an effort to circumvent the application of the mandatory provisions of this law as far as possible. Despite the fact that the provisions of the Law No. 805 are mandatory, Turkish courts abstain from their *ex officio* application. It is only when a party raises the Turkish language requirement do the Turkish courts examine the question of whether or not the contract violates Law No. 805.

Moreover, even if a party were to raise an objection based on the Turkish language requirement, Turkish courts do not directly jump to the conclusion that the contract itself is void. In those cases, Turkish courts examine whether raising the Turkish language requirement in turn constitutes an abuse of rights.[2)] In many instances, Turkish courts concluded that a party, who had previously relied on any part of the contract, cannot later argue that the contract is void for violating the provisions of the Law No. 805.

The Price to be Paid for the Separability Presumption under Turkish law

Nevertheless, the Turkish courts' hands are tied when it comes to arbitration agreements. Although the Turkish courts appear to do all that they can to eliminate the negative impacts of the Law No. 805, these efforts generally have no avail when it comes to the arbitration agreements.

In some instances, Turkish courts enforce those contracts, prepared in violation of the Law No. 805, except for the arbitration clauses therein. Whilst Turkish courts did not provide any reasoning as to why they treat the arbitration agreement and the contract differently, such a conclusion appears to be based on the separability presumption.[3)] This is indicated by the fact that Turkish courts enforce the contracts, prepared in violation of Law No. 805, by relying on the abuse of rights; however, such abuse of rights conclusions are not expanded to cover arbitration agreements, which are included in the same contracts. The core meaning of the separability presumption is that arbitration clauses do not necessarily live or die with the contracts in which they are found. In other words, arbitration agreements are separate agreements, and their validity must be analysed independently from the rest of the contract.

Although the separability presumption generally assists in promoting arbitration by concluding that the arbitration agreement itself is valid while the rest of the contract is not, this presumption sometimes backfires. In some cases, the separability of the valid contract does not serve to insulate the defective clause but rather leaves it to perish alone. Accordingly, even though the Turkish courts are able to circumvent the application of the Law No. 805 based on the abuse of rights, this argument generally does not work when upholding the arbitration agreements. Indeed, since arbitration agreements are considered to be stand-alone agreements, independent from the main contract, the parties' previous reliance on the main contract does not help to conclude that the challenge of the arbitration agreement results in an abuse of rights. The abuse of rights argument is possible in arbitration agreements only when the party previously relied on or remained silent to the application of the arbitration agreement itself but later started to challenge it.

There might be an argument that if the parties act on the contract, in violation of the Law No. 805,

without any qualification, a later reproach of the arbitration agreement by a party should not enable that party to wash its hands of the arbitration clause. However, it seems like this is the price to be paid for the separability presumption under Turkish law.

Ultimately, the efficacy of an international arbitration agreement depends on the parties' ability to enforce that agreement. Therefore, it is essential to consider the Law No. 805 not only when the arbitration agreement is subject to Turkish law but also when the place of enforcement is Turkey. Indeed, in both cases, the Turkish courts might refuse recognition and enforcement based on the public policy exception under Article V(2)(b) of the New York Convention.

A Way Forward

Against this backdrop, it is always advisable to have the Turkish translation of the contracts that are to be executed with Turkish parties. Nonetheless, sometimes the contracts contain hundreds of pages, and the parties may not wish to translate it due to costs or other related concerns. Alternatively, the Turkish language requirement might come to mind at the last moment, and the parties might not have sufficient time for translation. In those cases, it is highly recommended to have, at the very least, the Turkish translation of the arbitration clause annexed to the contract in order to ensure that the separability presumption does not backfire.

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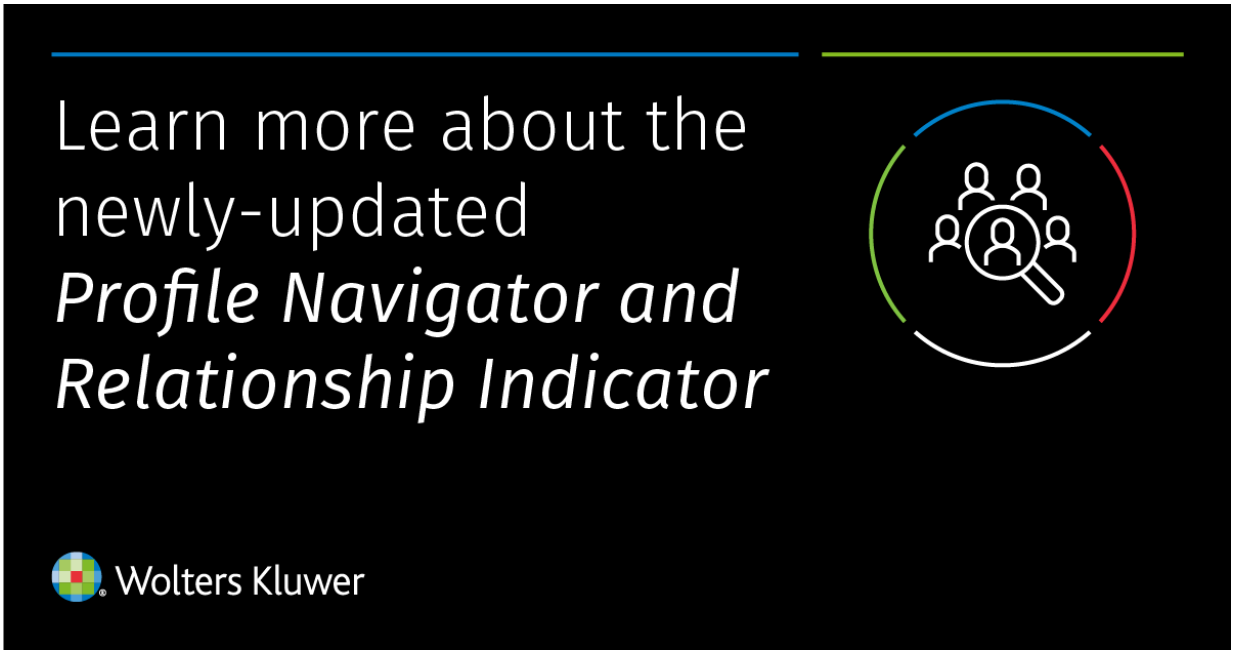

References

?1 Decision of 11th Chamber of Court of Cassation Case No. 2012/4088, Decision No. 2013/3972, dated 04.03.2013.

?2 Decision of 11th Chamber of Court of Cassation Case No. 2012/3122, Decision No. 2012/4073, dated 16.03.2012.

?3 Decision of 11th Chamber of Court of Cassation Case No. 2014/1385, Decision No. 2014/3815, dated 28.02.2014.

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