



PRESS SUMMARY

13 May 2014

Cukurova Holding A.S (Appellant) v Sonera Holding B.V (Respondent) [2014] UKPC 15 *On appeal from the Court of Appeal of the British Virgin Islands*

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge

BACKGROUND TO THE APPEAL

Turkcell İletişim Hizmetleri A.S (“Turkcell”) is the largest mobile phone operator in Turkey. 51% of the shares in Turkcell are held by a Turkish company called Turkcell Holding A.S (“Turkcell Holding”). At the relevant time, 52.91% of the shares in Turkcell Holding were held by the Cukurova Holding A.S (“Cukurova”) group. The remaining 47.09% of the shares were held by Sonera Holding B.V (“Sonera”).

On 25 March 2005, Cukurova and Sonera entered into a Letter Agreement regarding the potential purchase by Sonera of the Cukurova group’s entire 52.91% shareholding in Turkcell Holding. While the Letter Agreement is in general governed by Turkish law, the arbitration agreement in clause 5.4 is governed by and interpreted in accordance with Swiss law. Also on 25 March 2005, the parties initialled a prospective share purchase agreement (the “Prospective SPA”). Like the Letter Agreement, the Prospective SPA is in general governed by Turkish law but the arbitration agreement is governed by Swiss law.

On 23 May 2005, Cukurova publicly announced that it would not be selling the shares to Sonera. On 27 May 2005, Sonera commenced arbitration proceedings against Cukurova pursuant to the arbitration clause in the Letter Agreement.

On 1 September 2011, an arbitration Tribunal made a final award in which it awarded Sonera damages of US\$932million against Cukurova. Sonera applied to the High court in the British Virgin Islands for permission to enforce the final award. The High Court granted permission and entered judgment for the sum due plus interest in a total amount of over US\$1billion. Cukurova applied to set aside the judgment on the basis that the Tribunal had no jurisdiction to make the final award, that Cukurova had been refused permission to call their chief negotiator to give evidence to the Tribunal and that the Tribunal had not properly considered Cukurova’s expert evidence. Both the judge and the Court of Appeal rejected Cukurova’s case.

Cukurova now appeals to the Judicial Committee of the Privy Council. The narrow grounds upon which the court can refuse to enforce an award are set out in section 36 of the British Virgin Islands Arbitration Ordinance 1976 (“the Arbitration Ordinance”). In particular, the court cannot refuse to enforce an award on the ground of error of law or fact. The appeal raises three questions:

- (1) Whether the Tribunal had jurisdiction to grant the relief in the final Award or whether enforcement of the final award should be refused pursuant to section 36(2)(d) of the Arbitration Ordinance;

- (2) Whether the Court of Appeal was correct to conclude that Cukurova had not been unable to present its case before the Tribunal within the meaning of section 36(2)(c) of the Arbitration Ordinance 1976; and
- (3) Whether the Court of Appeal was correct to conclude that enforcement of the Final Award would not be contrary to the public policy of the British Virgin Islands within the meaning of section 36(3) of the Arbitration Ordinance.

JUDGMENT

The Judicial Committee of the Privy Council unanimously dismisses Cukurova's appeal. Lord Clarke gives the judgment of the Board. The Board stresses that, as the enforcing court, it has no jurisdiction to set aside the award on the basis of an error of fact or law and that the sole question is whether the enforcement of the award should be upheld under section 36.

REASONS FOR THE JUDGMENT

Cukurova is bound by the terms of the Letter Agreement, including the terms of the arbitration clause at clause 5.4. Both the Letter Agreement and the Prospective SPA contain arbitration clauses with identical wording as to the scope of the arbitration [21]. There is no dispute that Sonera was entitled to commence arbitration proceedings under the Letter Agreement. It would make no commercial sense to require Sonera to commence a fresh arbitration under the Final SPA once the Tribunal found that the Letter Agreement had been breached. The agreements here were component parts of a single transaction [27]. The judge was correct to hold that the Tribunal had jurisdiction to make the award [28-29].

Cukurova complains that the Tribunal refused to allow it to call Mr Berkmen, Cukurova's chief negotiator, to give oral evidence. The Board detects no breach of the rules of natural justice. Cukurova had every opportunity to present its case. Cukurova did not originally seek an adjournment of the hearing in order to enable it to call Mr Berkmen. Cukurova submitted a detailed witness statement. After the hearing, Cukurova did not comply with a direction in the Tribunal's Order that it must identify those points of fact on which they considered the evidence of Mr Berkmen to be decisive. In the circumstances, the Tribunal was justified in declining to hear his oral evidence [51-52].

Cukurova also relies on the Tribunal's treatment of the expert evidence of Mr Christopher Osborne who gave expert evidence of quantum on Cukurova's behalf. Cukurova submitted that the Tribunal ignored evidence which would have reduced the damages by about 40 per cent. However, it is not disputed that Cukurova was able to adduce the evidence of Mr Osborne. There was no breach of the rules of natural justice because Cukurova was heard in full on this part of the case. Although the Tribunal did not spell out the evidence of Mr Osborne, it was well aware of it. The Board concludes that there is no basis upon which the decision of the judge or the Court of Appeal should be reversed, so far as the Tribunal's treatment of the evidence of Mr Osborne is concerned [55-64].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: <http://www.jcpc.uk/decided-cases/index.html>.