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Possible Ratification of the Hague Convention by Turkey and Its Effects to the Recognition and Enforcement of Foreign Judgments*

Lahey Konvansiyonu'nun Türkiye Tarafından Onaylanmasının Yabancı Mahkeme Kararlarının Tanıma ve Tenfizine Etkileri

Ceyda Süral Efeçinar** 

Abstract

The recognition and enforcement of foreign court judgments in Turkey have been regulated by the International Private and Procedural Law Act, which was entered into force on 4 December 2007 (hereinafter referred to as "PILA") in Articles 50-59. According to the Turkish Constitution Article 90/V, international conventions shall have the same effect as national laws. In Article 1/2 PILA, it is emphasized that the provisions of international conventions prevail over the provisions of PILA. Therefore, if Turkey ratified the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter referred to as the "Convention"), its provisions would prevail over PILA in cases within the scope of the Convention. In this study, the provisions of the Convention and PILA are compared in order to determine to what extent the recognition or enforcement of foreign court decisions would be facilitated in Turkey in the event that Turkey ratified the Convention. It is hypothetically accepted that not only Turkey, but also all other South East European countries mentioned in the study would ratify the Convention.

Keywords

Recognition and Enforcement, Foreign Judgments, The Hague Judgments Convention, Private International Law, International Litigation

Öz

Türkiye'de yabancı mahkeme kararlarının tanıma ve tenfizi, 4 Aralık 2007'de yürürlüğe giren Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'un ("MÖHUK") 50-59. maddelerinde düzenlenmektedir. Anayasa'nın 90/V. maddesi uyarınca, milletlerarası andlaşmalar kanun hükmündedir. MÖHUK'un 1/2. maddesi uyarınca da milletlerarası sözleşme hükümleri saklıdır. Dolayısıyla, Türkiye'nin Hukuki ve Ticari Konularda Yabancı Mahkeme Kararlarının Tanıma ve Tenfizine İlişkin Lahey Konvansiyonu'nu ("Konvansiyon") onaylaması halinde, Konvansiyon kapsamına giren hallerde Konvansiyon hükümleri, MÖHUK hükümlerine göre öncelikli olarak uygulanacaktır. Bu çalışmada, Konvansiyon ve MÖHUK hükümleri karşılaştırılarak, Türkiye'nin Konvansiyon'a taraf olması halinde Türkiye'de yabancı mahkeme kararlarının tanıma ve tenfizinin kolaylaşp kolaylaşmayacağı sorusuna cevap aranmıştır. Çalışmada, sadece Türkiye'nin değil, adı geçen diğer Güney Doğu Avrupa ülkelerinin de Konvansiyon'a taraf olacağı varsayılmıştır.

Anahtar Kelimeler

Tanıma ve Tenfiz, Yabancı Mahkeme Kararları, Lahey Konvansiyonu, Milletlerarası Özel Hukuk, Milletlerarası Usul Hukuku

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Introduction

The recognition and enforcement of foreign court judgments in Turkey have been regulated by the International Private and Procedural Law Act, which was entered into force on 4 December 2007 (hereinafter referred to as “PILA”)¹ in Articles 50-59.

According to the Turkish Constitution Article 90/V, international conventions shall have the same effect as national laws. In Article 1/2 PILA, it is emphasized that the provisions of international conventions prevail over the provisions of PILA.² Turkey is party to a number of bilateral³ and multilateral⁴ conventions dealing with the recognition and enforcement that provide for a facilitated procedure. Some multilateral conventions in force in Turkey are: the Hague Convention of 1 March 1954 on Civil Procedure,⁵ the Convention on the Contract for the International Carriage of Goods (CMR),⁶ the Convention concerning International Carriage by Rail (COTIF),⁷ the International Convention on Civil Liability for Oil Pollution Damage,⁸ the Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to the Duty of Maintenance Towards Children,⁹ the Hague Convention of 2 November 1973 concerning the Recognition and Enforcement of Decisions relating to the Duty of Maintenance,¹⁰ the CIEC Convention of 8 September 1967 Concerning the Recognition of Decisions Pertaining to the Bond of Marriage,¹¹ the European Convention of 20 May 1980 Concerning the Recognition and Enforcement of Decisions on the Custody of Minors and the Re-establishment of the Custody of Minors,¹² and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.¹³

¹ The law has entered into force as of the date of its publication in the OG 12.12.2007/2678.

² However, Kadıköy Fourth Commercial Court of First Instance, in its decision dated 17 June 2008, applied the provisions of the PILA instead of the bilateral agreement between Turkey and Uzbekistan, on the ground that the conditions for enforcement provided by the bilateral agreement (the enforcing court is entitled to review the jurisdiction of the foreign court) is stricter than those provided in the PILA. Kadıköy 4 ATM, 1020/386, 17.06.2008. See, Nuray Ekşi, *5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'a İlişkin Yargıtay Kararları* (On İki Levha 2010) 109. This decision is criticized in the doctrine because international conventions prevail regardless of their content due to Article 1/2 of the PILA. Nuray Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (Beta 2013) 483. On the other hand, another view in the doctrine supports the idea that more favorable PILA provisions shall be applicable if the provisions of an international convention are stricter and/or PILA has entered into force after the relevant international convention. Cemal Şanlı and Emre Esen and İnci Ataman Fıganmeşe, *Milletlerarası Özel Hukuk* (Beta 2019) 550.

³ For further information on the bilateral conventions, see Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 417-478.

⁴ For further information on the multilateral conventions, see *ibid* 353-417.

⁵ OG 23 May 1972 No 14191.

⁶ OG 4 January 1995 No 22161.

⁷ OG 1 July 1985 No 18771.

⁸ OG 24 June 2001 No 24472.

⁹ OG 11 January 1973 No 14418.

¹⁰ OG 16 February 1983 No 17961.

¹¹ OG 14 September 1975 No 15356.

¹² OG 2 November 1999 No 23864.

¹³ OG 20 January 2004 No 25352.

Therefore, if Turkey ratified the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter referred to as the “Convention”), its provisions would prevail over PILA in cases within the scope of the Convention.

In this study, the provisions of the Convention and PILA are compared in order to determine to what extent the recognition or enforcement of foreign court decisions would be facilitated in Turkey in the event that Turkey ratified the Convention. It is hypothetically accepted that not only Turkey, but also all other South East European countries¹⁴ mentioned in the study would ratify the Convention.

The explanations on provisions of the Conventions are limited in order to answer the question comprising the title of this study. The history of the Hague Judgments Project, the reasons and motivations under the system brought by the Convention. or its relation to other Hague conventions do not constitute a part of this study.

I. Prerequisites of Recognition and Enforcement

A. Scope of Claims Pertaining to Civil and Commercial Matters

According to Article 1/1 of the Convention, it applies to the recognition and enforcement of judgments in civil or commercial matters. It does not extend to revenue, customs, or administrative matters.

Article 2 of the Convention, however, lists certain matters that are excluded from its scope which include the following:¹⁵ (a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and succession; (e) insolvency, composition, resolution of financial institutions, and analogous matters; (f) the carriage of passengers and goods; (g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship- source marine pollution, limitation of liability for maritime claims, and general average; (h) liability for nuclear damage; (i) the validity, nullity,

14 Certain group of countries is chosen on purpose. It is not possible to scrutinize whether Turkish court judgments are *de facto* being enforced in each and every country within the limits of an article. Selection of a certain group helps substantiate the conclusions of this study. South East European countries are preferred with two reasons. First is a subjective reason. I am proud to be part of annual regional private international law conferences organized in different universities located in South East European countries which had been an ignition for a number of my studies also in the past years. Second is an objective reason. Turkey has vast relations with these countries especially due to the historical, geographical and cultural acquaintance between Turkey and these countries. Therefore, it is hoped that studying the effects of a possible ratification of an international convention on recognition and enforcement of foreign judgments given in these countries will be helpful for scholars and practitioners.

15 According to Article 2/2: “A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.”

or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; (j) the validity of entries in public registers; (k) defamation; (l) privacy; (m) intellectual property; (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties; (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties; (p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin; (q) sovereign debt restructuring through unilateral State measures.

The list is quite comprehensive. This is understandable because as stated in the Preamble of the Convention the desire is “*to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation*”. Therefore, family law matters; wills and succession; and issues, which are subject to other specific international instruments such as carriage of passengers and goods, marine pollution, and nuclear damage,¹⁶ are out of the scope.

The scope of PILA provisions on recognition and enforcement of foreign judgments is provided in Article 50 PILA. This provision requires that a decision must be granted in a civil action; Turkish law determines whether an action is a civil action.¹⁷ Court judgments regarding administrative and criminal matters are not subject to recognition and enforcement under PILA.¹⁸ Therefore, it is common for both the Convention and PILA that they concern civil and commercial matters, but as PILA is the general law concerning recognition and enforcement, it will be applied for recognition or enforcement of all foreign judgments concerning civil and commercial matters without any such restriction provided in the Convention.

B. Judgments Rendered by a Court

In Article 3/1/b of the Convention, a “judgment” is defined as “*any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court)*”. Therefore, the Convention is not applicable to

16 Andrea Bonomi, ‘Courage or Caution? A Critical Overview of the Hague Preliminary Draft on Judgments’ (2015/2016) 17 Yearbook of Private International Law 6.

17 Ergin Nomer, *Devletler Hususi Hukuku* (Beta 2017) 509; Şanlı, Esen and Ataman-Figancı (n 2) 542; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 125; Pelin Güven, *Tanım – Tenfiz* (Yetkin 2013) 39; Işıl Özkan and Uğur Tütüncübaşı, *Uluslararası Usul Hukuku* (Adalet 2017) 180; Ceyda Süral and Zeynep Derya Tarman, ‘Recognition and Enforcement of Foreign Court Decisions in Turkey’ (2013/2014) 15 Yearbook of Private International Law 487.

18 Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 121; Süral and Tarman (n 17) 487.

decisions issued by any authorities other than the courts. This is in line with the fact that family law matters, wills and succession, insolvency, and validity of entries in public registers are all out of the scope of the Convention. These are examples of certain matters that can be brought before or decided by authorities other than the courts in various national laws.¹⁹

According to Article 50 PILA, to seek recognition and enforcement, firstly the existence of a foreign court's decision is required. Whether the foreign decision is a court decision shall be determined in accordance with the law of the country where it was rendered.²⁰ Decisions issued by administrative bodies such as the municipality,²¹ governorship, consulate or notary cannot be enforced in Turkey pursuant to PILA.²² Therefore, there is a gap in Turkish law pertaining to the recognition and enforcement of foreign judicial decisions rendered by authorities other than the courts. This gap will not be fulfilled by the ratification of the Convention.

According to Article 11 of the Convention, judicial settlements which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced in the same manner as a judgment.

According to Turkish law, if parties have reached a settlement agreement in the course of litigation, and petitioned the court to record terms of the settlement agreement in a court judgment; such a court judgment will be enforceable under PILA. On the other hand, the settlement agreement, in and of itself, does not benefit from such enforceability.²³

However, recognition and enforcement of judicial settlements became more important in light of the latest developments in Turkish civil procedure law. A new legislation came into effect on 1 January 2019 providing for mandatory mediation

19 For example, municipalities in Denmark or notaries in Romania are competent to give divorce decisions. Şanlı, Esen and Ataman Fıganmeşe (n 2) 539.

20 Şanlı, Esen and Ataman Fıganmeşe (n 2) 538; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 109; Güven, *Tanım – Tenfiz* (n 17) 29; Sürat and Tarman (n 17) 488.

21 Second Civil Chamber of the Court of Cassation, in its decision dated 13 April 1995, decided that a foreign divorce decision issued by the Copenhagen municipality could not be recognised in Turkey. Yargıtay 2 HD, 3612/4567, 13.4.1995. (Kazancı Caselaw Database) <www.kazanci.com>

22 Özkan and Tütüncübaşı (n 17) 177. However, some international conventions such as the Hague Convention of 2 November 1973 concerning the Recognition and Enforcement of Decisions relating to the Duty of Maintenance include provisions to allow the enforcement of decisions issued by administrative bodies. Furthermore, according to Article 27A of the Civil Registration Services Act, the divorce decisions or decisions pertaining to the nullity, cancellation or existence of a marriage, which are final and binding, and rendered by competent foreign judicial or administrative authorities may be registered provided that both parties apply in person or through their attorneys, and there is no contradiction with Turkish public policy. According to Article 30/2 of this same Act, the enforcement of decisions or documents related to adoption issued by foreign judicial or administrative authorities which, according to the law of the country concerned, were finalized, or have effects as such, shall be subject to recognition or enforcement by a competent Turkish court. O.G. 29.04.2017/30052.

23 Nomer (n 17) 512; Sürat and Tarman (n 17) 488.

as a prerequisite for commercial disputes.²⁴ As per this recently adopted legislation, parties to a commercial dispute pertaining to monetary receivables shall first refer their case to mediation. Previously, on 1 January 2018, applying to a mediator was made a prerequisite when filing a lawsuit concerning monetary claims by employees or employers arising out of employment contracts, collective labor agreements, or reinstatement claims.²⁵ As a result of this recent legislation, it is expected that more disputes will be resolved by judicial settlement. According to Article 18/4 of the Law on Mediation of Civil Disputes²⁶, if the parties reach a settlement at the end of a mediation process, the settlement agreement signed by the mediator and the parties along with their attorneys are deemed to serve as a court judgment and can be enforced in the same manner. This provision makes judicial settlements reached at the end of voluntary or mandatory mediation subject to recognition or enforcement within the meaning of Convention Article 11. Therefore, ratification of the Convention may contribute to cross-border efficiency of mediation by realizing that settlements reached at the end of mediation would be recognized or enforced in other contracting states.²⁷

Furthermore, ratification of the Convention may end discussions concerning the recognition or enforcement of settlement agreements enacted as a result of mediation conducted in foreign contracting states in Turkey. Currently, recognition or enforcement of settlement agreements reached at the end of mediation conducted in foreign countries is not possible according to PILA as settlement agreements are not “court judgments”.²⁸ However, if the executive effect of a settlement agreement is approved by a court; would recognition or enforcement then be possible? There are differing views in the doctrine. According to one view, such settlement agreements would not be subject to recognition or enforcement under PILA even if the executive effect of these settlements were approved by a foreign court; because such approval would not change the fact that these settlements were not “court judgments”²⁹ but

24 The Law on Starting Legal Proceedings for Monetary Receivables Arising from Subscription Agreements. O.G. 19.12.2018/30630.

25 Labor Courts Law. OG 25.10.2017/30221.

26 OG 22.06.2012/28331.

27 Please note that the United Nations Convention on International Settlement Agreements Resulting from Mediation exclude from its scope the settlement agreements that have been approved by a court and are enforceable as a judgment in the state of that court (Article 1/3). Therefore, even after the entry into force of this Convention, not all settlement agreements enacted at the end of mediation according to the Law on Mediation of Civil Disputes will be subject to this Convention. For further information on the Singapore Convention in Turkish, see, Mustafa Erkan, *Arabuluculuk ve Singapur Sözleşmesi* (On İki Levha 2020).

28 Vahit Doğan, *Milletlerarası Özel Hukuk* (Savaş 2020) 162. It is opined in the doctrine that the provisions of certain international conventions such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards may be adapted and applied to the recognition or enforcement of settlement agreements reached at the end of mediation. Necla Öztürk, ‘Arabuluculuğun Milletlerarası Özel Hukuk Boyutu : Genel Bakış’ (2015) 31(2) Banka ve Ticaret Hukuku Dergisi 241.

29 If settlement agreements reached as a result of mediation are deemed as « court judgments », then they shall be recognized or enforced in Turkish law. However, in this case, a provision shall be added to the Law on Mediation of Civil Disputes referring to the PILA provisions for recognition and enforcement of settlement agreements reached at the end of mediation conducted in foreign countries or new provisions shall be added to the PILA providing for recognition and enforcement of such settlement agreements. Hatice Selin Pürselim, ‘Yabancılık İçeren Arabuluculuk Usulü ve Bağlayıcılığı Hakkında Düşünceler’ (2014) 20(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 16. For suggestions on adoption of such new provisions in Turkish law, see, Güven Yazar, *Milletlerarası Özel Hukukta Arabuluculuk* (On İki Levha 2019) 203-212.

“agreements” reached as a result of mediation.³⁰ Another view opines that in such a case, not the settlement agreement but the executive effect rendered by a court would be recognized or enforced; so such agreements must be considered as “court judgments” and eligible for recognition or enforcement under PILA.³¹ Ratification of the Convention may, indeed, serve to strengthen this second opinion; as the idea that settlement agreements that are approved and enforceable in the same manner as a court judgment shall be considered as “court judgments”, is inherent in the Convention.

C. Final and Enforceable Judgments

According to Article 4/4 of the Convention, recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. Therefore, the requested court has the option to grant a period of time to the claimant until the judgment becomes final in the state of origin. The requested court also has the option of refusing recognition or enforcement. In such case, a refusal would not prevent a subsequent application for recognition or enforcement of the judgment.³²

However, Article 50 PILA stipulates that only foreign court judgments, which are final according to the law of the state of origin shall be recognized and/or enforced before the courts of Turkey. Therefore, if at the outset or during the course of action for recognition or enforcement, the judge discovered that the judgment was not final, he/she would not have the option to grant any period but must immediately deny recognition or enforcement.³³ Therefore, ratification of the Convention would result in a novel application in Turkey; a judge would have the option to grant a period of time for the finalization of the foreign court judgment if he/she discovered that the judgment was not final in the state of origin, instead of immediately denying recognition or enforcement.

According to Article 4/3 of the Convention, a judgment shall be recognized only if it has effect in the State of origin and shall be enforced only if it is enforceable in the State of origin. According to Article 50 PILA, the foreign judgment, for which an *exequatur* is sought, must be both final and enforceable under the law of the state where the judgment was rendered.

30 Faruk Kerem Giray, ‘Tenfize İlişkin Üç Soru : Tenfize Konu Yabancı İlamın Hukuk Devletinden Sadır Olması Gerekir Mi ? Arabuluculuk Neticesinde Yapılan Sulh Anlaşması Tenfiz Edilebilir Mi ? Yabancı Mahkemedен Sadır Ödeme Emri Kararı Tenfiz Edilebilir Mi ?’ (2019) 39(2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 632.

31 Doğan (n 27) 163.

32 This optional approach might result in disparities in the application of the Convention; courts in European Union Member States will be more easily prepared to grant immediate recognition or enforcement; whereas, less recognition-friendly countries will opt for a refusal. Bonomi (n 16) 9.

33 For further information, see Banu Şit, ‘Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kesinleşme Şartı’ (2011) 15 Gazi Üniversitesi Hukuk Fakültesi Dergisi 69.

The Convention excludes interim measures of protection from the definition of a judgment in its Article 3/1/b. Similarly, the recognition and enforcement of foreign provisional and protective measures is not accepted under PILA.³⁴ This gap caused many problems and difficulties in international commercial practice and it is disappointing that the Convention did not deal with this problem.³⁵ The rapidity is very vital when interim measures are at stake; but they do not have global circulation, which means that it may be necessary to require these measures be decided in a number of different forums. This is burdensome and not in line with the nature of interim measures, which need to be decided and enforced rapidly. Had the Convention dealt with the enforcement of interim measures, an important gap would have been removed and a major practical problem would have been eliminated.

II. Grounds for Refusal of Recognition and Enforcement

There are only four grounds³⁶ provided by Article 54 PILA that render the recognition and/or enforcement of a foreign judgment impossible. A Turkish judge shall not review the merits of the foreign judgment but shall only review whether any of these four grounds exist in the court judgment. A Turkish judge shall not verify whether the foreign judge complied with the applicable procedural rules or whether the applicable law was correctly implemented to the facts of the dispute. This is called “prohibition of *revision au fond*”.³⁷

The principle of prohibition of *revision au fond* is expressly provided in Article 4/2 of the Convention. Accordingly, “*There shall be no review of the merits of the judgment*

34 Nomer (n 17) 512; Güven, *Tanıma – Tenfiz* (n 17) 67; Süral and Tarman (n 17) 489. Also see, Yargıtay 19 HD, 4717/6504, 12.06.2008. (Kazancı Caselaw Database) <www.kazanci.com>. According to some scholars, only if such an interim measure is resolving the relevant dispute in a final and binding manner according to law of the court which rendered it, its recognition or enforcement shall be possible within the meaning of Article 50 PILA. Nomer (n 17) 512; Şanlı, Esen and Ataman Fıganmeşe (n 2) 547; Özkan and Tütüncübaşı (n 17) 183. However, resolution of a dispute in a final and binding manner is contrary to the provisional nature of such measures. Therefore, instead of requiring an interim measure to resolve a dispute in a final and binding manner, the extent of such finality shall be questioned. Do the possible alteration or cancellation of interim measures mean that they are formally not final and binding? The answer is in the negative according to the German and Swiss laws and must be so also in Turkish law. Deniz Defne Kırılı Aydemir, *Milletlerarası Usul Hukukunda İhtiyati Tedbirler* (On İki Levha 2013) 362-373. Although some scholars question the denial of recognition and enforcement of provisional measures rendered by foreign courts, it is still the majority view and practice that such measures may not be enforced in Turkey. On the other hand, it must be noted that in certain international instruments, the recognition and enforcement of provisional or protective measures are possible. For example, according to the 1958 Hague Convention concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children Article 2, provisional measures may also be declared enforceable. Turkey is a party to this Convention. In its decision dated June 20, 2005, the 2nd Civil Chamber of the Court of Cassation decided that the first instance court may not deny enforcement based on the fact that the foreign judgment has not been finalized as the enforcement had been requested according to the 1958 Hague Convention. Yargıtay 2 HD, 7158/9535, 20.06.2005. (Kazancı Caselaw Database) <www.kazanci.com>. Another example is the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Recast). According to Article 2/a, ‘judgment’ includes provisional, including protective, measures ordered by a court or tribunal.

35 Bonomi (n 16) 6.

36 These grounds may be categorized in two groups: those that can be taken into consideration by the judge on his/her own motion; and those that need to be claimed by the respondent. The breach of right of defense as provided in PILA Article 54/ç and exorbitant jurisdiction of the court of origin fall in the second category. You may find further information in the relevant explanations below.

37 Nomer (n 17) 516; Şanlı, Esen and Ataman Fıganmeşe (n 2) 536; Doğan (n 28) 115; Güven, *Tanıma – Tenfiz* (n 17) 81; Özkan and Tütüncübaşı (n 17) 176; Süral and Tarman (n 17) 495.

in the requested State. There may only be such consideration as is necessary for the application of this Convention.”

Similar to PILA, there are certain grounds for refusal of recognition or enforcement provided in the Convention. Some of the grounds provided in PILA correspond to the grounds for refusal of recognition and enforcement accepted in the Convention; whereas there are additional grounds in the Convention. Furthermore, the grounds provided in PILA consist of absolute impediments to the recognition or enforcement. In other words, a Turkish judge shall deny recognition or enforcement provided that the grounds listed in Article 54 exist. However, grounds brought by the Convention are grounds in the existence of which recognition or enforcement “may be” refused. In other words, a judge has discretion to deny recognition or enforcement despite the existence of grounds provided by the Convention, Article 7.³⁸ However, in Article 5 of the Convention, the judge has no discretion to disregard where indirect jurisdiction rules take place, and that comprises an eligibility requirement for recognition or enforcement according to the Convention.

A. Grounds that are Common for PILA and the Convention

1. Breach of Right of Defense

In Article 54(ç) PILA some procedural requirements pertaining to the defense rights of the person against whom enforcement is sought are formulated as conditions to enforcement. If the defendant has not been duly served to appear before the court according to the law of the state of which the judgment is rendered and given an opportunity to be represented or if the judgment was rendered in the absence of the defendant in contrary to the law, and if the defendant has objected to the enforcement before the Turkish court then it is assumed that the defendant was not duly granted the right or possibility of defending himself (Article 54(ç) PILA).³⁹

There is a similar provision in Article 7/1/a of the Convention: “*Recognition or enforcement may be refused if the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim; (i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or (ii) was*

38 The Convention adopts a minimum standard approach and, in the long run, it can cause approximation of the national legal systems with the principles provided in the Convention. Ilija Rumenov, ‘Implications of the New 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments on the National Legal Systems of Countries in South Eastern Europe’ (2019) 3 EU and Comparative Law Issues and Challenges Series 402.

39 This provision is applied in the following decisions: Yargıtay 2 HD, 532/6718, 08.04.2009; 11 HD 2822/9027, 28.05.2012; 11 HD 3175/5547, 06.04.2012. (Kazancı Caselaw Database) <www.kazanci.com>

*notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents”.*⁴⁰

2. Public Policy

Article 54(c) PILA allows for the refusal of recognition and enforcement of foreign judgments based on the ground that it is manifestly contrary to Turkish public policy.⁴¹ The limits of the public policy concept are neither clear, nor defined in Turkish law.⁴² A prominent decision of the Court of Cassation draws a framework for the public policy concept.⁴³ Accordingly, the public policy concept includes basic values of Turkish law, a general understanding of Turkish moral and ethics, a basic understanding of the justice and general politics which form the basis of Turkish laws, fundamental rights and freedoms provided in the Constitution, rules based on common international principles and principle of good faith in private law, legal principles that define moral principles and understanding of justice acknowledged by all civilized societies, civilization level of the public, the political and economic regime and human rights and freedoms. A foreign court decision whose effects or consequences are manifestly incompatible with Turkish public policy cannot be recognized or enforced in Turkey.⁴⁴

Manifest incompatibility with public policy of the requested State is a ground for refusal of recognition and enforcement in the Convention (Article 7/1/c).

Along with this, there are other grounds listed in the Convention pertaining to cases that are considered within the scope of incompatibility with public policy in Turkish practice. In Turkish practice, if the foreign judgment has been obtained by means of fraud, for example, by taking into account the presence of false witnesses or false documents, a Turkish judge has to assess the new evidence that had not been submitted before the court of origin at the stage of recognition or enforcement.⁴⁵ The fact that the judgment had been obtained by fraud constitutes a ground for refusal of recognition and enforcement according to Article 7/1/b of the Convention.⁴⁶

40 For a criticism of inclusion of a separate ground of refusal concerning notification of a defendant and that it shall be caught by the right to a fair trial aspect of public policy defense, see, Paul Beaumont and Lara Walker, 'Recognition and Enforcement of Judgments in Civil and Commercial Matters in the Brussels I Recast and Some Lessons from It and the Recent Hague Conventions for the Hague Judgments Project' (2015) 11 Journal of Private International Law 44-54.

41 For further information, see Cemile Demir Gökyayla, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizde Kamu Düzeni* (Seçkin 2001); Bilgin Tiryakioğlu, "Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzenine Aykırılık", in Süheyla Balkar Bozkurt (ed) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler*, (On İki Levha 2018) 83-94.

42 Nomer (n 17) 527; Süral and Tarman (n 17) 501.

43 Yargıtay HGK, 1/1, 20.02.2012. (Kazancı Caselaw Database) <www.kazanci.com>

44 Nomer (n 17) 527; Aysel Çelikel and Bahadır Erdem, *Milletlerarası Özel Hukuk* (Beta 2017) 727; Şanlı, Esen and Ataman Fıganmeşe (n 2) 569; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 280; Özkan and Tütüncübaşı (n 17) 209; Süral and Tarman (n 17) 501.

45 Şanlı, Esen and Ataman Fıganmeşe (n 2) 575; Süral and Tarman (n 17) 505.

46 For a criticism of inclusion of a separate ground of refusal concerning procedural fraud and that it shall be caught by the right to a fair trial aspect of public policy defence, see, Beaumont and Walker (n 40) 54-56.

Furthermore, it is accepted in Turkish case law that Turkish public policy may intervene, when there is a foreign judgment that is inconsistent with a prior judgment rendered by a Turkish court in a legal dispute between the same parties on the same cause of action.⁴⁷ Inconsistency of the judgment with a judgment given by a court of the requested State in a dispute between the same parties is also a ground for refusal of recognition and enforcement according to Article 7/1/e of the Convention.

Recognition or enforcement of a judgment awarding exemplary or punitive damages that do not compensate a party for actual loss or damage may be refused according to the Convention Article 10.⁴⁸ In Turkish law, the matter is assessed from the perspective of public policy. There are differing views in the doctrine. According to one opinion, court judgments rendering punitive damages that are issued in common law jurisdictions will not be enforced in Turkey due to their punitive character.⁴⁹ In contrast, another view defends that punitive damages shall not be construed as contrary to Turkish public policy provided that they are not excessive.⁵⁰

B. Additional Grounds Brought by the Convention

1. Jurisdiction

Turkish courts cannot review the basis of jurisdiction of a court that rendered the foreign judgment. Only in two cases, can jurisdiction be a ground for refusal of recognition or enforcement. According to Article 54(b) PILA, foreign judgments given on issues that Turkish courts have exclusive jurisdiction to resolve may not be enforced. Additionally, if the foreign court's jurisdiction is based on an exorbitant jurisdiction rule,⁵¹ and the party against whom enforcement is sought objects to the enforcement, the foreign judgment may not be enforced in Turkey.⁵²

47 Nomer (n 17) 534; Çelikel and Erdem (n 44) 729; Özkan/Tütüncübaşı (n 17) 214; Sürat and Tarman (n 17) 505. Some scholars in the doctrine opine that in this case, recognition or enforcement shall be denied due to lack of a prerequisite for filing a lawsuit. According to Article 114/i of the Civil Procedure Law, in order for a court to hear a dispute, it shall not have been finally decided between the same parties. Şanlı, Esen and Ataman Fıganmeşe (n 2) 578; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 318.

48 Recent decisions by European courts show that public policy precludes the recognition and enforcement of a punitive damages award only if the awarded amount is excessive. The Convention, however, acknowledges only one option if the judgment awards punitive damages: to deny enforcement. It would have been better if the Convention accepted the current practice of European courts and enable the court of origin to opt for an intermediate solution between full recognition and denial, consisting in reducing the size of the award. Bonomi (n 16) 29.

49 Nomer (n 17) 510; Sürat and Tarman (n 17) 487.

50 Pelin Güven, "Tanıma Tenfize Konu Olabilecek Kararlar", in Süheyla Balkar Bozkurt (ed) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler* (On İki Levha 2018) 35.

51 For example, Article 14 of the French Civil Code grants jurisdiction to the French court on the sole ground that the claimant is a French national. Article 23 of the German Code of Civil Procedure lays down that, where no other German court has jurisdiction, actions relating to property instituted against a person who is not domiciled in the national territory come under the jurisdiction of the court for the place where the property or subject of the dispute is situated. Dutch Code of Civil Procedure Article 127 provides that a foreigner, even if he does not reside in the Netherlands, may be sued in a Netherlands court for the performance of obligations contracted towards a Dutch citizen either in the Netherlands or abroad. Ceyda Sürat, *Avrupa Birliği'nde Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (Güncel 2007) 127. For further information on exorbitant jurisdiction rules see Nuray Ekşi, "Devletler Özel Hukukunda Aşırı Yetki Kuralları" in *Selahattin Sulhi Tekinay'ın Hatırasına Armağan*, (Marmara Hukuk Fakültesi 1999); Nuray Ekşi, *Türk Mahkemelerinin Milletlerarası Yetkisi*, (2nd Ed, Beta 2000) 50 *et seq.*; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 235 *et seq.*

52 For further information on the review of the jurisdiction of the court of origin at recognition or enforcement stage, see, Begüm Süzen, *Tanıma ve Tenfiz Davalarında Kararı Veren Mahkemenin Yetkisinin Denetimi* (On İki Levha 2016).

For a jurisdictional rule to be deemed as granting exclusive jurisdiction to Turkish courts, its purpose shall be to ensure that all disputes arising out of the relevant matter are resolved by the Turkish courts only.⁵³ In line with this purpose, the parties should always be able to find a competent Turkish court to resort to for the resolution of the matter.⁵⁴

Turkish courts have exclusive jurisdiction to resolve disputes arising out of rights *in rem* over immovable property located in Turkey. Therefore, any foreign judgment concerning rights *in rem* over immovable property in Turkey shall not be enforced.⁵⁵ As a matter of fact, the exclusive jurisdiction of the State to resolve disputes arising out of rights *in rem* over immovable property located within its territory is recognized in the Convention. According to Article 6, “*a judgment that ruled on rights in rem in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin.*” This provision means that, in its application of the Convention, the Turkish court will not only deny recognition or enforcement of a foreign judgment if the immovable property subject to the judgment is located in Turkey; but will also inquire whether the relevant property is situated in the foreign country where the judgment was rendered.

Whether exclusive jurisdiction forms an impediment to enforcement in disputes where one of the parties are protected due to its vulnerable position has been discussed in Turkey. These are disputes arising out of employment contracts, consumer contracts and insurance contracts. Articles 44, 45, and 46 PILA, respectively, provide for jurisdiction of certain Turkish courts in these disputes.⁵⁶ According to Article 47, the jurisdiction of these courts shall not be set aside by any jurisdiction agreement. Therefore, it is set forth that Turkish courts have exclusive jurisdiction in these matters.⁵⁷ However, it must be noted that Turkish courts’ exclusive jurisdiction is limited with the purpose of protecting the vulnerable party. Consequently, that purpose shall always be taken into account at the enforcement stage. For example, if the consumer is a habitual resident in Turkey, any foreign judgment rendered against him by a foreign court may not be enforced in Turkey. However, if the consumer seeks the enforcement

53 Nomer (n 17) 523; Çelikel/Erdem (n 44) 715.

54 Şanlı, Esen and Ataman Fıganmeşe (n 2) 561; Süral and Tarman (n 17) 498.

55 Nomer (n 17) 523; Çelikel and Erdem (n 44) 715; Şanlı, Esen and Ataman Fıganmeşe (n 2) 561; Özkan and Tütüncübaşı (n 17) 196; Süral and Tarman (n 17) 498.

56 The Turkish court that is located where the employee habitually carries out his work shall have jurisdiction in disputes arising out of employment contracts. In lawsuits initiated by the employee, the Turkish courts located at the domicile of the employer or domicile or habitual residence of the employee shall also have jurisdiction (Article 44 PILA). A consumer may bring proceedings against the other party in the Turkish courts located either in his domicile or habitual residence or the place of business, domicile or habitual residence of the other party. The other party may bring proceedings against the consumer in the Turkish court where the consumer habitually resides (Article 45 PILA). The Turkish courts located at the principal place of business or the agency or branch that had concluded the relevant insurance contract have jurisdiction over disputes arising out of insurance contracts. Proceedings may be brought against the policyholder, the insured or the beneficiary in the Turkish courts located at their domicile or habitual residence (Article 46 PILA).

57 In contrast see Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 207, 210, 214.

of a foreign judgment in his/her favor and against the other party, the enforcement of such judgments will not be refused due to exclusive jurisdiction.⁵⁸

The Convention brought a similar protection to consumers and employees in Article 7/2. If the jurisdiction of the court of origin is based on a choice of court agreement or on the fact that the consumer or employee did not contest the jurisdiction of the court of origin but argued on the merits; then the judgment will not be eligible for recognition or enforcement. Furthermore, the jurisdiction of the court of origin may not be based on the fact that the State of origin is where a contractual obligation shall be performed. It must be noted that, in the Convention's system, it is not taken into consideration whether the judgment is in favor of or against the vulnerable party or which party is requesting recognition or enforcement. In cases where the jurisdiction of the court of origin is based on an express or tacit agreement or it is located in the place of performance of a contractual obligation, the judgment of the court of origin will not be eligible for recognition or enforcement regardless of the fact that it is the vulnerable party who seeks recognition or enforcement.

The exclusive jurisdiction of the court of a requested State and exorbitant jurisdiction of the court of origin are not the only impediments to recognition or enforcement according to the Convention. Article 5 lists eligibility requirements for recognition or enforcement of a judgment.⁵⁹ These requirements concern the basis of jurisdiction of the court of origin. Accordingly, there must be a certain connection admitted by the Convention between the court of origin and the dispute which is, for example, based on habitual residence of the party against whom enforcement is sought, an express or tacit choice of court agreement, or a location of place of performance of a contractual obligation, or a branch, agency, or principal place of business.⁶⁰ It is beyond the scope of this study to explore each and every connection required for recognizing a judgment according to the Convention, but suffice it to say that the connections required between the dispute and the court are connections widely accepted in comparative law⁶¹ and in Turkish law. However, the basis for jurisdiction that are acceptable for recognizing a judgment provided in Article 5 can be more limited than the basis for jurisdiction for initiating an action in the court of origin.⁶² What Article 5 means is that the court

58 Nomer (n 17) 522; Çelikel and Erdem (n 44) 718; Şanlı, Esen and Ataman Figanmeşe (n 2) 562; Süral and Tarman (n 17) 500. For an opposing view, see, Doğan (n 28) 128.

59 It is opined in the doctrine that this is necessary for any world-wide convention since courts are unlikely to accept the jurisdictional findings of every other court in the world. William E. O'Brian Jr, 'The Hague Convention on Jurisdiction and Judgments: The Way Forward' (July 2003) 66 *The Modern Law Review* 503.

60 Rumenov (n 38) 388-389; David P. Stewart, 'The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (October 2019) 113 *American Journal of International Law* 778-779.

61 Rumenov (n 38) 389.

62 This is an approach of indirect jurisdiction. Louise Ellen Teitz, 'Another Hague Judgments Convention? Bucking the Past to Provide for the Future' (Spring 2019) 29 *Duke Journal of Comparative & International Law* 501. Another option would be to provide that a Contracting State must recognize and enforce a foreign judgment if its own courts would have exercised jurisdiction in corresponding circumstances. This would not realize the goal of accessibility and transparency of the law on recognition and enforcement of judgments; and the application of the Convention would vary for each Contracting State. David Goddard, 'The Judgments Convention – The Current State of Play' (Spring 2019) 29 *Duke Journal of Comparative & International Law* 483.

in the requested State shall first review the basis of jurisdiction of the court of origin and deny recognition or enforcement if the jurisdiction is based on a ground other than that provided in Article 5. To clarify with an example, if the judgment is ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, the act or omission directly causing such harm shall occur in the State of origin, irrespective of where that harm occurred. In other words, the only court that has jurisdiction shall be a court located in the place of occurrence of the act or omission according to the Convention. However, the court of origin may be located in the State where the harm occurred or may occur⁶³; or where the claimant suffering the damage or loss is a habitual resident;⁶⁴ in which cases it is possible to say there is admissible connection between the court of origin and the dispute. To be more specific, a factual example may be given. A farmer living in Germany loses his/her harvest due to the pollution of a river by a factory located in Austria. An Austrian court may find itself competent in a dispute arising between the farmer and the factory as Austria is where the harm occurred; but a court of a third contracting state shall deny recognition or enforcement according to the Convention as it is not Austria but Germany where the act directly causing the harm occurred. So, the judgment will not be eligible for recognition or enforcement according to the Convention.

This will not always mean that recognition or enforcement shall be denied. Article 15 of the Convention permits recognition or enforcement of judgments under national law. The foreign judgment may still be recognized or enforced according to national law. Consequently, the system of the Convention brings an additional burden of reviewing the jurisdiction of the court of origin at the outset of recognition or enforcement proceedings to determine whether the judgment is eligible to be recognized or enforced according to the Convention. If not, recognition or enforcement of the judgment may still be possible according to the national law. However, it is clear that the ratification of the Convention will complicate and lengthen the recognition or enforcement proceedings.

A Turkish judge, who does not examine the jurisdiction of the court of origin according to PILA, will first have to inquire into the jurisdiction of the court of origin to determine whether the judgment is eligible to be recognized or enforced under the Convention; and if not, then he/she will resort to PILA to decide on recognition or enforcement.

63 The reason of the divergence of the Convention from the European system is the effect of American jurisdiction rules on tort. For further information on this, see, Audrey Feldman, 'Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations' (2014) 89 New York University Law Review 2190-2227.

64 According to Brussels I Regulation Article 7/2, courts where the harmful event occurred or may occur shall have jurisdiction in matter relating to tort, delict or quasi-delict. In Turkish law, in addition to a similar provision, it is also provided that courts located in the domicile of the person suffering harm shall have jurisdiction (Article 16 of the Turkish Civil Procedure Code).

2. Incompatibility with a Choice of Court Agreement

According to Article 7/1/d of the Convention, recognition or enforcement may be refused if the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin.

There is no similar ground of refusal in Turkish law. However, it is discussed in the doctrine that omission of a valid choice of court agreement or an arbitration agreement would mean that the jurisdiction of the court of origin is exorbitant.⁶⁵ According to this view, a valid choice of court agreement or an arbitration agreement will annihilate the relationship between the parties or the dispute and the court of origin. In other words, if the defendant claimed that another court has jurisdiction due to a valid choice of court agreement between the parties, or asserted existence of an arbitration agreement before the court of origin; and such claim had been disregarded or wrongly evaluated by that court, the same defendant may claim denial of recognition or enforcement before a Turkish court due to exorbitant jurisdiction of the court of origin. Otherwise, the recognition or enforcement of the foreign judgment will be realized by disrespecting the wills of the parties pertaining to the choice of court or arbitration. However, according to a contrary view in the doctrine, a Turkish court is not obliged to control whether any choice of court or arbitration agreement had been violated by the court of origin.⁶⁶

3. Inconsistency with an Earlier Judgment of Another Contracting State

According to Article 7/1/f of the Convention, recognition or enforcement may be refused if the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Obviously, this ground is a suitable ground for a multilateral convention, and it cannot be found in any national law. Therefore, there is no similar ground of refusal in Turkish law.

4. *Lis Pendens*

According to Article 7/2 of the Convention, recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where (a) the court of

⁶⁵ Şanlı, Esen and Ataman Fıganmeşe (n 2) 567-568; Burak Huysal, 'Yabancı Mahkemenin Dava ve Taraflar ile Gerçek Bağlantısının Tanıma ve Tenfiz Üzerindeki Etkisi' (2011) Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 490-494.

⁶⁶ Ekşi (n 2) 279. Süzen makes a distinction between the existence of a choice of court agreement and an arbitration agreement; and opines that the court of origin may still have jurisdiction over the dispute according to its national law despite a choice of court agreement; whereas, the wills of the parties pertaining to arbitration shall always be upheld by the requested court. Süzen (n 52) 199-200.

the requested State was seized before the court of origin;⁶⁷ and (b) there is a close connection between the dispute and the requested State.

There is no similar provision in PILA. It is opined in the doctrine that while a proceeding for recognition or enforcement of a foreign judgment is pending, there is no prohibition to initiate a lawsuit in Turkish courts between the same parties on the same subject matter. In such a case, both actions will continue and when one of them is finalized, it will deter the other due to the existence of a final and binding judgment on the same matter between the same parties.⁶⁸ However, in practice, in the event that the request for recognition of a foreign judgment is made prior to an action on the merits of the same dispute, the Court of Cassation decides that the court reviewing the merits shall stay proceedings until the court reviewing recognition comes to a decision.⁶⁹

C. Ground for Refusal of Enforcement in Turkish Law: Reciprocity

According to Article 54(a) PILA, a multilateral or bilateral agreement between Turkey and the State from whose courts the foreign judgment was given may provide for the mutual enforcement of foreign judgments. If no such agreement is in place, a statutory provision must be in place in the relevant foreign State enabling the enforcement of Turkish court decisions in the relevant foreign state; or at least the Turkish court decisions shall *de facto* be enforced in that State.⁷⁰

Reciprocity is not one of the grounds for refusal of recognition (Article 58(1) PILA). The distinction between recognition and enforcement becomes important if there is no reciprocity between Turkey and the State from whose courts the judgment has been rendered.⁷¹

Reciprocity must exist between Turkey and the foreign State where the court of origin is located. The nationality of the parties is of no significance. In other words, the existence of reciprocity cannot be required between Turkey and the State that the parties to the dispute are nationals of.⁷²

67 If the proceedings in the requested state had been initiated after those in the state of origin, a denial of recognition would unfairly reward one of the parties' abusive attempts to avoid the effects of the foreign judgment. Bonomi (n 16) 11.

68 Çelikel and Erdem (n 44) 731; Özkan and Tütüncübaşı (n 17) 214; Güven, *Tanım – Tenfiz* (n 17) 147-148.

69 Yargıtay 11 HD, 4627/3589, 09.05.2019. (Kazancı Caselaw Database) <www.kazanci.com>

70 According to some scholars, if the Turkish court decisions are not *de facto* being enforced in a foreign state despite the existence of an agreement or a statutory provision, then the requirement of reciprocity shall be deemed not to exist. Nomer (n 17) 519; Şanlı, Esen and Ataman Fıganmeşe (n 2) 559. For further information on reciprocity, see, Özüm Demirkol, *Yabancı Mahkeme Kararlarının Tenfizinde Karşılıklılık Esası* (On İki Levha 2017).

71 For example, although divorce judgments are subject to recognition, the Second Civil Chamber of the Court of Cassation, in its decision of 10 October 2004, mistakenly stated that the enforcement of a divorce judgment given by the Bulgarian court must be refused due to non-existence of reciprocity between Turkey and Bulgaria. Yargıtay 2 HD, 9389/11706, 12.10.2004. (Kazancı Caselaw Database) <www.kazanci.com>. See Ali İhsan Özüğür, *Türk Medeni Kanununun Yeni Düzenlemeleri ile Açıklamalı İçtihatlı Velayet-Vesayet-Soybağı ve Evlat Edinme Hukuku* (Seçkin 2003) 1297. Notwithstanding, divorce judgments are not subject to enforcement; therefore, their recognition is sufficient to accept the *res judicata* effect of the divorce judgment in Turkey.

72 Çelikel and Erdem (n 44) 710-711; Özkan and Tütüncübaşı (n 17) 189; Süral and Tarman (n 17) 496.

The reciprocity shall be deemed as evident if the foreign court judgment may be enforced in the relevant foreign state with similar conditions as Turkish law. In other words, the foreign state does not require the existence of further conditions to enforce Turkish judgments. For example, if the relevant State does not apply the prohibition of *revision au fond* principle, reciprocity will be deemed not to exist.⁷³

The non-existence of reciprocity shall be sufficient for the rejection of enforcement of the foreign judgment. A Turkish judge shall first examine the condition of reciprocity and only if this condition is fulfilled, will further review take place.⁷⁴

In practice, courts always inquire into the existence of reciprocity from the Ministry of Justice.⁷⁵ Although its opinions are not binding on the courts,⁷⁶ the courts always prefer to act in accordance with the opinion of the Ministry. However, in some cases the opinion may not be clear or sufficient to determine the statutory or *de facto* situation in the relevant foreign law.⁷⁷ The court may also seek assistance of the comparative law and private international law departments or institutes of the law faculties, the diplomatic representatives of the relevant foreign countries, or experts. The parties may also assist the court by providing expert opinion on the statutory provisions or the case law of the relevant foreign law.⁷⁸

The requirement of reciprocity has been criticized in Turkish doctrine.⁷⁹ It is not easy for a Turkish judge to ensure the existence of reciprocity; the information provided by Turkish authorities may not be reliable on this matter and the application in different countries may rapidly change.⁸⁰ Furthermore, most states would first expect the other State to start enforcing its judgments.⁸¹ Additionally, other grounds of non-enforcement aim to protect either the interests of Turkish citizens or public policy. However, reciprocity in no way serves the interests of persons, as it is an entirely

73 Nomer (n 17) 520; Çelikel and Erdem (n 44) 706; Şanlı, Esen and Ataman Fıganmeşe (n 2) 551; Özkan and Tütüncübaşı (n 17) 189; Süral and Tarman (n 17) 496.

74 Nomer (n 17) 519; Özkan and Tütüncübaşı (n 17) 189; Süral and Tarman (n 17) 496.

75 Çelikel and Erdem (n 44) 711; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 107; Güven, *Tanım – Tenfiz* (n 17) 87; Süral/Tarman (n 17) 496.

76 Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 169; Süral/Tarman (n 17) 496.

77 For example, Second Civil Chamber of the Court of Cassation, in its decision of 16 February 2011, states that the opinion of the Ministry of Justice General Directorate of International Law and Foreign Relations found in the case file does not indicate whether there is a statutory impediment to the recognition of Turkish judgments in North Carolina and does not provide any information on the *de facto* situation. Yargıtay 2 HD, 11237/2718, 16.02.2011. (Kazancı Caselaw Database) <www.kazanci.com>. See Kazancı Caselaw Database at <www.kazanci.com>.

78 Şanlı, Esen and Ataman Fıganmeşe (n 2) 559; Süral and Tarman (n 17) 496.

79 According to one view, non-existence of reciprocity shall not preclude enforcement; instead, in case of non-existence of reciprocity, the prohibition of *revision au fond* shall be set aside and the merits of the case shall be reviewed by the Turkish court. Kerem Giray, “Karşılıklı Koşulu ve Uluslararası Antlaşmalarla MÖHUK’un Tanım-Tenfiz Sistemine Getirilen Farklılıklar” in Süheyla Balkar Bozkurt (ed) *Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler* (On İki Levha 2018) 76.

80 Nomer (n 17) 519; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 174.

81 Nomer (n 17) 519.

political criterion.⁸² On the other hand, others believe reciprocity does serve a purpose, especially in enforcing of foreign judgments concerning property rights, as the exercise of jurisdiction and execution of judgments are part of the sovereignty of the State; all states are free to exercise such power only with respect to judgments of foreign states which would mutually exercise the same power.⁸³

When scrutinizing the bilateral agreements enacted with countries located in South East Europe, Turkey has bilateral agreements on judicial cooperation in civil and commercial matters with Albania⁸⁴, Macedonia⁸⁵, Bosnia Herzegovina⁸⁶ and Croatia⁸⁷. All four of these agreements contain provisions pertaining to mutual recognition and enforcement of court judgments. Therefore, the existence of reciprocity shall not be a problem for judgments rendered by the courts of any of these four countries. These bilateral conventions will continue to apply as according to Article 23/2 of the Convention, it shall not affect the application by a Contracting State of a treaty that was concluded before the Convention.

Turkey enacted bilateral judicial cooperation agreements in civil and commercial matters also with Bulgaria⁸⁸ and Hungary⁸⁹; however, these agreements do not contain provisions concerning mutual recognition or enforcement of judgments. There is no agreement between Turkey and Kosovo, Montenegro, Serbia, or Slovenia. In practice, the Court of Cassation accepts that there is *de facto* reciprocity between Turkey and Bulgaria; thus, does not deny enforcement of Bulgarian court judgments due to non-existence of reciprocity.⁹⁰ However, it is not possible to state the same for other countries because there is no reported case-law of the Court of Cassation. Therefore, reciprocity may be an impediment to the enforcement of court decisions rendered in Hungary, Kosovo, Montenegro, Serbia, and Slovenia.

82 Ata Sakmar, *Yabancı İlamların Türkiye'deki Sonuçları* (Istanbul 1982) 88; Nomer (n 16) 520; Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 177.

83 Tuğrul Arat, 'Yabancı İlamların Tanınması ve Tenfizi' (1964) 21 Ankara Üniversitesi Hukuk Fakültesi Dergisi 502; Çelikel and Erdem (n 44) 705; Güven, *Tanım – Tenfiz* (n 17) 86.

84 The Agreement on Judicial Cooperation in Civil, Commercial and Criminal Matters between Turkish Republic and Albanian Republic. O.G. 09.11.1997/23165.

85 The Agreement on Judicial Cooperation in Civil and Criminal Matters between Turkish Republic and Macedonian Republic. O.G. 14.05.2000/24049.

86 The Agreement on Judicial Cooperation in Civil and Commercial Matters between Turkish Republic and Bosnia Herzegovina. O.G. 07.01.2008/26749.

87 The Agreement on Judicial Cooperation in Civil and Commercial Matters between Turkish Republic and Croatian Republic. O.G. 24.05.2000/24058.

88 The Agreement on Judicial Cooperation in Civil and Criminal Matters between Turkish Republic and People's Republic of Bulgaria. O.G. 24.05.1978/16296.

89 The Agreement on Judicial Cooperation in Civil and Commercial Matters between Turkish Republic and People's Republic of Hungary. O.G. 23.07.1990/20583.

90 Yargıtay 2 HD, 11442/1293, 06.02.2007; 15 HD 3538/4341, 08.11.2018 (Kazancı Caselaw Database) <www.kazanci.com>.

III. Procedural Issues Provided in the Convention

According to Article 13/1 of the Convention, the procedure for recognition, declaration of enforceability or registration for enforcement, and enforcement of the judgment, are governed by the law of the requested State unless the Convention provides otherwise. Article 9, 12, and 14 of the Convention concern procedural issues provided by the Convention. These provisions are not different from Turkish law except for Article 14 concerning security, bond, or deposit.

A. Severability

According to Article 9 of the Convention, recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognized or enforced under the Convention.

Partial recognition or enforcement of a foreign court decision is also possible in Turkish law. According to Article 56 PILA, the court may decide on enforcement of the whole or part of the foreign judgment; or refuse enforcement. The decision of enforcement is written under the foreign judgment and undersigned and stamped by a judge.

B. Documents to be Produced

Article 12/1 of the Convention lists the document to be produced by the party seeking recognition or applying for enforcement. These are: (a) a complete and certified copy of the judgment; (b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party; (c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin; (d) if recognition or enforcement of a judicial settlement is sought, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin. Article 12/4 provides that if the documents are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

These documents correspond with those listed in Article 53 PILA which lists documents that need to be attached to the petition for enforcement. According to Article 52 PILA, such petitions shall include the following information: (i) the names, surname and addresses of the person seeking enforcement, the person against whom enforcement is sought and their statutory representatives as well as the relevant attorneys-at-law

if any; (ii) the state where the court that rendered the foreign judgment is located, the name of the court and the date, number and summary of the judgment; (iii) if partial enforcement is sought, an indication as to which part is sought to be enforced.

C. Expedited Procedure

Leaving procedural issues to national laws, Article 13/1 of the Convention obliges the court of the requested State to act expeditiously.

According to Article 55/1 PILA, the court must examine the claim of enforcement and pleas against it in a simple litigation procedure provided in Articles 316-322 of the Turkish Code of Civil Procedure⁹¹ (hereinafter referred to as “TCCP”) that is a more facilitated procedure than the principal litigation procedure provided in Articles 118-186 TCCP.

D. Security, Bond or Deposit

According to Article 14/1 of the Convention, no security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

On the other hand, in Turkish law, the foreign parties must deposit a security according to Article 48 PILA. Foreign natural or legal persons filing or participating in suits or pursuing enforcement proceedings before Turkish courts shall be required to provide the security determined by the court in order to cover litigation and proceeding costs and the loss and damages of the opposing party. The court shall exempt the plaintiff, the intervening party or the party pursuing enforcement proceedings from providing security on the basis of reciprocity (Article 48 PILA). Furthermore, Turkish citizens who do not have their domicile in Turkey shall deposit a security to cover the possible expenses of the respondent when they initiate legal proceedings before Turkish courts (Article 84 TCCP). Foreign claimants⁹² and those who do not reside in Turkey shall be exempt from security in the following cases: (i) if he or she is in receipt of legal aid; (ii) if he or she has real property or a credit guaranteed with a right *in rem*, the value of which is sufficient to cover the amount of the warranty; (iii) if the proceedings are initiated solely with the purpose of protecting a child’s rights; and (iv) for the execution proceedings based on a court decision (Article 85 TCCP). The judge

91 O.G. 04.02.2011/27836.

92 The provisions of the TCCP pertaining to warranty shall be applicable also to the warranty prescribed in the PILA. Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (n 2) 92; Uğur Tütüncübaşı, ‘Milletlerarası Usul Hukukunda Teminat Gösterme Yükümlülüğü’ (2010) 12(2) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 210; Zeynep Çalışkan, *Milletlerarası Usul Hukukunda Teminat* (Vedat 2013) 44. An opposing view states that the requirements of exemption provided in the TCCP and in the PILA are different from each other. Şanlı, Esen and Ataman Fıganmeşe (n 2) 471.

determines the amount and type of the security (Article 87(1) TCCP). If the security is not deposited within the definite period granted by the judge, the proceedings shall be rejected (Article 88(1) TCCP).

It must be noted, however, that according to the bilateral conventions referred to above between Turkey and several of South East European countries concerning mutual cooperation on civil and commercial matters⁹³, the citizens of certain countries shall be exempt from the obligation to provide any security, bond, or deposit. The bilateral agreements with Albania, Bosnia Herzegovina, Bulgaria, Croatia, Hungary, and Macedonia, all provide for exemption from any security, bond or deposit.

Furthermore, Turkey is a party to the Hague Convention on Civil Procedure 1954.⁹⁴ The foreign claimants who are nationals of a contracting state to this Convention shall be exempt from security. Montenegro, Serbia, and Slovenia are parties to this multilateral convention.

Therefore, it is possible to say that the obligation to provide security according to Turkish law is not a real impediment for the recognition or enforcement of foreign decisions rendered in South East European countries.

Conclusion

Article 2 of the Convention excludes a comprehensive list of matters from the scope of the Convention. Especially, the recognition and enforcement of foreign judgments concerning family law matters; wills and succession; and insolvency give rise to problems in Turkish practice and relevant discussions in the doctrine. The Convention does not contribute to resolution of these problems or discussions. It states that the Convention will, in practice, mostly affect the recognition and enforcement of judgments rendered as a result of disputes between parties in a contractual relationship, actors of cross-border trade. Even for these disputes or parties, it is not easy to give a firm answer to the question which comprises the title of this study.

There will be certain advantages of the ratification of the Convention:

1. The ratification of the Convention by Turkey will eliminate the impediment of reciprocity, which is criticized in Turkish doctrine as being an entirely political criterion, provided that a significant number of other states also ratify the Convention.⁹⁵

93 See, notes 86-91 above.

94 According to Article 17 of the Convention, no security, bond or deposit of any kind, may be imposed by reason of their foreign nationality, or of lack of domicile or residence in the country, upon nationals of one of the Contracting States, having their domicile in one of these States, who are plaintiffs or parties intervening before the courts of another of those States. According to the Court of Cassation, this provision only concerns real persons and not legal entities; therefore, legal entities located in other contracting states can not be exempt from the obligation to provide security. Yargıtay 12 HD, 26555/3489, 11.02.2016; 12 HD, 17436/24686, 02.07.2013. (Kazancı Caselaw Database) <www.kazanci.com>. For further information, see, Emre Esen, 'Hukuk Usulüne Dair Lahey Sözleşmesi Kapsamında Yabancı Tüzel Kişilerin Teminat Yükümlülüğünden Muafiyeti' (2018) 9(1) İnönü Üniversitesi Hukuk Fakültesi Dergisi 1-26.

95 Rapidity of ratifications effect the ultimate success of the Convention. On one hand, it is detailed, complicated, and full of contingencies and compromises; on the other hand, the text of the Convention was adopted by all states that participated in its negotiation, and adherence is not restricted to members of the Hague Conference. Stewart (n 60) 783.

2. Although foreigners filing or participating in suits or pursuing enforcement proceedings before Turkish courts are under the obligation to provide a certain amount of security in Turkish law; Turkey is a party to multilateral and bilateral agreements according to which such obligation is abolished. Still, the Convention may contribute to eliminating the impediment of the obligation to deposit a security provided that a significant number of other states also ratify the Convention.
3. Bearing in mind that mediation is a prerequisite of court action in the resolution of labor and commercial disputes in Turkey, the ratification of the Convention by Turkey may contribute mostly to the efficiency of mediation proceedings. Judicial settlements reached at the end of mediation, which shall be enforced in the same manner as a judgment in Turkish law, will also be subject to recognition or enforcement in other contracting states according to the Convention. This might encourage parties, especially those who plan to enforce the decision or refer to the property of the other party located in another country, to settle through mediation in Turkey.

On the other hand, it must be noted that the Convention brings an additional burden of scrutinizing the jurisdiction of the court of origin at the recognition or enforcement stage. Even if a judge can still resort to his/her national law for recognition or enforcement, the eligibility requirement based on jurisdiction of the court of origin provided in Article 5 will definitely complicate and lengthen the recognition or enforcement proceedings.

Moreover, the Convention is not dealing with two issues which give rise to many problems in Turkish practice: First, the recognition and enforcement of decisions rendered by foreign authorities other than the courts; and second, the recognition and enforcement of interim measures, which are very significant in safeguarding the interests of parties in international commercial practice, and whose lack of global circulation hinder their efficiency. Had the Convention dealt with these two issues, it would contribute to the resolution of two major practical problems. In such a case, the answer of the question asked in the title of this study would definitely be in the affirmative.

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