Choice of Foreign Law in Contracts to be Concluded between Turkish Citizens

Nowadays, Turkish real persons and/or legal entities may have a tendency to choose foreign law as applicable law to their contracts. There could be several reasons for such tendency. In particular, contracting legal entities' being members of global group companies and certain contracts' being drafted earlier as template in line with the policy of such group lead to choice of foreign law. Likewise, there could be cases where the chosen foreign law is deemed by the contracting parties as the most developed and appropriate law, considering that particular transaction and interests of the parties. There is no doubt that foreign law would be chosen where a contracts is related to international law at some point. Nevertheless, there are still different opinions on whether the choice of foreign law would be valid if a contract is not related to international law at any point. We would like to provide brief information on this matter hereinbelow.

Foreign Element

Contracting parties may choose foreign law to be applied to their contract on condition that such contract contains a foreign element. International Private and Civil Procedure Law numbered 5718 ("**IPCPL**") regulate that contracting parties may choose foreign law. However, IPCPL can only be applied to transactions with foreign element; thus, it is clear that the concerned contract should contain a foreign element to benefit from the option provided by IPCPL.

Understanding the context of foreign element is important since choice of foreign law can be made if only the contract has a foreign element therein. IPCPL does not define the foreign element; therefore, its definition and determination are left to doctrine and practice. In Turkish law, contracts containing foreign elements are considered as contracts with international elements. This is clearly a tautological definition which does not have sufficient explanation in it. Foreign element is the element which makes any legal incident or relationship associated with at least one additional legal system except the country's law that the judge is part of. Therefore, in order to accept the presence of foreign element, it is not essential that the legal incident or relationship is linked to the foreign country in terms of location. Association of the incident or relationship in question with the foreign legal system in any way is sufficient. As a general rule, an element relating to international trade is sufficient to be defined as foreign element. For instance, if the place of performance is in a foreign country or funds or materials that are essential for performance of the contract are delivered from abroad, the contract becomes relevant to international trade. In such circumstances, it should be accepted that the contract contain foreign element. Similarlyi in most cases where a contracting party is foreign, presence of foreign element is accepted. Determination of whether foreign element is present should be made considering characteristics of each contract separately.

There are controversial opinions on whether the choice of foreign law would constitute a foreign element by itself and whether such choice would be sufficient to justify choosing a foreign law if a contract concluded between two Turkish parties is not related to either a foreign law or international trade.

Is the Choice of Foreign Law Itself a Foreign Element?

This query is responded differently by the doctrine and Court of Cassation.

Doctrine Opinions: According to the majority opinion, in order to enable contracting parties to choose foreign law in the meaning of Article 24 of IPCPL, the contract has to contain foreign element at present. Therefore, determination of foreign law itself in a contract which is concluded between two Turkish citizens and does not contain foreign element at present is not sufficient to bring foreign element to that contract. The subject matter of a contract containing objectively foreign element means that there is a link between the chosen foreign law and at least one of the matters such as place of signature, place of performance, workplaces or citizenships of parties. Scholars who support this opinion claims that it is the matter of eliminating Turkish mandatory rules when disputes, arising from contracts which do not objectively contain any foreign element and are completely part of national law, are subjected to a foreign law.

According to the minority opinion supported in the doctrine, in order to choose a foreign law, there is no need that the contract contains foreign element at present. If parties decide that foreign law will be applied, such contract is evaluated as a contract with foreign element. According to scholars who support this opinion, Article 24 of IPCPL does not bring any limitation on choosing law; yet, in Turkish law, there is a freedom principle on choosing law and presence of a relationship between the subject matter of the contract and chosen law is not needed. Therefore, just as foreign element appears when parties agree on foreign country as the place of signature or place of performance so when parties use their will to choose a foreign law, it is natural that this choice itself creates foreign element.

The decisions of the Court of Cassation: When the decisions of the Court of Cassation ordered as of the effective date of the abolished IPCPL numbered 2675 are examined, it shows that first instance courts generally have failures in determination of foreign element. Court of Cassation ordered many reversing decisions due to the fact that first instance courts failed to determine foreign element in the contracts. However, decisions of the Court of Cassation related to the subject matter have been lately parallel to the minority opinion supported by the scholars.

For example, the case subject to the decision of the 11th Chamber of the Court of Cassation dated 07.12.2006[1] concerns insurance claim and two claimants indicated as beneficiaries are foreign. Court of Cassation stated that parties are subjected to chosen foreign law since the case in question involves foreign element. The Court of Cassation further decided that even if there were

[1] 11th Chamber of the Court of Cassation with merits number 2006/8585, decision number 2006/1287 and dated 07.12.2006

no foreign element in the case, contract with foreign element would not be required in order to apply foreign law and enable parties to put a provision related to the choice of foreign law in the contract.

The case subject to the decision of the 15th Chamber of the Court o Cassation dated 03.11.2016[2] concerns claims arising from contract of work. Although the content of the decision does not clearly state that whether there is a foreign element in particular, given information indicates that there is no foreign element. As parallel to its decision above, Court of Cassation decided that contract with foreign element is not required in order to make foreign law applicable and enable parties to put a provision related to this issue in the contract. Court of Cassation also concluded that parties therefore will be subjected to the law which they choose.

In an old decision of the Civil Chambers of the Court of Cassation dated 06.05.1998[3], it is indicated that "*in a debtor-creditor relationship subject to the dispute, a foreign element, such as one or two parties of contract are foreign or place of signature or place of performance of the contract is a foreign country or the subject matter of the contract presents in a foreign country or debtor-creditor relationship was born in a foreign country, applicable law to debtor-creditor relationship is a foreign law, must be present.*" From this point, it is stated that choosing a foreign law is one of the elements which bring a foreign element to the legal relationship.

Conclusion

In principal, Turkish law applies to a contract between two Turkish real persons or legal entities. Cases where a law other than Turkish law may be applied are shown in IPCPL. Choice of a foreign law as applicable law to the contract is one of those cases. Yet, to benefit from the option provided by IPCPL, first the contract in question should be in the scope of application of IPCPL which is a law only applicable to contracts containing foreign element. Therefore, contracting parties can choose foreign law only where there is already a foreign element in the contract regardless of the choice of foreign law. It should be accepted that only upon presence of such condition parties can decide that foreign law will apply to their contract. Otherwise, we come to the conclusion that the prior condition of choosing foreign law is parties' deciding to choose foreign law which obviously does not match with the logic of law. Presence of foreign element is accepted when parties can choose a foreign country as the place of performance at their own discretion; on the contrary, we also think that only choice of foreign law cannot give rise to foreign element considering that the choice of the place of performance is an understanding between the parties which bears concrete results and links the contract to international law. Parties' choosing foreign law itself does not contain a characteristic in practice which connects the contract to international law. Therefore we agree with the majority opinion supported by the scholars; yet, it

[2] 15th Chamber of the Court of Cassation with merits number 2016/3365, decision number 2016/4525 and dated 03.11.2006

[3] Civil Chambers of the Court of Cassation with merits number 1998/12-287, decision number 1998/235 and dated 06.05.1998

should be noted that the Court of Cassation and certain valuable scholars do not agree with such opinion.