

Turkish Court of Appeal's Latest Approach to the Use of Foreign Language in Arbitration Agreements

January 2021

Overview

The application of the rule regarding the mandatory use of Turkish language to the arbitration agreements had been highly debated in the past years. The lack of consistency in the decisions of Turkish courts generally arises from the ambiguous wording of the Law No. 805 on Compulsory Use of Turkish Language by Economic Enterprises (the **Law No. 805**). Although there was uncertainty in the past decisions, the 15th Civil Chamber of the Court of Appeal (**Court of Appeal**) has recently adopted a significant decision on this issue.¹

In this letter, we aim to provide you with a brief summary of Turkish court decisions illustrating different perspectives on the application of the Law No. 805 and an analysis of the latest decision.

Discussions on the scope of the Law No. 805

Pursuant to Article 1 of the Law No. 805, enterprises with Turkish origin must make their transactions, agreements and notifications in the Turkish language. Therefore, Article 1 applies only if both parties are Turkish. On the other hand, Article 2 of the Law No. 805 requires foreign enterprises to use Turkish language in notifications, transactions, correspondences made with their Turkish counterparts and documents to be presented to the government agencies. The legal consequence of a breach of these rules is the invalidity of the relevant documents under Article 4.

As one may note, unlike Article 1, Article 2 does not contain “*agreements*” in its wording. This discrepancy in the wording causes ambiguity whether the use of the Turkish language in arbitration agreements (like any other agreements) entered into between a Turkish and non-Turkish party is obligatory. Some scholars argue that the word “*transactions*” in Article 2 could be interpreted as “*legal acts*” that also contain agreements in their nature. However, the majority of the scholars are of the view that the legislator has intentionally omitted agreements within the scope of Article 2.

Conflicting decisions of the Turkish Courts

Some notable court decisions concerning the applicability of Articles 1 and 2 of the Law No. 805 are briefly summarised below.

- The first decision to be examined is the one of the 11th Civil Chamber of the Court of Appeal² dated 26 September 2017. The dispute arose between a Turkish and a Swiss company that were parties to a license and distribution agreement containing an arbitration clause written in English and the Swiss company brought its claim before the Turkish courts. In response to this litigation, the Turkish company asserted that the dispute is subject to arbitration as there is an arbitration clause in the agreement accepted by both parties. Consequently, the 11th Civil Chamber of the Court of Appeal concluded that the arbitration clause drafted in English language is against the Law No. 805 and thus, invalid.

¹ Court of Appeal, 15th Civil Chamber, File No. 2020/1714, Decision No. 2020/2652, dated 2 October 2020.

² Court of Appeals, 11th Civil Chamber, File No. 2016/5836, Decision No. 2017/4720, dated 26 September 2017.

- The 12th Chamber of Istanbul Regional Court of Appeals (**Istanbul Regional Court**) has ruled two important decisions on the application of Law No. 805 to the arbitration agreements.
 - In the first decision³, the validity of the arbitration clause drafted in a foreign language between Turkish companies has been examined. The Istanbul Regional Court referred to Article 1 of the Law No. 805 and stated that as both parties are of Turkish origin, the agreement written in a foreign language will be considered invalid under Article 4.
 - In the second decision⁴ the Istanbul Regional Court evaluated a financial leasing agreement governed by the law of England and Wales and containing an ICC arbitration clause in English language. One of the parties to this agreement was Turkish, while the other was foreign. Within the scope of litigation between these parties, it was asserted that the arbitration clause in English should be deemed invalid pursuant to Article 4 of the the Law No. 805. The Istanbul Regional Court, in its decision, emphasized the difference between Article 1 and 2, and concluded that mandatory use of Turkish language is not applicable to agreements where one of the parties are of foreign nationality.

The latest decision of the Turkish Court of Appeal

Given the lack of consistency in precedents, each decision of the Turkish courts plays an important role for the foreign parties active in Turkey. Therefore, the recent decision of the Court of Appeal dated 2 October 2020 should be read with caution. The dispute involves a construction contract entered into between two Turkish companies. The contract provided that all disputes would be settled under the rules of the Istanbul Chamber of Commerce Arbitration Center (**ITOTAM**). One of the contracting parties commenced an arbitration proceeding and the arbitral tribunal rendered the award in favour of the respondent party. The Regional Court of Appeal annulled this award following a set aside claim but then this annulment decision was reversed by the Court of Appeal. Even if the Court of Appeal did not provide a clear assessment on the application of Law No. 805 or the validity of the arbitration agreement, it can be assumed that it implicitly accepted the validity of the agreement between two Turkish parties executed in English by considering the contract valid.

Further to this decision, the Istanbul Regional Court of Appeal re-examined its first decision and ruled its new decision in accordance with the Court of Appeal's explanations. The claimant appealed the Regional Court of Appeals' decision for the second time, but the Court of Appeal rejected the claimants' application and handed down a final and definite judgment explicitly stating that Law No. 805 is not violated by the use of foreign language in the arbitration agreement due to the existence of a foreign element within the meaning of Article 2 of the International Arbitration Law.

Conclusion

Considering the growth of cross-border transactions and contracts with an international element, mandatory rules on usage of languages like the Law No. 805 appears to be outdated. Thus, the Court of Appeal's latest decision is an important step towards adopting Turkish legislation into today's world.

Contacts

³ Istanbul Regional Court of Appeals, 12th Chamber, File No. 2019/2389, Decision No. 2020/189, dated 13 February 2020.

⁴ Istanbul Regional Court of Appeals, 12th Chamber, File No. 2020/19, Decision No. 2020/184, dated 13 February 2020.



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