Critique of a Turkish Court of Cassation Decision on the Validity of Choice-of-Law and Choice-of-Forum Clauses in an Insurance Agreement

Assist. Prof. Dr. Emre Esen*

I. Introduction

A relatively recent decision[1] of the Turkish Court of Cassation renewed a debate existing in Turkish private international law literature on the validity of choice-of-law and choice-of-forum clauses agreed upon by the parties of a contract involving no foreign element.

In this case the owner of a tuna fish farm initiated proceedings in Istanbul courts alleging that 6,881 tuna fish, which were insured by the defendant, perished due to bad weather conditions and demanded compensation for his loss from the defendant.

The defendant (insurer) asserted that in the 12th clause of the insurance contract the parties agreed that English law should be applied to the contract and the disputes arising out of the contract should be settled in English courts.

The lower court held that Turkish law had to be applied in this dispute since the parties of the insurance policy were Turkish nationals, since the contract involved no foreign element and according to Turkish Code of Civil Procedure Art.76. The court pointed out that the selection

* University of Istanbul, Faculty of Law, Private International Law Department [emreesen@istanbul.edu.tr]

1 Turkish Court of Appeals 11th Circuit, File Nr: 2006/8585, Decision Nr: 2006/12877, Date: 07.12.2006; published in: *Nuray Ekşi,* Milletlerarası Nitelikli Davalara İlişkin Mahkeme Kararları, Istanbul, 2007, p.105–107.

of the jurisdiction of a foreign court is contrary to Turkish public order since the parties were Turkish nationals and thus Turkish courts have jurisdiction according to Turkish Code of Civil Procedure Art.19.

The decision was appealed by the defendant.

The decision of the Turkish Court of Cassation annulling the decision of the lower court was unanimous and reads as follows:

"The dispute has arisen from the compensation demand originating from an insurance contract. In article 12 of the contract, the parties agreed that the disputes arising from the contract are subject to English law and English courts shall have exclusive jurisdiction. Based on article 12 of the contract, the defendant raised an objection against the decision of the lower court as to the applicable law and the jurisdiction. However the lower court decided in line with well-established case law of the court of appeals that the choice-of-forum clause is null because the parties did not name a specific court in the choice-of-forum clause.

On the other hand, in article 12 of the contract the parties agreed not only on jurisdiction of the courts but also on the applicable law. When disallowing the choice-of-law clause, the lower court relied on the facts that the contract involved no foreign element, that the parties of the contract were Turkish nationals and that Turkish law must be applied in the dispute with respect to the Turkish Code of Civil Procedure Art.76. However, Turkish Code of Civil Procedure Art.76 does not prohibit a foreign law to be applied in disputes arising from private law relationships between Turkish nationals; it stipulates that the party who asserts that a foreign law must be applied has the obligation to prove that foreign law. Turkish Code of Civil Procedure Art.76 is coherent with the principle that in private law contracts the parties may choose any foreign law which is not contrary to the public order of the lex fori. For the application of a foreign law and for a choice-of-law clause to be held valid there is no condition stipulating that the contract must involve a foreign element. With respect to PIL Art.24 Par.1, the law chosen by the parties must be applied to the dispute. Therefore while the binding effect of the choice-of-law clause must have been taken into consideration and an opportunity to prove the foreign

law must have been given to defendant, the rejection of the objection of the defendant about the applicable law cannot be upheld."[2]

Before analysing the decision it should be noted that the decision was rendered in the period in which the Turkish Code on Private and Procedural International Law Nr. 2675 (PIL–2675) was still in force. Therefore the questions arising from the decision will be evaluated according to the *repealed* PIL–2675. In 2007 the new Code on Private and Procedural International Law Nr. 5718 (PIL–5718) entered into force[3]. As to the main two questions arising from the decision, there is almost no difference between PIL–2675 and PIL–5718. Thus the statements about the validity of choice-of-forum and choice-of-law clauses in a contractual relationship involving no foreign element are current and effective for both PIL–2675 and PIL–5718. The differences will be pointed out where necessary.

II. Choice-of-Law Clauses in Contracts Involving No Foreign Element

About the validity of the choice-of-law clause, the lower court held that Turkish law had to be applied in this dispute since the parties of the insurance policy were Turkish nationals, since the contract involved no foreign element and according to Turkish Code of Civil Procedure Art.76. This statement means that according to Turkish law, in contractual relationships involving no foreign element, a foreign law cannot be selected as applicable law to a contract and to disputes arising out of that contract. In other words the lower court decided that under to Turkish law the choice-of-law clauses in contracts involving no foreign element are void.

With respect to PIL–2675/5718 Art.24 Par.1, contractual relationships are governed by the law explicitly chosen by the parties. Even if Art.24 Par.1 gives the impression that the involvement of a foreign element is not a condition for a choice-of-law clause to be held valid, the

[2] Unofficial translation of the author.

[3] The Official Gazette, Date: 12.12.2007, Nr: 26728.

decision of the lower court seems to be in compliance with the word of the PIL–2675/5718, because PIL–2675/5718 Art.1 provides that the scope of the code is limited to those private law relationships and transactions which involve a foreign element. Likewise a majority of academics[4] are of the opinion that for a choice-of-law clause to be held valid, the contractual relationship must involve a foreign element.

On the other hand, some authors assert that in contractual relationships, for a choice-of-law clause to be held valid, a foreign element is not a condition because the selection of a foreign law itself constitutes a foreign element[5]. Once the parties select a foreign law as applicable law, the contract turns to be a contract involving a foreign element. Another basis of this opinion is PIL–2675/5718 Art.24 Par.1 which gives the parties an opportunity to select an applicable law without any explicit requirement for the existence of a foreign element[6].

I agree with the opinion that there is no requirement of the existence of a foreign element since the selection of the parties of a foreign law as an applicable law to their contract turns the contract to one which involves a foreign element. Since "foreign element" means any touch of a foreign law on the conflict, selection of a foreign law and/or of the jurisdiction of a foreign court ensures a *touch* of that foreign law on the conflict and therefore solely constitutes a foreign element. One essential principle of contract law is the freedom of the parties to choose the terms of their contract and considering that a contract turns to a contract involving a foreign element by selection of a foreign law as applicable law is the logical outcome of this principle. Consequently, I do not agree with the decision of the lower court that choice-of-law clauses in contracts involving no foreign element are void under Turkish law.

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4 *Nihal Uluocak,* Milletlerarası Özel Hukuk Dersleri, Istanbul, 1989, p.185–186; *Gülören Tekinalp,* Milletlerarası Özel Hukuk Bağlama Kuralları, 10th Edition, Istanbul, 2009, p.336.

5 *Ergin Nomer / Cemal Şanlı,* Devletler Hususî Hukuku, 18th Edition, Istanbul, 2010, p.308.

6 *Nomer/Şanlı* (fn.5) 308.

The opinion that for a choice-of-law clause to be held valid, the contractual relationship must involve a foreign element is based on the assumption that if a contract involves no foreign element there may be an unfair or illegitimate reason for the selection of foreign law. For instance if the financial powers of the contracting parties are imbalanced, the strong party may impose the selection of a foreign law that is disadvantageous for the weak party. In a contractual relationship, application of a foreign law which was imposed by the financially stronger party cannot be allowed. On the contrary, in a contractual relationship involving no foreign element, the voluntary choice of a foreign law by parties having balanced financial powers should not be obstructed. The interference of public order on the application of foreign law provides enough protection in this matter.

Finally it should be noted that the Turkish Code of Civil Procedure Art.76[7] which the lower court invoked to support its ruling is not relevant to the question of whether the choice-of-law clause in a contract involving no foreign element is valid[8].

III. Choice-of-Forum Clauses in Contracts Involving No Foreign Element

The lower court held that since both parties were Turkish nationals, the choice-of-forum clause agreed upon by these parties is contrary to Turkish public order and that Turkish courts had jurisdiction according to Turkish Code of Civil Procedure Art.19. Court of Cassation, without referring to those evaluations of the lower court, approved the rejection of the jurisdiction objection on the ground that the foreign court

[7] *"The judge decides according to Turkish law on his own initiative. However when a foreign law is to be applied, the party depending on this application has the obligation to prove that foreign law. Otherwise Turkish law shall be applied."* [Unofficial translation of the author]

[8] In the scholarly literature it is considered that the second sentence of Turkish Code of Civil Procedure Art.76 was implicitly abolished by PIL–2675 Art.2 (*Saim Üstündağ / Yavuz Alangoya,* Hukuk Usulü Muhakemeleri Kanunu, 3rd Edition, Istanbul, 1996, p.63) and has lost the force to be applied [*Nomer/Şanlı* (fn.5) 190]. I am of the same opinion because PIL–2675 Art.2 stipulates the same subject, constitutes a special code of law and came into force after Turkish Code of Civil Procedure Art.76.

nominated by the parties in the choice-of-forum clause was not specific enough.

According to PIL–2675 Art.31[9] in cases where the domestic jurisdiction of Turkish courts is not determined pursuant to the principles of public order or exclusive jurisdiction, the parties may agree that a dispute among themselves involving a foreign element and resulting from obligational relations be heard at the court of a foreign state. In this regulation it is explicitly stipulated that for a choice-of-forum clause to be held valid, the contractual relationship must involve a foreign element.

For this reason it is considered in the scholarly literature that in contractual relationships involving no foreign element choice-of-forum clauses shall be void[10]. Besides it is asserted that had the existence of a foreign element not been expressly required in Art.31, the existence of a foreign element would, because of Art.1, still have been a condition *sine qua non*[11].

However, it is also considered that the application of a foreign law to the contract constitutes a foreign element and that in such situations the choice-of-forum clause shall be valid under Turkish law[12]. The same authors assert that in a contractual relationship involving no foreign element, the selection of a foreign law by the parties as the applicable law to their contract adds a foreign element to the relationship. If these two arguments are combined; when the parties of a contract involving no foreign element agree upon choice-of-law and choice-of-forum clauses, first the selection of a foreign law shall constitute itself a foreign element and then the choice-of-forum clause shall be valid.

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9 PIL–5718 Art.47 Par.1: *"In cases where the domestic jurisdiction of Turkish courts is not determined pursuant to the principle of public order, the parties may agree that a dispute among themselves involving a foreign element and resulting from obligational relations be heard at the court of a foreign state."* [Unofficial translation of the author]

10 *Aysel Çelikel / B. Bahadır Erdem,* Milletlerarası Özel Hukuk, 10th Edition, Istanbul, 2010, p.539; *Nomer/Şanlı* (fn.5) 459; *Ergin Nomer,* Milletlerarası Usul Hukuku, Istanbul, 2009, s.114.

11 *Fügen Sargın,* Milletlerarası Usul Hukukunda Yetki Anlaşmaları, Ankara, 1996, p.148.

12 *Nomer/Şanlı* (fn.5) 459.

On the contrary, it is asserted that a contractual relationship involving no foreign element entirely belongs to domestic law and that it is not probable for this kind of relationship to be treated as a relationship involving a foreign element depending on the selection of a foreign law by the parties as the applicable law to the contract since this is an absolutely subjective basis[13].

In my opinion, the foreign element condition laid down for the selection of the jurisdiction of a foreign court should be interpreted and applied as it is the case in choice-of-law clauses. This means that even if the contractual relationship does not involve any foreign element, it should be considered that the selection of a foreign court itself constitutes a foreign element. Considering that the agreement of the parties upon jurisdiction of a foreign court to settle the disputes that may arise from their contract turns the contract to a contract involving a foreign element shall be more appropriate for the essential principle of contract law: freedom of the parties to choose the terms of their contract.

IV. The Condition That the Jurisdiction Granted Foreign Court Must Be Nominated Specifically

In the insurance contract *"English courts"* were granted jurisdiction upon the agreement of the parties for the disputes that may arise out of the contract. However Court of Cassation held that this choice-of-forum clause is void since the parties did not nominate a specific court in choice-of-forum clause.

PIL–2675 Art.31 and PIL-5718 Art.47 involve no explicit stipulation that the foreign court must be specifically nominated. In the scholarly literature it is asserted that the court which was granted jurisdiction must be *definite*; however for a foreign court to be considered as *definite,* it is not a necessity to be mentioned *nominatim* and a choice-of-forum clause granting jurisdiction generally to the courts of a state –like "English courts" as in the case– is definite enough and valid under to Turkish law[14].

[13] *Sargın* (fn.11) 150.

[14] *Sargın* (fn.11) 171; *Nomer/Şanlı* (fn.5) 460.

According to this opinion, a choice-of-forum clause granting jurisdiction generally to the courts of a state is valid under to Turkish law. However if the party objecting to the validity of the choice-of-forum clause proves that this clause is not valid under the law of the state, courts of which were granted jurisdiction by the parties, the choice-of-forum clause shall be void under to Turkish law[15].

On the contrary it is considered that a choice-of-forum clause granting jurisdiction generally to the courts of a state shall not offer an outcome that is capable of being put into practice[16].

If in the choice-of-forum clause generally the courts of a specific state are granted jurisdiction, which court of that country may be resorted to by a potential claimant or which court of that country shall be deemed to have jurisdiction when a decision has to be made about the jurisdiction objection of the defendant is not clear. Certainly as a rule these questions shall be answered according to the law of the state, courts of which were granted jurisdiction by the parties. Nevertheless a choice-of-forum clause granting jurisdiction to all courts of a state does not offer sufficient legal safety to the parties. According to the Constitution of Turkish Republic Art.37, it is a fundamental right to be sued before the competent state courts unless otherwise agreed. According to this constitutional principle, the possibility to be sued before a court other than the competent state court constitutes an exception. Consequently the consent to be sued before a court other than the competent state court shall be understood clearly without any hesitation and thus the court which were granted jurisdiction by the parties must be definite enough to ensure the purpose of this constitutional principle. Therefore a choice-of-forum clause granting jurisdiction generally to the courts of a state shall be void under to Turkish law.

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[15] *Sargın* (fn.11) 171.

[16] *Nuray Ekşi,* Uluslararası Ticarete İlişkin İki Güncel Sorun: Sözleşme Bedelinin Yabancı Para Olarak Ödenmesi ve Yabancı Mahkemenin Yetkisinin Tesisi, in: İstanbul Barosu Dergisi, 10–11–12/1998, p.873.

V. The Validity of Choice-of-Forum Clauses Granting Jurisdiction to Foreign Courts in Insurance Contracts

PIL–2675 contained no special regulation about the international jurisdiction of Turkish courts for the disputes arising out of insurance contracts. According to PIL–2675 Art.27, the rules of domestic law on domestic jurisdiction determined the international jurisdiction of Turkish courts as well. With respect to this reference, in disputes arising out of insurance contracts; if the insurance contract is about an immovable property or a movable property which was provided to be stabilized, the court of the place where the property is located; when the insurance contract is about a movable property which was not provided to be stabilized, the court of the place where the risk has occurred and in life insurance contracts the courts of the domicile of the insured used to have both domestic and international jurisdiction (Turkish Code of Civil Procedure Art.19 Par.1). Also the choice-of-forum clauses violating this regulation were stipulated to have no legal effect (Turkish Code of Civil Procedure Art.19 Par.2). The second paragraph of the Art.19 connoted that the choice-of-forum clauses granting jurisdiction to foreign courts in insurance contracts shall not abrogate the jurisdiction of Turkish courts originating from Art.19 Par.1; but create an additional jurisdiction[17].

Therefore, in this case, despite the existence of the choice-of-forum clause in the insurance contract, the jurisdiction of the Turkish courts granted by Turkish Code of Civil Procedure Art.19 still survived. In other words, the jurisdiction of the English courts granted by the parties constituted additional jurisdiction beside the Turkish courts which had jurisdiction with respect to the Turkish Code of Civil Procedure Art.19. Therefore the jurisdiction objection should have been rejected on the basis that the Turkish court, where the suit was brought, had jurisdiction with respect to Turkish Code of Civil Procedure Art.19.

According to Art.46 of PIL–5718, in disputes arising out of insurance contracts, the Turkish courts of the real place of business of the in-

[17] *Sargın* (fn.11) 162.

surer or the courts of the place of its branch or agent which concluded the insurance agreement have international jurisdiction. However, when the suit is brought against a policy owner, insured or beneficiary, the Turkish courts located at their domicile or habitual residence have international jurisdiction. Due to PIL–5718 Art.47 Par.2, the statutory jurisdiction of Turkish courts stipulated in PIL–5718 Art.46 may not be abrogated by the agreement of the parties. This regulation offers a parallel stipulation with the Turkish Code of Civil Procedure Art.19 on the validity of the choice-of-forum clauses arranged in insurance contracts, since in both regulations the choice-of-forum clause granting jurisdiction to foreign courts does not abrogate the statutory jurisdiction of Turkish courts but creates additional jurisdiction.

VI. Conclusion

In my opinion, for the choice-of-law and choice-of-forum clauses in contractual relationships to be held valid, a foreign element is not a condition *sine qua non*. Because even if the contractual relationship does not involve any foreign element, the selection of a foreign law by the parties as applicable law to their contract or a choice-of-forum clause granting jurisdiction to a foreign court turns the contract into a contract involving foreign element. Acceptance that in a contractual relationship involving no foreign element, a clause granting jurisdiction to a foreign court or selection of a foreign law as applicable law to the contract turns the contract into one involving a foreign element is the logical outcome of the essential principle of contract law: freedom of contracting parties to choose the terms of their contract.

If in the choice-of-forum clause the courts of a state were granted jurisdiction with the general wording –like "English courts" as in the case–, which court of that country may be resorted to by a potential claimant or which court of that country shall be deemed to have jurisdiction when a decision has to be made about the jurisdiction objection of the defendant is indefinite. A choice-of-forum clause granting jurisdiction to all courts of a specific state on the one hand does not offer sufficient legal safety to

the parties and an outcome that is capable of being put into practice; on the other hand it shall be void under to Turkish law since the constitutional principle that the consent to be sued before a court other than the competent state court shall be without any hesitation has not been met.

According to the reference of PIL–2675 Art.27 to the rules of domestic law on domestic jurisdiction, the jurisdiction of Turkish courts in disputes arising from insurance contracts was regulated in the Turkish Code of Civil Procedure Art.19 Par.1 and the choice-of-forum clauses violating this regulation were stipulated to have no legal effect (Turkish Code of Civil Procedure Art.19 Par.2). The second paragraph of the article connoted that the choice-of-forum clause granting jurisdiction to a foreign court in insurance contracts regulated in Art.19 Par.1 shall not abrogate the jurisdiction of Turkish courts originating from Art.19 Par.1 but creates an additional jurisdiction parallel to them. The jurisdiction of English courts granted by the parties constituted an additional jurisdiction parallel to the Turkish courts which have jurisdiction with respect to Turkish Code of Civil Procedure Art.19. Therefore the jurisdiction objection should have been rejected on the basis that the court which the suit was brought had jurisdiction with respect to the Turkish Code of Civil Procedure Art.19.