

The below text on the recognition and enforcement of U.K. Judgments in Turkey was used in the speech given at Turkish-British Chamber of Commerce and Industry's Cross-Border Legal Issues Seminar held at the House of Lords, U.K. Parliament, Palace of Westminster on June 12<sup>th</sup>, 2013

## RECOGNITION AND ENFORCEMENT OF U.K. JUDGMENTS IN TURKEY

### INTRODUCTION

The provisions regarding the recognition and enforcement of foreign judgments are set forth in the **International Private and Procedural Law** ("IPPL"). There are also **bilateral and multilateral conventions** signed by and between Turkey and other states. These conventions take precedence as per Article 90 of the Constitution.<sup>1</sup>

As can be perceived from the Decision of the 19th Civil Chamber of the Supreme Court of Appeals - dated 05.09.1994 (as provided herein below) and subsequent judgments in this respect, there is a **de facto practice** established between Turkey and the United Kingdom;

*"The court judgment which is requested to be enforced by the plaintiff pertains to the English Courts. Albeit there is not an agreement between the U.K. and Turkey regarding the enforcement of the court decisions; the fact that the English Courts recognize and enforce foreign decisions was mentioned in various lawsuits and can also be comprehended from the documentation submitted by the plaintiff."*

Accordingly, the recognition and enforcement shall be realized by means of the implementation of Articles 50-59 (inclusive) of IPPL. The most significant aspect is that the judgment to be recognized and/or enforced should be a decision rendered by an independent judicial body.

At this point, the difference between recognition and enforcement should be mentioned. Under Turkish Law, a foreign court decision acquires final and definitive judgment status with recognition whereas such decision triggers public force when enforced and shall be treated like a national judgment. Nonetheless, neither during recognition nor enforcement proceedings, Turkish courts are able to go into the merits of the case but can only scrutinize whether the statutory preconditions are present or not.

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<sup>1</sup>Last paragraph of **Article 90 of the Constitution** states as follows: "International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. **In case of any conflicts between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.**" [Emphasis Added]

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## ENFORCEMENT

Article 50 of IPPL sets forth that foreign court judgments shall be subject to the enforcement decision of the Turkish courts in order to be enforceable in Turkey. In order for the enforceability in Turkey, such decisions should have become definitive as per the legislation in the country they are rendered.<sup>2</sup>

Under Article 51(1) of IPPL, the Courts of First Instance are charged with enforcement decisions.<sup>3</sup> Yet, within the framework of the distribution of work, Commercial Courts of First Instance and Labour Courts shall also be competent. Furthermore, with respect to family matters, Family Courts shall be competent as per the Law on the Establishment, Functions and Proceedings of the Family Courts numbered 4787 and dated 09/01/2003.

Article 52 (1) of IPPL states that anyone with a legal interest may request enforcement by a petition.<sup>4</sup> The petition should contain fundamental information as to the court judgment;

- a) The names, surnames, and addresses of the parties and, if any, their legal representatives;*
- b) The court of the state that has rendered the decree subject to enforcement and the name of the court, the date and number of the decree, and a summary of the judgment,*
- c) If partial enforcement is sought, an indication as to which part of the decree constitutes the subject of the request.”*

Article 53 (1) of IPPL further sets out the documents to be attached to the petition.<sup>5</sup> These documents are as follows;

- a) The original copy of the court decree duly upheld by the authorities of the foreign state or a copy of the decree certified by that organ of jurisdiction and a certified translation thereof,*
- b) A document or written statement from the authorities of the state which officially confirms that the court decree is definitive and a certified translation thereof.”*

Given that the Turkish courts cannot go into the merits of the dispute; Article 54 sets forth additional requirements for enforcement which are considered in detail herein below.

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<sup>2</sup>**Article 50-(1)** Enforcement of court decrees rendered by foreign courts in the course of civil lawsuits in Turkey which become definitive pursuant to the law of that foreign state shall be subject to the enforcement decision of the competent Turkish court.

(2) Enforcement decision may also be requested with regard to judgments on personal rights stipulated in the court decrees of foreign criminal courts.

<sup>3</sup>**Article 51- (1)** The Courts of First Instance shall have jurisdiction over enforcement decisions.

(2) These decisions shall be requested from the court at the place of habitual residence of the person against whom enforcement is requested if (s)he does have a domicile in Turkey, or from one of the courts in Istanbul, Ankara, or Izmir if (s)he does not have a domicile or habitual residence in Turkey.

<sup>4</sup>**Article 52- (1)** Anyone who has a legal interest in the enforcement of a decree may request such enforcement. Enforcement shall be requested by a petition. Copies of the petition in the number of opposing parties shall be attached. The petition shall contain the following:

- a) The names, surnames, and addresses of the parties and, if any, their legal representatives;*
- b) The court of the state that has rendered the decree subject to enforcement and the name of the court, the date and number of the decree, and a summary of the judgment,*
- c) If partial enforcement is sought, an indication as to which part of the decree constitutes the subject of the request.*

<sup>5</sup>**Article 53- (1)** The following documents should be attached to the petition:

- a) The original copy of the court decree duly upheld by the authorities of the foreign state or a copy of the decree certified by that organ of jurisdiction and a certified translation thereof,*
  - b) A document or written statement from the authorities of the state which officially confirms that the court decree is definitive and a certified translation thereof.*
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**(i) Existence of an agreement on a reciprocal basis or a provision of law or a *de facto* practice**

The first condition under the referred provision is reciprocity which can be by laws or can also be by *de facto* practice - as in the case of Turkey and the U.K. In a 2003 judgment of the Turkish Supreme Court of Appeals; the appeal - on the ground of non-existence of reciprocity - against the enforcement decision of the 2<sup>nd</sup> Civil Court of First Instance of Beyoglu in which the payment order by the Queen's Bench Division of the High Court of Manchester had been enforced was rejected and hence the *de facto* practice as stipulated in the aforementioned judgment rendered in 1994 was confirmed once again.<sup>6</sup>

**(ii) The judgment must have been rendered by a competent court on matters not within the exclusive jurisdiction of the Turkish courts**

The second condition is that the judgment must have been rendered by a competent court on matters not within the exclusive jurisdiction of the Turkish courts. Exclusive jurisdiction shall be at issue only if a lawsuit should be tried by the Turkish Courts – in an absolute manner. In a decision of the Assembly of Chambers of the Supreme Court of Appeals which concerned the appointment of a guardian that is a matter regarded under the exclusion of the Turkish courts; it is expressed that “[t]he lawsuit concerns a request for the recognition and enforcement of a decision on the appointment of a guardian which was rendered by a foreign court...A foreign court judgment in a matter under the exclusive jurisdiction of the Turkish courts cannot be recognized or enforced.”<sup>7</sup> Moreover, in case of the excess of authority of the foreign court which is defined under Article 54(b) as the non-existence of any actual relation between the court in question and the subject of the lawsuit and/or the parties thereto; enforcement may be prevented if and when so contested by the other party.

**(iii) The court decree should not be explicitly contrary to public order**

The third condition is that the judgment should not be contrary to public order. At this point, it should be emphasized that the examination as to the contradiction to public order is related with whether the results of the implementation of such judgment in Turkey shall give rise to any contradiction to public order or not. The Courts shall not allow the enforcement of foreign judgments regarding the custody of children. This situation can be perceived from the decision of the 2<sup>nd</sup> Civil Chamber of the Supreme Court of Appeals which states that “*the arrangement of custody concerns public order. Any written orders of custody rendered by foreign courts are contrary to the Turkish Civil Code*”.<sup>8</sup> In such case, the decision was partially enforced with solely the divorce being enforced. Moreover, the Turkish courts shall not allow for foreign court judgments to be enforced when the intention by mostly the Turkish parties is to avoid the mandatory rules as can be seen from the decision of the 11<sup>th</sup> Civil Court of the Supreme Court of Appeals which states as follows; “*at this point, the attempts of probably the Turkish parties to attain a foreign court judgment and to have such judgment enforced in Turkey with the intention to avoid the mandatory provisions of the Turkish law may be deemed as weakening the sense of justice and constituting contradiction to another mandatory law which is prohibition against fraud and consequently the Turkish public order*.”<sup>9</sup>

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<sup>6</sup> Decision of the 11<sup>th</sup> Civil Chamber of the Supreme Court of Appeals dated 15.09.2003 (Case No: 2003/1872 Decision No: 2003/7813).

<sup>7</sup> Decision of the Assembly of Chambers of the Supreme Court of Appeals dated 08.07.2009 (Case No: 2009/2-280 Decision No: 2009/326).

<sup>8</sup> Decision of the 2<sup>nd</sup> Civil Chamber of the Supreme Court of Appeals dated 22.11.2004 (Case No: 2004/12285 Decision No: 2004/13680).

<sup>9</sup> Decision of the 11<sup>th</sup> Civil Court of the Supreme Court of Appeals dated 06.04.2012 (Case No: 2012/3175 Decision No: 2012/5547).



**(iv) The rights of defence should have been complied with**

Finally, the fourth condition is that the rights of defence should have been complied with. All kinds of notifications not duly served or not served within the time limits may also be considered under this provision. In a decision of the 3<sup>rd</sup> Civil Court of the Supreme Court of Appeals; it was held that the defendant should have been granted the right to appeal the court judgment by means of the notification of such judgment to the defendant pursuant to the acknowledgment of the overseas place of residence of the defendant as the address for service.<sup>10</sup> The onus of proof regarding the service of the summons is on the other party asserting that they have indeed been served. Within this framework; enforcement may be accepted, rejected or partial enforcement may be at issue.

The notification and objection procedures are regulated under Article 55 of IPPL.<sup>11</sup> In this respect, it should be highlighted that the enforcement request petition shall subject to the simplified trial procedure – which is obviously easier and faster than the written trial procedure. Furthermore, the clause clearly sets forth what the defendant can object to; (i) that the enforcement conditions are not present; (ii) that the foreign court decree was partially or wholly executed; or (iii) that a reason hindering the enforcement has arisen.

According to Article 56 of IPPL, the court may render a decision for full or partial enforcement or dismissal of the request for enforcement.<sup>12</sup>

The execution and appeal of the enforcement decisions are governed by Article 57 of IPPL.<sup>13</sup> According to Article 57(1), foreign court decrees which are enforced by the Turkish courts shall be executed as if they are rendered by the Turkish Courts. Furthermore, as per Article 57(2), the appeal of the enforcement decision shall suspend the execution thereof.

## **RECOGNITION**

Recognition, as governed by Article 58 of IPPL, enables the foreign court decrees which cannot be enforced – as per their nature – to acquire final and definitive judgment status.<sup>14</sup> As can be perceived from the wording of the present provision, the conditions of recognition are similar to the conditions of enforcement - yet reciprocity is not sought.

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<sup>10</sup> Decision of the 3<sup>rd</sup> Civil Court of the Supreme Court of Appeals dated 02.07.2012 (Case No: 2012/11697 Decision No: 2012/16596).

<sup>11</sup> **Article 55- (1)** *The petition for the request for enforcement shall be served on the opposing party and shall contain the date of the hearing. Recognition and enforcement of undisputed court decrees shall also be subject to the same provision. For recognition of undisputed court decrees, the provision regarding notification shall not be applied. The request shall be reviewed and resolved by the court in accordance with the provisions of simplified trial procedure.*

*(2) The opposing party may only raise objections by claiming that the enforcement conditions under the provisions of this chapter are not present or that the foreign court decree was partially or wholly executed or that a reason hindering the enforcement has arisen.*

<sup>12</sup> **Article 56- (1)** *The court may decide for full or partial enforcement of the foreign court decree or may dismiss the request. This decision shall be written on the foreign court decision and signed and sealed by the judge.*

<sup>13</sup> **Article 57- (1)** *Foreign court decrees which are enforced shall be executed as if they are rendered by the Turkish Courts.*

*(2) The appeal of the court decrees regarding dismissal or acceptance of the enforcement request shall be subject to the general provisions. The appeal of the enforcement decision shall suspend the execution thereof.*

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As per Article 59 of IPPL, the recognition of the foreign court judgment takes effect as of the date of such foreign court decision by the national courts and not when it is recognized by the Turkish courts.<sup>15</sup>

## EVALUATION OF THE LAW AND PRACTICE

In the light of the foregoing, it can be mentioned that Turkish law is integrated with bilateral and multilateral conventions which enable the application of the decisions in that respect. Nonetheless, from time to time, the Supreme Court of Appeals may “hide” behind the ground of public order - generally in terms of family matters including custody of children, state assets etc. which are all sensitive issues in which the state cannot remain objective.

As per the Turkish law, public order is stated to mean “*the entirety of the rules protecting the fundamental structure and fundamental interests of the Turkish society*”.<sup>16</sup> It is generally accepted that the notion of public order differs under national and international private law. Under national law, public order means the entirety of the rules protecting the fundamental structure and fundamental interests of the Turkish society. These rules comprise of the rules – pertaining to legislation and private law – with which the parties should comply. On the other hand, the notion of international public order is narrower and restricted. Hence, a case which is considered as a violation of public order under the national law may not be considered as a violation of public order in terms of international law.

Other issues in which recognition and enforcement are considered within the framework of public order can be enumerated as Turkish economic life; Existence of public institutions; Cases which may require the preclusion of judges from trying the lawsuit as per such law; Existence of the cases requiring re-adjudication; Fraud; Pendency of another lawsuit and Application of the procedural laws violating fair trial. For instance, in a decision of the 2<sup>nd</sup> Civil Court of the Supreme Court of Appeals in which the issue of pending lawsuits (*lis alibi pendens*) was reviewed; it is stated that “*Turkish citizens may also file divorce at foreign courts in addition to the Turkish courts...In case of the filing of divorce both at foreign courts and the Turkish courts; the issue of pending lawsuits shall be confronted. The problems with adjudication in cases with a foreign element shall be resolved by the application of the lex fori. This rule is based on the principle of public order...*”<sup>17</sup>

Despite the existence of the aforementioned court decisions and the use of the ground of public order may indeed seem unfavourable in terms of foreign investors; it should be highlighted that these problems are not confronted in matters regarding the commercial agreements between merchants or debtor/creditor relations between the same and are restricted to the matters considered in this present article.

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<sup>14</sup> **Article 58- (1)** A foreign court decree may serve as a final judgment and conclusive evidence, provided that the court decides that the foreign court decree fulfills the conditions of enforcement. Subparagraph (a) of Article 54 shall not be applicable to recognition.

(2) The same provision shall apply to the recognition of undisputed court decrees.

(3) The same procedure shall also be applicable to the execution of an administrative transaction based on a foreign court decree.

<sup>15</sup> **Article 59- (1)** A foreign court decree shall serve as a final judgment and conclusive evidence as of the time the foreign court judgment becomes definitive.

<sup>16</sup> Decision of the Grand Chamber of Unification of Jurisprudence of the Supreme Court of Appeals dated 10.02.2012 (Case No: 201/1 Decision No: 2012/1).

<sup>17</sup> Decision of the 2<sup>nd</sup> Civil Court of the Supreme Court of Appeals dated 11.11.1997 (Case No: 1997/8719 Decision No: 1997/12159).

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