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Judicial Control on Standardized Contract Terms and its Potential Effect on Arbitration Clauses

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In June 2019, at a conference jointly hosted by Istanbul Arbitration Centre (“ISTAC”) and the Banks Association of Turkey, the representatives of a number of Turkish banks expressed their intention to include ISTAC arbitration as the exclusive dispute resolution method in their loan agreements with legal entities. Some of these banks even declared that they have already taken a Board of Directors’ resolution to this effect.

This declaration raises the question whether an arbitration clause in such a loan agreement would be valid. The said bank loan agreements are almost always prepared and drafted unilaterally by the bank; the entities entering into such agreements have little or no bargaining power to negotiate and revise the terms of such agreements. Then, is it possible to speak of clear party intention and party autonomy, which are the foundations of arbitration as an alternative dispute resolution mechanism?

This question should be addressed in the context of provisions of the new Turkish Code of Obligations numbered 6098 (“TCO 6098”), which entered into force on 1 July 2012, on standardized contract terms in the section titled “General Transaction Terms” (“GTTs”) under Articles 20 to 25. The said provisions of TCO 6098 are applicable for any and all kinds of contracts and they provide legal protection for the party, which has little or no bargaining power compared to its counterparty at the stage of preparation and negotiation of contracts.

According to Article 20 of TCO 6098, GTTs are defined as contract terms that:

- are unilaterally prepared by the drafting party beforehand
- have the purpose of being used in the future in a great number of similar contracts and
- are submitted to the counter party at the time of signing of the contract.

The subsequent articles of TCO 6098 set forth assessment methods for GTTs. Article 21 of TCO 6098 stipulates that unless the drafting party gives explicit information to its counter party regarding the existence of GTTs that are against the interest of such counter party and gives counter party full opportunity to become aware of the content of such GTTs and counter party accepts such GTTs, the GTTs would be rendered as not having been written in the contract, i.e. void. Article 21 of the TCO 6098 also stipulates that GTTs that are unrelated to the characteristics of the contract and unfamiliar to the nature of the transaction would be rendered as not having been written in the contract, i.e. void.

Accordingly, it is questionable whether the arbitration clauses inserted in the loan agreements that are prepared *ex parte* by the banks may be deemed invalid against a counter party, which had little or no bargaining power to negotiate and revise such clause.

In a recent decision numbered 2016/12162 E. 2018/1313 K. and dated 21.02.2018, the 11th Chamber of the Court of Appeals approved the decision of a Commercial Court, whereby the Commercial Court dismissed the defendant's arbitration plea by stating that "*even though the defendant claims that the agreement was drafted unilaterally and that the defendant could not have influence on the terms of the contract and therefore the arbitration clause is void; it was seen that the agreement executed between the parties includes provisions that are different than the ones available in the standard agreements which the plaintiff signs with similar entities, and thus this issue shows that the agreement is negotiated between the parties*".

Accordingly, it can be interpreted that if it can be proved that the agreement is negotiated and that the party, which received the GTTs, was given the chance to revise its provisions, the court of first instance, as well as the Court of Appeals considers the arbitration clause in such GTTs as valid.

As the said Court of Appeals decision does not provide detailed legal or factual justification either on its approval or on the decision of the court of first instance, the underlying circumstances are unclear. However, taking into consideration that in practice, the banks do not allow entities to negotiate and revise the provisions of the standardized loan agreements, the arbitration clauses unilaterally inserted by the banks may be successfully claimed to be invalid in light of Article 20-21 of the TCO 6098.

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