KOLCUOĞLU DEMİRKAN KOÇAKLI
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APPLICATION OF LAW NO. 805 IN AGREEMENTS INVOLVING A FOREIGN PARTY

In a dispute arising from an agreement executed in a language other than Turkish, particularly in cases where one of the parties is non-Turkish, there is a risk of Turkish courts assessing such agreement's validity under Law No. 805 on the Mandatory Use of Turkish in Commercial Enterprises (**"Law No. 805"**). This risk bears great significance, as there is no uniform jurisprudence on whether or not an agreement, an arbitration clause or a jurisdiction clause is valid, if it is concluded between a Turkish party and a foreign company, in a foreign language.

Recently, the 43rd Civil Chamber of the Istanbul Regional Court of Appeals has tackled the issue in its decision of 4 March 2021 (the **"Court of Appeals Decision"**). The Court of Appeals concluded that there is no requirement to execute the agreement in Turkish, if one of the parties is foreign, and accordingly overruled the first instance court's decision which deemed the said agreement invalid due to not being executed in Turkish. The Court of Appeals Decision is of guiding nature, considering the ongoing debate on the mandatory use of Turkish language in agreements involving foreign companies and enterprises.

1. Relevant Legislation

Law No. 805 is a relatively short piece of legislation, consisting of nine articles. It was adopted in 1926, when the government was actively promoting the use of Turkish language as state policy. Under Article 1 of Law No. 805, all Turkish companies and enterprises are obliged to use Turkish language in all their business transactions, agreements, correspondence, accounts and books that are executed in Turkey. Breach of this law may result in invalidity of the document, in respect of the party under the obligation to use Turkish language. In addition, a judicial fine may be imposed on the said party.

Under Article 2, the obligation to use Turkish language also applies to foreign companies and enterprises in their correspondence, transactions and relations in Turkey, and for documents and books that must be submitted to Turkish governmental authorities and government officers.

However, unlike Article 1 of Law No. 805, Article 2 of Law No. 805 does not refer to "agreements". Given such lack of reference, whether "agreements" executed between foreign companies and Turkish parties in a foreign language falls within the scope of Article 2 of Law No. 805, is a highly debated subject in Turkish doctrine and practice. Some scholars opine that the lawmaker intentionally excluded "agreements", while others maintain that the use of Turkish language is mandatory in "agreements" as well.

2. Cassation Court's Decisions

The Cassation Court has not adopted a consistent approach on whether an agreement concluded in a language other than Turkish by foreign companies with Turkish parties is invalid. For instance, in a decision dated 4 March 2013, concerning a dispute arising from an agreement between a Turkish party and a foreign party, the 11th Civil Chamber of the Cassation Court held that the defendant could not raise an arbitration objection based on the arbitration clause in the agreement, which was only in English.

By contrast, the same 11th Civil Chamber has accepted the validity of agreements executed in foreign languages in several of its subsequent decisions, without providing any reason as to why these agreements were deemed valid in those particular disputes. Having said this, the 11th Chamber has rendered a more recent decision on 23 December 2020, in which it once again accepted the validity of an agreement in a foreign language, but this time also provided a reasoning for its conclusion. The 11th Chamber approved the Court of Appeals decision which held that Article 1 of Law No. 805 is not applicable, because one of the parties to the agreement is foreign. The decision heavily implies that foreign companies are not obliged to execute their agreements in Turkish, for these agreements to be valid in Turkey.

3. The Court of Appeals Decision

The Court of Appeals Decision is related to an agreement which was executed only in English, between a foreign company and Turkish individuals, with the purposes of amending a shareholders agreement. The first instance court held that the agreement was against Law No. 805 and that for this reason it was invalid. The first instance court based its decision on certain Cassation Court decisions, but those decisions were related to agreements executed between Turkish parties.

The first instance court's decision was appealed, on the ground that Article 1 of Law No. 805 could not apply, as one of the parties to the agreement is foreign and a foreign company is not obliged to execute its agreements in Turkish. The Court of Appeals held the following:

> *"[…] In accordance with Article 1 of Law No. 805, Turkish companies are obliged to use Turkish in agreements they execute in Turkey, and execution of agreements in breach of this requirement, shall result in the agreement's invalidity under Article 4 of the Law. However, under Article 2 of the same law there is no obligation to use Turkish language, where one of the parties is foreign and the agreement is signed with Turkish companies."*

Accordingly, the Court of Appeals Decision determined that foreign companies are not obliged to execute their agreements in Turkish with Turkish parties, for these agreements to be valid in Turkey. In practice, it is common to execute agreements and other documents in a foreign

language, even if the documents are related to a project that will be performed in Turkey or that has Turkish parties. For this reason, the risk of having agreements invalidated have raised concerns in recent years. The Court of Appeals Decision is final and is a constructive step to hopefully end this ambiguity.

4. Conclusion

There is no clear provision in Law No. 805, providing that an agreement executed between a Turkish party and a foreign party must be in Turkish. While Article 1 of Law No. 805, governing agreements between Turkish parties, specifically mentions "agreements" among those that are required to be concluded in Turkish, the same reference does not exist in Article 2, governing agreements between a Turkish party and a foreign party. This has led to an extensive debate on the matter, which is still not settled. However, the Court of Appeals Decision, along with the recent approach adopted by the Cassation Court, are expected to bring an end to the existing confusion, at least to some extent.

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