

REPUBLIC OF TURKEY

COURT OF APPEAL

11th CIVIL LAW CHAMBER

Merit No. : 2014/15681

Judgment No. : 2015/11244

Date : October 28, 2015

THE LAWSUIT: In the lawsuit between the parties it has been requested by the plaintiff's attorney to have a hearing in order to review the judgment of the (closed) 52nd Commercial Court of First Instance dated May, 08, 2014 and numbered 2013/174-2014/124 and, upon listening to the plaintiff's attorney O.A. and the defendants' attorney M.Y.U. who were present on October 27, 2015 which was the date set for the hearing, the verdict has been put off due to the heavy workload with hearings and shortness of time. Upon listening to the report prepared by the Investigation Judge and again upon reading and examining the petitions, pleadings, hearing records and all other documents within the file, the matter has been discussed and reviewed:

THE JUDGMENT: The plaintiff's attorney has requested and claimed the collection of EUR 191,452.28 and USD 173,638.00 with interest, without prejudice to the rights to surplus, by claiming that it has been determined that his client has suffered a loss amounting to EUR 191,452.28 and USD 173,638.00 as a result of the incident caused by the defects of the towboats belonging to the defendant during the operations of sidling the ship of the plaintiff named C.C. to the yard pool of B. Tersanecilik at the date of August 7, 2012 with the assistance of the towboats named Y.M and E.M which belongs to and is operated by M.M. Kılavuzluk ve Römorkaj Hizmetler A.Ş.

The defendants' attorney has requested the dismissal of the lawsuit by defending that the governing law is English Law and the competent courts for the lawsuit are the Courts of England as per the existing agreement between the parties, the service has been provided upon request and by signing a "P.B." with the captain, a Pilotage and Towboat Service Agreement has been executed between the plaintiff and his client, it has been decided that the P. and R. services be provided in accordance with the provisions of the United Kingdom Standard Conditions for Towing and Other Services as per the agreement, it is provisioned under Article 9 of the UK Standard C. that English Law shall govern any and all disputes arising from the provided services and that the Courts of England have exclusive jurisdiction, a non-liability lawsuit has also been filed by his client against the plaintiff before the High Court of Queen's Bench Division Royal Commercial Court and that such lawsuit should be made a prejudicial issue.

In accordance with the “P.B.” document dated August 7, 2012 it is understood that; the service has been provided for the entrance of the ship M/V C.C. to B. shipyard and that the “P.B.” has been signed by the captain of the boat with the seal of the boat, the “P.B.” document has a record stating “P.T and mooring boat services are under U.K. standard conditions for towage and other services (revised 1986)” and as understood from the translations in the file the provision which reads as follows “Pilotage, towing and mooring boat services provided as per the P.B. are governed by the United Kingdom Standard Conditions for Towage and Other Services (revised 1986)” is written, that it is provisioned under Article 9 of the United Kingdom Standard Conditions for Towage and Other Services that “the courts of England shall have exclusive jurisdiction for the disputes arising from the agreement between the tugowner and the hirer”, the mentioned jurisdiction clause to be binding for the parties, although the plaintiff’s attorney has claimed that the competent court is not precise, the term “a foreign state court” as stated in Article 47 of the Act on International Private Law and Procedural Law refers to the courts of a precise state, and as the jurisdiction of a foreign court authorized as per an agreement executed pursuant to Article 47 of the Act on International Private Law and Procedural Law shall be determined according to the law of such state, the competent court in England shall be determined as per English Law, that the referral to the Courts of England in the jurisdiction agreement is valid as such referral authorizes a foreign state court within the scope of Article 47 of the Private International and Procedure Law, although the plaintiff’s attorney claims that the defendant’s jurisdiction plea is against good faith such claim has not been considered due to the facts that it has been understood from the documents presented to the file by the defendants that the defendants have filed a lawsuit before the Courts of England for the determination of the non-liability of defendants for the incident subject to this lawsuit and that the Courts of England have proceeded with the trial by deeming themselves competent, even though the plaintiff’s attorney has stated by presenting the document which belongs to the plaintiff D. Klavuzluk A.Ş. and the defendant M.M. A.Ş. titled “Written request and demand for pilotage, towage and mooring services” annexed to his/her petition dated March 14, 2014 that the Courts of Istanbul were deemed competent, when the provision in the written request was evaluated as a whole it was seen that the jurisdiction of the Courts of Istanbul was in relation to disputes arising from the payments to be made in return of the provided services and again that such would not be applicable to the incident subject to the lawsuit as there was again a reference to the United Kingdom Standard Conditions, as the jurisdiction clause in Article 9 of the United Kingdom Standard Conditions for Towage and Other Services shall be binding for the parties with the reference of the “P.B.” dated August 7, 2012 and on the grounds that the parties have deemed the Courts of England as the competent courts in the agreement it has been resolved by the Court to accept the first plea of jurisdiction and the lack of jurisdiction of the court, and the dismissal of the lawsuit petition due to the lack of jurisdiction.

The judgment has been appealed by plaintiff’s attorney.

1. The dispute is related to the compensation claim arising from collision occurred during the pulling of the ship owned by the plaintiff with towboats owned by defendant named Y.M and E.M to B. Shipyard located in Y. in line with the agreement between the parties.

As understood from the explanations above, although the Court accepted the objections as to the jurisdiction clause in Article 9 of the United Kingdom Standard Conditions for Towage and Other Services being binding for the parties with the reference of the “P.B.” dated August 7, 2012 and on the grounds that the parties have deemed the Courts of England as being the competent courts in the agreement and the jurisdiction clause being valid and accordingly rejected the lawsuit due to lack of jurisdiction, Article 47 of the Act on International Private Law and Procedural Law No. 5718 titled “Agreement on Jurisdiction and Limitations” indicates that, in cases where the jurisdiction of a Turkish court is not determined according to exclusive jurisdiction principles, the parties’ choice of jurisdiction of a court of a foreign state in a dispute which contains a foreign element and arises from obligatory relations shall also be binding with respect to Turkish Law. In order for a jurisdiction agreement which submits to the jurisdiction of a foreign court to have legal value with respect to Turkish law, the contract shall be concluded in written form and the dispute shall contain a foreign element and shall be in relation to a dispute arising from obligatory relations. Secondly, the jurisdiction of a court shall have not been designated according to exclusive jurisdiction principles with regard to the dispute in question. Thirdly, the jurisdiction agreement shall be about the settlement of the dispute in a foreign court. On the other hand, the condition of “being precise” for the foreign courts that are chosen with a jurisdiction agreement by the parties as per Articles 17 and 18 of the Civil Procedure Code is also applicable for Article 47 of the Act on International Private Law and Procedural Law. In order to accept that the court chosen by the parties is precise, it is mandatory that the name of the competent court shall be clearly stated in the agreement. In this respect, the making of a judgment in writing which states that, a jurisdiction clause written as “*English courts have jurisdiction to examine the case*” which does not meet the criteria of being precise, is valid (without taking into consideration the issues referred to by the court), is not accurate and the judgment is required to be reversed.

2. Pursuant to grounds and form of reversal, it has not been found necessary to examine other requests of appeal made by the plaintiff’s attorney.

CONCLUSION: It has been unanimously resolved on the date of October 28, 2015 that the request for appeal filed by the plaintiff’s attorney be accepted and the judgement be REVERSED on behalf of the plaintiff in the light of the reasons explained in paragraph (1), that it is not presently necessary to examine other requests of appeal made by plaintiff’s attorney in the light of the reasons explained in paragraph (2), that the attorney’s fee of TRY 1,100.00 shall be received from the defendant and shall be paid to the plaintiff, that the advance fee of appeal be returned to the appellant if requested.