**Implementation of the Prohibition of *Révision au Fond* in the Enforcement of Arbitral Awards in Türkiye**

**Overview**

A German international industrial and technology company applied to Turkish courts for the enforcement of the International Chamber of Commerce ("ICC") arbitral award against a publicly traded Turkish chemical fertilizer producer company. The first instance court decided on enforcement of the arbitral award. The court of first instance, among other issues, the prohibition of *révision au fond* was discussed within the framework of public policy. It was emphasized that the deficiencies and errors identified in the facility, as determined in the expert report, cannot serve as grounds for refusing enforcement of the foreign arbitral award, even if they pose risks to public health. The enforcement decision became final with the recent decision of the Court of Cassation.

**Facts**

The case is related to enforcement of the ICC arbitral award dated 23.08.2018 and numbered 21942/FS issued in favour of the German international industrial and technology company ("Claimant") against the publicly traded Turkish chemical fertilizer producer company ("Respondent"). The dispute subject to arbitral award arises from a construction contract ("Agreement") signed between the parties in 2012 for the construction of a facility.

In accordance with article 21.1 of the Agreement, any disputes between the parties arising out of or in connection with the agreement shall be initially resolved by discussion between senior executives of the parties and if no settlement is reached following one month after one party's explicit and written request of a settlement meeting, the arbitration clause under the same article shall be valid and finally settled in Zurich under the ICC Arbitration Rules in force at the time of dispute by 3 arbitrators appointed in accordance with the same rules.

The amount of the arbitral award subject to enforcement is 22,881,882 Euros, 1,020,213 U.S. Dollars, 1,500,000 Swiss Franc.

The Claimant filed a lawsuit before the Turkish courts for the enforcement of the arbitral award. The Court of First Instance ("CFI")[1] granted enforcement on 30 December 2021, deciding that there was no refusal ground for the enforcement of the arbitral award. The CFI also ordered Respondent to pay the remaining proportional judgement and writ fee of 7,571,968 TL, to the Treasury, by deduction of 2,523,989 TL which was paid in advance by the Claimant and to compensate the Claimant's initial fee payments.

The Respondent appealed the enforcement decision, and the Regional Court of Appeal ("CA")[2] unanimously rejected the appeal on 10 May 2023 on the grounds that there was nothing contrary to law in the decision of the CFI neither in terms of procedure nor merits.

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[1] Decision of Istanbul 16th Commercial Court of First Instance, 30 December 2021, E. 2018/1157 K. 2021/997.

[2] Decision of Istanbul 15th Chamber of the Regional Court of Appeal, 10 May 2023, E. 2022/1394 K. 2023/549.

The Respondent appealed the CA's decision before the Court of Cassation, which then approved the decision of the CA on 12 December 2023.

**Decisions of the Courts**

The Respondent has alleged that the arbitral award violates public policy, amongst other arguments. Among its assertions, it contends that the arbitral tribunal violated its right to be heard, restricted its right to defence, displayed bias, and rendered a decision without adequately resolving conflicting expert opinions. Furthermore, the Respondent has emphasized deficiencies and errors within the facility covered by the Agreement, citing potential risks to the safety of future workers and public health.

The CFI ruled that the Respondent failed to prove that its right to be heard had been violated considering that it had filed a counterclaim which had been considered during arbitration proceedings, submitted a report obtained from the expert nominated by itself, both parties' experts had been heard and had responded to questions of each party's counsels, that the arbitrators have a discretionary right under the ICC Rules to obtain an expert report, and that it had not requested the arbitral tribunal to *ex officio* nominate experts to carry out re-examination.

The CFI also evaluated that the parties stipulated an arbitration clause in the Agreement that they signed with their free will and both parties had nominated one arbitrator who appointed the president of the arbitral tribunal. The CFI ruled that the Respondent failed to submit a substantial fact or evidence proving that the arbitral tribunal had displayed biased.

The CFI deliberated on the alleged contravention of public policy by the arbitral award, a matter that falls within the court's *ex officio* jurisdiction. The Respondent asserted that the award violates public policy due to concerns about public health stemming from deficiencies in the facility. In reference to the decision of the Court of Cassation General Assembly on Unification of Judgments[3] on the interpretation of public policy and its assessment by enforcement courts, the CFI underscored that the enforcement judge lacks the prerogative to delve into the substance of a foreign award beyond reviewing the refusal grounds of enforcement. Instead, the focus lies on scrutinizing whether enforcement of the foreign award in Türkiye would violate Turkish public policy. The CFI determined that the foreign arbitral award does not contravene Turkish public policy, principles of Turkish law, or fundamental moral norms, citing the following rationale:

- Receivable issued in the arbitral award arises from a commercial agreement between the parties that is not contrary to Turkish law and public policy,
- It cannot examine whether the Claimant had fulfilled its obligations under the Agreement in accordance with the terms and conditions stipulated thereunder since this would entail examination on the merits,

The deficiencies and errors identified in the expert report pertain to substantive evaluation. Therefore, the risks posed to future workers in the facility and to public health because of these deficiencies and errors cannot be deemed a violation of public policy.

In its appeal against the enforcement decision of the CFI, the Respondent reiterated various claims, including those concerning the alleged violation of public policy. Upon reviewing the appeal within the confines of the grounds stated in the petition of appeal and considering the concept of public policy, the CA concluded that:

- Pursuant to the procedural rules governing the arbitration proceedings, both parties were invited to present their evidence concerning the extent of damages suffered by the Claimant to the arbitral tribunal and to the opposing party within a specified timeframe. Each party was afforded the simultaneous opportunity to respond to the evidence submitted by the opposing party.
- The Respondent duly exercised its rights by filing a counterclaim before the arbitral tribunal, submitting its arguments and evidence in support of said counterclaim.
- The rights of both parties were upheld throughout the arbitration process; thus, the arbitral award is not deemed contrary to Turkish public policy.

The CA concluded that upon thorough examination of the case file, the evidentiary basis, the stated legal grounds, and the grounds for appeal, there exists no procedural or substantive violation of law in the CFI's decision.

Considering the reasons under the law for reversal of the decisions of the regional courts of appeal, the Court of Cassation unanimously approved on 12 December 2023 the decision of the CA[4].

**Comment**

The decision is noteworthy in that it demonstrates that Turkish courts respect the prohibition of *révision au fond* in the enforcement of foreign arbitral awards, and continue the jurisprudence set by the Court of Cassation General Assembly on Unification of Judgments regarding what should be understood from public policy and how it should be examined by the Turkish courts in enforcement of foreign awards.

Considering the large amount of the proportional judgement and writ fee of 10,095,957 TL, the case is also significant as it demonstrates that the different practice among Turkish courts as to whether the judgement and writ fee should be proportional or fixed regarding decisions on the enforcement of foreign arbitral awards continue given the lack of a clear provision for foreign arbitral awards. It should be noted that the matter has been previously considered by the General Assembly of Civil Chambers of Court of Cassation in 2019 whereby it was unanimously decided that it should be accepted that a fixed fee shall be charged in cases of enforcement of foreign arbitral awards by the interpretation of the amendment introduced in 2016 to article III – Judgement and Writ fee and subparagraph 1. Proportional Fee under Tariff No. (1) annex to Law

[4] Decision of the 6th Chamber of Court of Cassation, 12 December 2023, E. 2023/3007 K. 2023/4212.

on Fees numbered 492[5], which concludes that no proportional fee shall be charged in arbitration proceedings[6].

[5] No fee shall be charged in arbitration proceedings to be held pursuant to the provisions of this subparagraph. The President of the Republic is authorized to reduce the rate written in this subparagraph up to 10 per thousand for each type of case together or separately, or to increase it up to the rate written in the Law.

[6] Decision of General Assembly of Civil Chambers of Court of Cassation dated 27 June 2019, E. 2017/930, K. 2019/812.