

## Litigation - Turkey

### Litigation ruling reversed due to unclear and uncertain arbitration clause

Contributed by **Cerrahoğlu Law Firm**

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**Facts**  
**Decision**  
**Comment**

On September 26 2013 the Court of Appeals reversed a decision in favour of arbitration on the grounds that the arbitration clause was unclear and uncertain.<sup>(1)</sup>

#### Facts

The dispute arose from an agreement dated April 4 2008. The plaintiff claimed that disputes arising from this agreement should be resolved by a tribunal of three arbitrators according to Article 19 of the agreement. The plaintiff appointed its arbitrator and duly sent notice to the defendant and requested it to appoint its arbitrator within one month. However, the defendant did not appoint its arbitrator within this time frame.

In order to constitute the arbitral tribunal, the plaintiff brought an action before the court. However, the defendant stated that the arbitration clause was unclear and uncertain due to Article 20 of the agreement, which provided that if disputes could not be resolved by the arbitral tribunal the Istanbul courts would be required to resolve them.

The court of first instance ruled in favour of the plaintiff and constituted the arbitral tribunal with two arbitrators. The defendant appealed this decision. However, the Court of Appeals reversed the ruling due to the invalidity of the arbitration clause.

#### Decision

The Court of Appeals stated that according to both the applicable Code of Civil Procedure on the execution date of the agreement (Law 1086)<sup>(2)</sup> and the applicable Code of Civil Procedure on the submission date of the lawsuit petition (Law 6100), the court should review the validity of the arbitration clause. In other words, the court should rule on the validity of the arbitration clause prior to the appointment of arbitrators. However, the court of first instance had not reviewed the validity of the arbitration clause.

Further, it stated that:

*"In principle, arbitration is an exceptional proceeding and the parties should clearly and certainly state their will to arbitrate. However, the abovementioned arbitration clauses are not certain. Accordingly, such an arbitration clause is invalid and such invalidity should be taken into consideration ex officio by the Court."*

As a result, the Court of Appeals decided to allow the appeal and reversed the first-instance decision.

#### Comment

This decision is significant due to the Court of Appeals' approach with respect to the arbitration procedure and the validity of the arbitration clause. The Court of Appeals still views arbitration as an exceptional procedure and requires clear and certain arbitration clauses to start proceedings. Further, it is strange that although the number of arbitrators should be odd according to Article 415 of Law 1086<sup>(3)</sup>, the court of first instance did not take this provision into consideration.

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#### Endnotes

(1) Decision of the 11th Civil Chamber of the Court of Appeals, E2012/18274, K2013/16901.

(2) Article 519 of Code of Civil Procedure (Law 1086) states that: "The Courts are authorized to decide on whether a dispute can be resolved by the arbitrators or not."

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(3) The same provision is indicated in the International Arbitration Act. Article 7(a) of the International Arbitration Act states that: "The parties are free to determine the number of arbitrators. However, the number shall be odd."

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