

US court finds for Çukurova in Turkish telecoms battle

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A US appeals court has blocked enforcement of a US\$932 million ICC award against Turkey's Çukurova Holding in New York, allowing the company to resume efforts to buy back a controlling interest in mobile phone operator Turkcell.

In a decision on 25 April, the US Court of Appeals for the Second Circuit said it lacked jurisdiction to enforce the award because Çukurova did not have sufficient connection with the state of New York.

The appeals court reversed a district court's confirmation of the ICC award in favour of Sonera, a Dutch subsidiary of Swedish-Finnish telecoms group TeliaSonera. It also overturned a preliminary injunction that had prevented Çukurova from selling assets, transferring funds or raising finance globally.

The ICC award stems from a dispute over the sale of shares in Turkcell Holding, which has a controlling stake in Turkey's largest mobile operator.

An arbitral tribunal in Geneva chaired by Lalive partner **Michael E Schneider** issued the damages award in favour of Sonera in 2011, finding that Çukurova breached an agreement to sell its majority stake in Turkcell Holding to Sonera.

Çukurova had pledged the shares to Russia's Alfa Group as security for a US\$1.4 billion loan, but forfeited them to Alfa in 2007 when it defaulted. The Turkish company has been seeking to buy them back ever since. Last July, it won a ruling from the UK Privy Council giving it 60 days to redeem the shares. However, its efforts to raise the necessary funds were stymied by Sonera's enforcement proceedings in the US and other jurisdictions.

According to Çukurova's counsel, "the practical effect of the Second Circuit's decision is that Çukurova is now free to raise the requisite financing in order to redeem its interest in Turkcell if it chooses to do so." In February, the Privy Council agreed to suspend its 60-day deadline for the share buyback pending the discharge of the US injunction.

In overturning the injunction, the Second Circuit relied on *Daimler v Bauman*, a decision handed down by the US Supreme Court in January, which found that the general jurisdiction of US courts extends beyond a company's state of incorporation and principal place of business only in exceptional cases. Çukurova lacked sufficient "contacts" in New York to render it "at home" there, the court said.

In particular, the court rejected Sonera's arguments that it had general jurisdiction over the case through the "agency theory" – a test applied by the Second Circuit before *Daimler* – on the grounds that several affiliates of Çukurova had done business in New York on its behalf.

Sonera cited unsuccessful negotiations by Çukurova and one of its affiliates for the sale of an interest in a Turkish TV broadcaster to two New York private equity funds, and the company's sale of US-dollar denominated shares in Turkcell to an underwriter in London that subsequently offered them on the New York Stock Exchange. It also cited an agreement between another Çukurova affiliate, Digiturk, and a US company for the provision of digital TV content, and the use of a New York office by Baytur and EPE, two other Turkish affiliates of the company.

The Second Circuit found, however, that the agency theory of jurisdiction is no longer compatible with due process following *Daimler*, and ruled that, even assuming all of the affiliates' contacts with New York should be imputed to Çukurova, they still fell short of the requirements for all-purpose general jurisdiction.

The appeals court further dismissed Sonera's claim that the parties had consented to the jurisdiction of any court in any New York Convention country when they entered into the ICC arbitration clause in their Turkcell share purchase agreement in 2005. The court said it did not read the clause so broadly.

Counsel to Çukurova, **Dorit Ungar Black** of litigation boutique Holwell Shuster & Goldberg in New York, explains that *Daimler* has left little of the "agency" theory in place, reducing it to the more stringent "at home" test. This will have an impact on any litigant "seeking to avail itself of US courts to sue a foreign entity without a substantial presence in the US".

She emphasises, however, that neither the Second Circuit opinion nor *Daimler* changes the landscape for enforcement of awards in the US, as a finding of personal jurisdiction has always been a prerequisite. The "pro-arbitration policy" adopted by courts towards New York Convention awards was never intended to "trump" due process rights, she says.

In addition to the US proceedings, Sonera has been pursuing enforcement of its ICC award in Switzerland, the Netherlands, the British Virgin Islands, the UK and the Netherlands Antilles.

As previously reported by GAR, US court filings indicate that Alfa subsidiary Altimo has been financing Sonera's worldwide enforcement efforts, with the exception of the BVI proceedings, pursuant to a 2009 agreement. Sonera is represented in most of these proceedings by Alfa's regular counsel, Hogan Lovells.

Sonera has been using separate counsel from Sullivan & Cromwell for the BVI proceedings, where it has had more success. In February, the Privy Council rejected Çukurova's appeal against a 2013 decision by the Eastern Caribbean Court of Appeal, which upheld the enforcement of the award in the BVI.

John Hardiman, partner at Sullivan & Cromwell in New York, explains that the jurisdictional issues in the latest US court decision were not relevant in the BVI and Privy Council proceedings, since Çukurova has a registered subsidiary in the BVI with assets. He adds that Altimo did not play any part in the BVI proceedings.

Aside from the enforcement actions, Sonera and Çukurova are also engaged in two further ICC arbitrations over the Turkcell shares. Çukurova filed a second case in Geneva against Sonera in 2012, attempting to reverse the outcome of the first. That second case is being chaired by Swiss arbitrator **François Perret**. An affiliate of Sonera, meanwhile, is pursuing a separate ICC case seated in Vienna against Çukurova, arguing breach of their shareholders agreement for Turkcell Holdings.

Hardiman, who was also counsel to Sonera in the all three ICC arbitrations alongside Turkey's Hergüner Bilgen Özeke and Swiss firm Bär & Karrer, says the firm recently submitted an application to dismiss the second Geneva case on *res judicata* grounds. He notes the Vienna case has been on hold since 2007.

Çukurova has hired White & Case to coordinate its global legal strategy, and also used the firm in the BVI and for both sets of Privy Council proceedings. It originally relied on Chaffetz Lindsey as counsel in the New York court proceedings, but the firm withdrew in April 2013, making room for Holwell Shuster & Goldberg to lead the appeal. Chaffetz Lindsey continues to act as co-counsel on the two pending ICC cases in Geneva and Vienna along with Swiss firms Tavernier Tschanz and Lenz & Staehelin, and Turkey's Akinci Law.

In the US Court of Appeals for the Second Circuit

Circuit Judges

- **Ralph Winter**
- **Richard Wesley**
- **Susan Carney**

Counsel to Sonera

- Hogan Lovells
Pieter Van Tol, Andrew Behrman and Erin Meyer in New York

Counsel to Çukurova Holding

• Holwell Shuster & Goldberg
Richard Holwell, Michael Shuster, Dorit Ungar Black, Karen Andrea Sebaski
and **Deylan Dimitrov**

• Chaffetz Lindsey
Partners **David Lindsey** and **Andreas Frischkneft** in New York (until April 2013)

Before the UK Privy Council (on appeal from BVI)

Counsel to Sonera

• **Bankim Thanki QC** and **Ben Valentin** of Fountain Court Chambers in London

• Sullivan & Cromwell
John Hardiman in New York and **Louise Delahunty** in London

Counsel to Çukurova

• **Ken MacLean QC**, James Nadin and David Caplan of One Essex Court in London

• Maples & Calder
Arabella Di Iorio

• White & Case
John Reynolds and **Charles Balmain** in London

In the first ICC arbitration seated in Geneva (Sonera Holding BV v Çukurova Holding AS)

Tribunal

• **Michael E Schneider** (Switzerland) (chair)

• **Pierre Karrer** (Switzerland) (appointed by the claimant)

• **Christian Rumpf** (Germany) (appointed by the respondent)

Counsel to Sonera

• Sullivan & Cromwell
John Hardiman, Fern Mechlowitz and **James Carter*** in London/New York

(*left the firm in January 2011)

• Hergüner Bilgen Özeke
Ender Özeke in Istanbul

• Bär & Karrer
Saverio Lember in Geneva

Counsel to Çukurova

- Tavernier Tschanz
Pierre-Yves Tschanz and **Frank Spoorenberg** in Geneva
- Akinci Law Office
Ziya Akinci in Istanbul
- Lenz & Staehelin
Xavier Favre-Bulle and **Paolo Michele Patocchi** in Geneva

In the ICC arbitration seated in Vienna (TeliaSonera Finland OYJ v Çukurova Holding AS and Turiye Genel Sigorta AS)

Tribunal

- **Andreas Reiner** (Austria) (chair)
- **Thomas Webster** (Canada)
- **Pierre Karrer** (Switzerland)

Counsel to TeliaSonera

- Sullivan & Cromwell
Partners **John Hardiman**, **Jonathan Cross**, **Anjali Sekaria** and **David Rhodes**
- Hergüner Bilgen Özeke
Ender Ozeke and **Burcu Basar** in Istanbul

Counsel for Cukurova

- Tavernier Tschanz
Partner **Pierre-Yves Tschanz** in Geneva
- Lenz Staehelin
Partner **Xavier Favre-Bulle** in Geneva
- Akinci Law Offices
Partner **Ziya Akinci** in Istanbul
- Chaffetz Lindsey (as of 2012)
Partners **David Lindsey**, **James Hosking** and **Andreas Frischknecht** in New York

In the second ICC arbitration in Geneva, filed in April 2012 (Çukurova Holding AS v Sonera Holding BV)

Tribunal

- **François Perret** (Switzerland) (president)

- **VV Veeder QC** (UK)
- **Dominique Brown-Berset**(Switzerland)

Counsel to Çukurova

- Tavernier Tschanz
Partner **Pierre-Yves Tschanz** in Geneva
- Lenz Staehelin
Partner **Xavier Favre-Bulle** in Geneva
- Akinci Law Offices
Partner **Ziya Akinci** in Istanbul
- Chaffetz Lindsey
Partners **David Lindsey, James Hosking** and **Andreas Frischknecht** in
New York

Counsel to Sonera

- Sullivan & Cromwell
John Hardiman in New York
- Hergüner Bilgen Özeke
Ender Özeke in Istanbul
- Bär & Karrer
Saverio Lember in Geneva