An Important Ruling from the Turkish Court of Appeal Regarding the Bankruptcy Jurisdiction

The 23rd Chamber of the Turkish High Court of Appeal (Court of Appeal) recently gave a significant ruling which changed the bankruptcy case structure and ended a dispute within the legal environment. According to the ruling, when parties have agreed on a competent court of jurisdiction other than the courts where the debtor is seated, the creditor will not be allowed to file a bankruptcy claim at the courts where the debtor is seated, providing that the dispute arises out of an agreement in which the parties have agreed on a different jurisdiction. To clarify the dilemma, first we will briefly explain the Turkish bankruptcy system, then clarify the facts of the dispute itself.

Turkish bankruptcy system

Under Turkish bankruptcy procedures, the creditor makes an application to the execution office and the execution office sends a payment order to the debtor. The order indicates that if the debt is not paid or no objection is made within seven days, the debtor will be declared bankrupt by an application to the commercial court. If the debtor objects to the payment order, the creditor has right to file a bankruptcy case before the commercial court. Upon the trial, the commercial court first investigates whether there is debt. If there is a debt, the court lifts the objection of the debtor, orders the debtor to pay the debt amount and if the debt is not paid then declares the debtor bankrupt.

The merits of the case

The bankruptcy case was between a group of Turkish jewellery companies (the defendants) and five international banks (the claimants) from different countries. There are nine cases in total with the same subject filed by the claimants. The courts of first instance made an order to declare the insolvency of the defendants. However, the Court of Appeal overruled three decisions out of nine. the Court of Appeal's ruling is about the case between a French bank among the claimants and one of the defendant companies of the jewellery group.

The dispute between the claimants and the defendants arose in late 2008. The French bank was selling gold bullion to the defendants. The defendants and the French bank a commercial relationship since 2003. The French bank was sending the gold bullion to the defendants and the defendants were paying the price of the delivered gold within 120 days. The payment time for each delivery was being agreed between the parties on a case by case basis. The parties agreed on the jurisdiction of the English Courts and the choice of law was English law in the agreement between the parties.

The dispute arose when the French bank asked the defendants to pay back the price of all the delivered gold bullion, which was around US$500m, before the due date. The defendants requested a payment schedule to be agreed because payment of such an amount at once would not be possible due to the cash flow of the defendants. While the negotiations between the parties were going on, the French bank obtained a freezing order from the English Courts and filed a claim in England. A few days later, the French bank also filed a criminal complaint against the defendants' management in Turkey. After the relevant investigation, the Turkish judicial authorities ruled that there was a commercial dispute and dismissed the criminal complaint. Then the French bank filed the bankruptcy case against one of the defendant companies, which was one of jewellery companies involved in the gold bullion trade, and ended with the Court of Appeal's abovementioned decision.

Jurisdiction dilemma

When the French bank filed the bankruptcy case, the defendants' counsels objected to the Turkish Court's jurisdiction, claiming that the agreement was governed by English law and the English Courts had jurisdiction over the dispute. Their argument was that bankruptcy cases are composed of two stages. The first stage is finding out whether there is a debt or not. This stage of the case is conducted just like a receivable claim before the court, except a receivable claim case is at the end of the case.

In a bankruptcy case, if the receivable is not paid the debtor will be declared bankrupt, whereas a case claiming a receivable does not have the same consequence. For instance, if the French bank filed directly a receivable claim, the court would have decided that it didn't have jurisdiction over the case because the competent courts are English Courts. Therefore, if the court decides that it has jurisdiction over the dispute, it will be a *fraus legi facta*. The defendants' counsels also argued that the French bank already filed a case in England and if the defendants were ordered to pay an amount to the French bank during a trial in England, then only the French bank could make this England court order the subject of a bankruptcy case in Turkey, since the first stage of the bankruptcy case would be duly completed as per the parties' agreement. The Turkish first instance court rejected the defendants' counsellor's objections, deciding that it had jurisdiction because the jurisdiction over a bankruptcy case arises from the independency of each country and the French bank never pursued its case in England. The defendants claimed that no notice or documents were ever duly served.

Court of Appeal overrules

After four years at trial, the Turkish court ordered the bankruptcy of one of the defendant companies. The lawyers appealed the decision. The Court of Appeal overruled the decision of the local court and ruled that the objections made by the defendants were right. The French bank firstly should have filed its claim in England.

The Court of Appeal's ruling has great importance, since it will prevent foreign companies from filing unjust bankruptcy cases in Turkey when parties have agreed on different jurisdictions.

After the Court of Appeal overruled the decision of the local court and sent the case back to the court of first instance, the court of first instance abided by the decision of the court of appeal.

Conclusion

The order ruled by the Court of Appeal is very important since the order of first instance court was allowing parties to directly claim a bankruptcy filing at the Turkish courts to collect debts, even though the parties had agreed on the jurisdiction of a foreign court.

In other words, for the party seated in Turkey, putting a jurisdiction clause in a contract stating that a foreign court has jurisdiction over disputes arising out of the contract did not prevent the opposite party from claiming a bankruptcy filing in Turkey and neutralising the jurisdiction clause.

The order ruled by the Court of Appeal clearly states that if there is a jurisdiction clause between parties, the creditor first needs to determine whether there are any receivables or not by making a claim before the court with jurisdiction. Only after this ruling can a bankruptcy claim be filed with the Turkish courts.