Turkish International Private Law: The Case of Recognition and Enforcement of Foreign Judgments

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ABSTRACT:

The main purpose of this study is to present the conditions for the recognition and enforcement of foreign judgments in Turkey under Turkish law, with emphasis on judicial decisions and a more follows reference to arbitration decisions. Due to the breath of the subject for which extensive literature has been developed in Turkish science as well as important jurisprudence, it has been considered appropriate to limit the development of this study to the presentation of the provisions of current Turkish law through its sources, notably the Code of Private International and Procedural Law (MÖHUK), as well as the way in which it is interpreted and applied, both in theory and in case law.

KEY WORDS:

International private law, turkish code of private international and procedural law (MÖHUK); recognition of foreign judgments; turkish arbitration decision; principle of reciprocity; public order.

1.SOURCES OF TURKISH PRIVATE INTERNATIONAL LAW

The first Turkish legislative act of private international law with reference to the recognition and enforcement of foreign judgments was "the Law of Obligations of Aliens in the Ottoman State"[1] (Memaliki Osmaniyede Bulunan Ecnebilerin Hukuk ve Vezaıfi Hakkında Kanunu) of 23 February 1330 (1914), a remnant of the Ottoman Empire which was maintained for decades in the legislation of the modern Turkish State. This law was enacted by the Sultan Mehmed E's government after the Ottoman occupation shortly after the end of the Second Balkan War and for the facilitation of foreign nationals who had settled or then settled in the cities of the Empire[2]. This law became obsolete after the adoption of the Turkish Code of Civil Procedure and was abolished definitively in 1982[3].

After the introduction of the first Turkish Code of Civil Procedure (Hukuk Usulü Muhakemeleri Kanunu/HUMK) of 18.08.1927, the recognition and enforcement of foreign judgments was governed by the provisions of articles 537-545 of the Code. It should be noted that these provisions significantly restricted the possibility of recognition and enforcement of judgments, with a more prominent example of the complete exclusion of foreign decisions on family law (art. 540 par. 4)[4].

The first legislative act of purely private international law of the modern Turkish State was the first Code of Private International Law and Procedural Law (MÖHUK) of 20.05.1982[5], which included a specific chapter on the recognition and enforcement of both foreign judgments (articles 34 to 42) and-for the first time-foreign arbitration (articles 43 to 45). The introduction of the new Turkish Civil Code in 2001 led to the appointment of a preparatory Committee for the drafting of a new Code of Private

1 The present work is updated until October 2018.

2 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, stanbul 2010, pp. 42ss.

3 A. ÇEL KEL, B.B. ERDEM, *Private international* law, stanbul 2016.

4 A. SAKMAR, Yabancı lâmların Türkiye'deki Sonuçları, stanbul Üniversitesi Hukuk Fakültesi, Fakülteler Matbaası, stanbul 1982, pp. 82ss.

5 T. ANSAY, E. SCHNEIDER, The new private international law of Turkey, in Netherlands International Law Review, 1990, pp. 142ss.

International Law and Procedural Law which replaced the first Code in 2007[6].

Thus, the general provisions of Turkish law on the recognition and enforcement of foreign judgments and arbitration awards are currently compiled in the Code of Private International law and Procedural law (MÖHUK) n. 5718, 27 November 2007, and particularly to articles 50-54 referred to provisions on international jurisdiction and the law applicable to disputes with foreigners[7].

The general provisions of par. 50 et seq. of Turkish Code of Private International and Procedural Law do not apply where there is either a bilateral agreement with the State from which the judgment originates or even a multilateral Convention ratified by that State, of course, if it concerns the subject of the foreign decision. The priority of international conventions against the general provisions of Turkish Code of Private International and Procedural Law stems from the provision in art. 1 par. 2 which states that the provisions of the Code are to be applied without prejudice to the international Conventions to which the Republic of Turkey is a contracting party. Turkey is a party to several International Conventions of the Hague Conference and other Multilateral Conventions[8] and has also concluded 24 Bilateral Conventions[9], mainly with Arab States, with Eastern European States as well as with Turkish-speaking former Soviet Republics of Central Asia. However, Turkey has not concluded a bilateral convention with Greece and Cyprus[10].

6 A. EVIN, G. DENTON, Turkey and the European Community, Laske Verlag, 2012, pp. 92ss.

7 T. ANSAY, D. WALLACE, Introduction to Turkish law, Kluwer Law International, 2011.

8 Turkey is also a party to the following Conventions:Convention on Recognition and Enforcement of Decisions concerning the Matrimonial Bond dated 1975; Convention on Recognition and Enforcement of Decisions concerning Maintenance Allowance Obligations Towards Children dated 1958; Convention on Recognition and Enforcement of Decisions concerning Maintenance Allowance Obligations dated 1973; European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children dated 1980. To all these Conventions, de facto reciprocity is also sufficient.

9 Turkey has also entered into bilateral treaties with Albania, Algeria, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, China, Croatia, Georgia, Iran, Iraq, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Macedonia, Moldova, Mongolia, Oman, Poland, Republic of Turkish Northern Cyprus, Romania, Slovakia, Syria, Tajikistan, Tunisia, Turkmenistan, Ukraine and Uzbekistan for the reciprocal recognition and enforcement of foreign judgments and judicial assistance in respect of commercial and civil matters

10 E. NOMER, Devletler Hususi Hukuku (Private international law), Istanbul: Beta 2013, pp. 438ss.

2.RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

According to the theory of Turkish law, foreign judgments that have either not been recognized or do not qualify for recognition, do not in themselves produce res judicata within the country. This principle is an expression of the independence of the domestic judicial authorities, so that no foreign decision can either be res judicata or can be enforced in the country without the intervention of the Turkish Courts. Thus, recognition of a foreign Court's judgment means applying its res judicata also within Turkey. The boundaries of res judicata, both objective and subjective, are determined in accordance with the procedural law of the State of the Court which delivered the judgment. Therefore, the res judicata of the Turkish Court's recognition decision can not be wider than that of the recognized foreign judgment[11]. However, if certain legal effects of the foreign decision are recognized by the foreign law in question but are not accepted by the Turkish, they can not be included in the recognition decision.

As regards the enforcement of foreign judgments, the competent Court is not confined to the recognition of foreign res judicata but, in addition, declares the enforeceability in Turkey of the voting provisions of the judgment (as long as this is permissible under Turkish law), by ordering all competent bodies of the Republic of Turkey for their execution. Therefore, for the execution of foreign judgments, additional conditions are required other than the conditions for the recognition[12].

Recognition and enforcement of foreign judgments is currently governed by articles 50 et seq. of the Turkish Code of Private International Law and Procedural Law. Articles 50-57 describe the procedure for the enforcement of foreign judgments, and articles 58-59 refer to the procedure for the recognition of judgments, by introducing certain specific arrangements, and

11 E. NOMER, Devletler Hususi Hukuku, Beta, stanbul 2008, pp. 472ss.

12 B. ERDEM, Yabancı Aile Hukuku Mahkeme Kararlarının Tanıma ve Tenfizi ile Avrupa Birli i Brüksel II Tüzü ü, in Uygulamalı Aile Hukuku Sertifika Programı, Medenî Hukuk ve Milletlerarası Özel Hukuk ile li kili Güncel Aile Hukuku Meseleleri, ITÜ Yayınarı, stanbul 2006.

by referring to the previous articles on enforcement, and finally articles 60-64 are devoted to the recognition and enforcement of foreign arbitration decisions[13].

The general and specific conditions for the enforcement of foreign judgments, which for the most part also apply to the recognition procedure, apart from the exceptions introduced by art. 58. For this reason, in several cases, reference will also be made to recognition issues of those judgments, in particular in matters of finality or public order. For more specific arrangements in accordance with the first paragraph of art. 50: Judgments of foreign Courts in civil cases which have become final under the law of the State in order to be enforceable in Turkey require a decision of enforceability to be applied by the competent Turkish Court[14].

The three basic conditions set out in that provision are a) to be a judgment given by a foreign Court in civil matters; b) has become final in accordance with the law of the issuing State; and c) declare its enforceability by a relevant decision of the competent Turkish Court.

The first condition refers to the type of decision that can be identified. The reference to "civil cases" (hukuk davalarina iliskin) until recently has led to the interpretation that the provision concerns only judgments handed down by civil Courts, thus ruling out criminal or administrative Court rulings.

An exception is, in accordance with art. 50 par. 2, criminal convictions of foreign Courts which contain provisions on civil rights (ki isel haklarla ilgili hükümler). These are the cases of criminal judgments handed down on private law requirements, in judgments of criminal Courts in labor law cases. This special rule of law has led to a new interpretation of art. 50, which has now been fully endorsed by Turkish theory, according to which, as a condition for the application of article 50, the type of Court which delivered the judgment is not examined, but a type of dispute

13 T. ANSAY, J. BASEDOW, Structures of civil and procedural law in South Eastern European countries, Berliner Wissenschafts Verlag, 2011, pp. 62ss.

14 A. ÇELIKEL, B. ERDEM, Milletlerarası Özel Hukuk, Istanbul: Beta 2012, pp. 507ss.

that must stem from private law relations[15]. As a result, it has been argued that even the decision of a foreign administrative Court that obliges a company to pay compensation for breach of a contractual obligation can be recognized and enforced in Turkey[16]. On the contrary, as a purely administrative, it has been judged by Turkish case law, decisions of administrative Courts dealing with unfair competition (cartels) and labor law cases not related to private claims, such as social security cases[17].

The judgment on whether or not it is a matter of private law it is up to the Turkish Court having jurisdiction to rule on enforceability, and this is considered to be in accordance with Turkish law[18], and this judgment is mandatory for the Court and is made of its own motion when seeking recognition and enforcement of a foreign decision.

It is also self-evident that the subject of recognition and enforcement can not be the subject of a foreign Court ruling on the recognition and enforcement of a judicial or arbitration award by a third State[19]. It also does not mean recognition of a foreign decision that by its very nature can not be recognized, such as the decision of a foreign Court declaring bankruptcy. On the other hand, it is acceptable to recognize (but not to execute) the decision of the foreign Court which rejects the plaintiff's claim, as it establishes the non-existence of the claim against the defendant[20].

It has also been ruled that the foreign judgment can not be enforced after the expiry of the limitation period, which is determined by the law of the State in which the judgment was delivered and therefore not apply to the 10-year period prescribed by Turkish law[21]. Also, foreign orders for payment may not be executed, even if they have become final and enforceable un-

15 G.TEKINALP, E. NOMER, A. ODMAN BOZTOSUN, Private international law in Turkey, Wolters Kluwer, 2012.

16 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, stanbul 2010, pp. 42ss

17 E. NOMER, Devletler Hususi Hukuku, Beta, stanbul 2008, pp. 472ss

18 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 476ss.

19 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 478ss.

20 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 484ss.

21 C. ANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyu mazlıkların Çözüm Yolları, Beta, stanbul, 2011, pp. 224ss.

der the law of the place where they were issued, as these are not judicial decisions as explicitly required by law[22]. It goes without saying that Turkish Code of Private International and Procedural Law is not the subject or recognition and enforcement within the meaning of that law of foreign notarial documents and administrative acts of foreign authorities[23].

As regards the notion of "Court" (mahkeme), it has been held that the authority which issued the judgment to be recognized must be recognized as a judicial or even a decision to bring legal effects similar to a judgment under the law of that State and, at the same time, as such and by Turkish law[24]. Thus, e.g. a divorce decree issued by the City of Copenhagen can not be recognized as it is not a body that meets the characteristics of a judicial authority[25]. A special exception, however, provides for art. 30 par. 2 of the "registry services act" (Nüfus Hizmetleri Kanunu)[26] which expressly defines the recognition and enforcement of adoption decision issued by foreign administrative bodies[27] provided that they are final or produce definitive results in accordance with the domestic law of the State[28].

It has also been ruled that divorce diplomatic missions or consular orders, as well as notarial deeds of marriage, do not fall within the scope of art. 50[29]. In contrast, to cases of marriage annulment under Muslim law with a unilateral declaration of husband to husband (3 times talak)[30], it has been held that since a foreign Court has issued a decree recognizing the marriage ter-

22 C. ANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyu mazlıkların Çözüm Yolları, op. cit. pp. 226ss.

23 S. ERTA , Yabancı Ilamları Tanınması ve Tenfizi, in Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 1987, pp. 282-283

24 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 363ss

25 Y. 2 HD, 13.04.1995 E.3612/K.4567 (Kazancı Hukuk Otomasyonu)

26 Law number nr. 5490 of 25-4-2006

27 See also the 29 April 2017, Article 27/A which has been added to Law on Civil Registry Services by Statutory Decree No: 690 issued under the State of Emergency. The Article regulates registration of divorce judgments produced by foreign judicial or administrative authorities to relevant civil registries.

28 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 503ss

29 A.C. RUH , Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun, Seçkin Yayınleri, stanbul 2009, pp. 126, see also: . 2. HD 12.07.2002 E.8254/K.9339.

30 R.W. HEFNER, Shari'a politics: Islamic law and society in the modern world, Indiana University Press, 2011, pp. 146ss.

mination in this way, it is possible to recognize it, since, of course, the rules of the Turkish public order are not violated[31].

The fact that such a decision was issued by a Court called "administrative" does not preclude recognition for that reason alone, since, the nature of the case, which in this case is purely private, is being investigated[32]. Thus, according to Turkish Code of Private International and Procedural Law the decision of a disciplinary body of a foreign sports federation imposing on an athlete a disciplinary punishment for exclusion or a fine, as the nature of that decision is more of an administrative rather than a private law[33].

3.FINAL JUDGMENT

Art. 50 par. 1 stipulates that the foreign decision which is sought recognition and enforcement must be final (kesinle mi). The classification of a judgment as final or not, always, is in accordance with the law of the State in which it was issued[34]. In any event, the fact that, under the law of the issuing State, the judgment is enforceable but not final (for example, provisional enforceable judgments), it is not sufficient to recognize and refuse recognition of a French inheritance certificate issued by a notary as it was not a Court decision[35]. A question arises as to those decisions that produce the so-called "typical" (maddi) but not "substantive" (ekli) res judicata[36]. These are primarily volun-

31 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 587ss. E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 506ss with reference to a judgment of the Chalcedon Court of First Instance: Kadiköy 2.Asl. H.M. 07.02.1991, in stanbul Barosu Dergisi, 1991, pp. 501ss.

32 Y. E. 1974/105, K. 1974/297 (Kazancı Hukuk Otomasyonu).

33 R. ERTEN, Milletlerarası Özel Hukukta Spor, Adalet Yayinevi, Ankara 2007, pp. 229-230.

34 Y. 14. HD 30.09.1985 E.5537/K.7505, in Yargıtay Kararları Dergisi, 1986, pp. 39-40 and Ankara Asl. H.M. 19.09.1991. A. SAKMAR, N. EK , Í. YILMAZ, Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun mahkeme Kararları, Bası Beta Yayınevi stanbul 2001, pp. 316ss which states that it is necessary to investigate when a decision becomes final under foreign procedural law, and proof is the relevant stamp on the decision given by the foreign judicial authorities.

35 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 589ss. E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 477ss, with an contrary opinion from A.C. RUHÍ, Milletleraresi Özel Hukuk ve Usul Hukuku Hakkinda Knun, Seçkin Yayinleri, Ístanbul, 2009, pp. 129ss, criticizing this issue, observing the unfair effects of excluding the execution of interim judgments, for example, in maintenance cases awarded by provisional decision in divorce proceedings or in paternity recognition when they are issued in countries which are not parties to the relevant Hague Conventions.

36 On this distinction, which is identical to that in Greek procedural theory, see. Y. 16. HD 15.07.1991

tary cases where they can be reformed if new information emerges later[37]. In such cases, both the theory and case law[38] are supported by the fact that it is not possible to recognize and enforce these judgments because of the doubt arising from the lack of effective res judicata. However, the exclusion of recognition and enforcement only on the grounds that they lack "substantive" res judicata has been criticized by part of the theory on the basis that this distinction is purely theoretical and does not clearly follow from the law. That view is supported by the fact that, in the legislation applicable to the recognition and enforcement of decisions up to 1982, art. 537 of the then Turkish Code of Civil Procedure required the existence of a "final decision"[39] (kesin hüküm te kil etmi bulunmasi).

However, derogations to the condition of termination apply to judgments of the Courts of the States with which Turkey has bilateral agreements to facilitate the mutual enforcement of judgments. Thus, e.g. in accordance with relevant bilateral Conventions signed with Tunisia and Italy, the recognition and enforcement of the foreign judgment is permissible, irrespective of the exercise of any extraordinary remedies (ola an kanun yolları), such as the appeal, provided that the decision is in accordance with the law of the executing State[40].

E.12819/K.10931, in Yargıtay Kararları Dergisi, 1992, pp. 741-742.

37 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 88ss.

38 Plenary Civil Divisions of Cassation Court (. HGK) 28.12.1994, E. 2-625/K. 905 (Kazancı Hukuk Otomasyonu).

39 At this point, it is useful to clarify the following: as "definitive" (nihai) in Turkey are the decisions of the Tribunals of the first instance, which are issued after the last debate before them (since, as a rule, the Court of first instance needs more than one debate until it makes its final decision). The word "final" is to be interpreted as meaning that the merits of the case can not be reexamined since in Turkey there are no secondary Courts of substance (although they are provided by article 341 of the Turkish Code of Civil Procedure (HMK), but have not yet been established) therefore decisions of first degree are only offensive with an appeal (temyiz) to the Cassation Court (Yargıtay). As "final" (kesinlesmi) are not those judgments of the first instance Courts for which either the time limit for appealing before the Cassation Court has expired, either have been appealed by an appeal and the Court of Appeal has issued an appeal or validating it. We see, therefore, that Court: finesse is ve nihai olmasını. Thus, the deletion of the reference to a "final decision", both in the old Code of 1982 and the new Turkish Code of Private International and Procedural Law, was considered to have been precisely because the legislator was interested in the "formal" irrespective of whether the decision could be reformed for substantive reasons. Besides, we believe that the recognition and enforcement of these decision is acceptable, as the hypothetical case of their reform in the future can come to recognize the new decision in Turkey. Moreover, this is not forbidden since, as we have seen above, the res judicata of the Turkish recognition/enforcement decision can not be wider than the res judicata of the foreign decision in its State of origin, and that res judicata has not prevented its reform in that State.

40 See also article 2c of the "Convention between the Republic of Turkey and the Republic of Tunisia

In addition, provisions facilitating the recognition of foreign judgments also exist in multilateral Conventions to which Turkey is a contracting party. Thus, for example, the "Hague Convention of 15 April" depends on the appeal, which is characterized by the Turkish theory as a "tactical" appeal. On the contrary, the "extraordinary" appeal (yargılamanın yenilmesi)[41] attacks the final judgments when there is a reason for rejoinder. For more information on the finality of the Turkish procedural law of 1958[42] on the recognition and enforcement of judgments concerning child-raising obligations[43] art. 2 par. 3 provides for the recognition of provisional enforcement orders or judgments ordering interim measures related to child nutrition even if legal remedies are pending[44].

However, such interim measures may not be enforced in the other State unless the law of the State in which enforcement is sought provides for the execution of such interim measures[45].

Termination or selectivity under the law of the State in which the decision was made must be expressly stated in an official document produced by the person concerned to the competent Court (art. 53 par. 2)[46].

on the Recognition and Enforcement of Judgments in Civil and Commercial Matters" ratified by the Turkish National Assembly on 17.7.1984 and article 19 par. 4 of the "Convention between the Republic of Turkey and the Kingdom of Italy on judicial protection, mutual assistance of judicial authorities in civil and criminal matters and the enforcement of judgments", ratified by the Turkish National Assembly on 16 February 1929.

41 J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO, Encyclopedia of private international law, Edward Elgar Publishing, 2017, pp. 2592ss.

42 A. PEKCAN TEZ, O. ALTAY, M. ÖZKEZ, Medeni Usul Hukuku Temel Bilgiler, Yetkin Hukuk Yayınları, Ankara 2008, pp. 251ss.

43 It was ratified by the Turkish National Assembly on 25.6.1973, but has not been ratified by Greece, see also article 4 of the "Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations", ratified by Turkey on 22.11.1982 and by Greece on 13.11.2003.

44 The term used in the legislation is "tenfiz karari", which translates verbatim into greek as "recognition decision". However, the theory of Turkish private international law mentions this term in conjunction with the Latin "exequatur", which in greek translation is "declaration of enforceability". See in argument: E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 474ss.

45 Y HGK E.2011/13-568 K.2012/47 T.08.02.2012

46 H. KRÜGER, F. NOMER-ERTAN, Neues Internationales Privatrecht in der Türkei, in Praxis des Internationalen Privat- und Verfahrensrechts, 2008, pp. 283-290.

4.EXECUTORY DECLARATION OF ENFORCEABILITY

Similarly, the execution of a foreign Court ruling within Turkey is not possible unless a decision of enforceability (tenfiz kararı) is first issued by the competent Turkish Court. This decision will first determine whether the first two basic conditions are met: either it is a matter of civil litigation or it is final[47].

Of course, for the recognition and enforcement of a foreign judgment, it must, in principle, be enforceable under the law of the State in which it was issued[48]. However, since this decision is not merely a finding of enforceability of the foreign judgment, but a decision of a Turkish Court investigating the existence of the relevant conditions required by law, its execution in Turkey is in accordance with the provisions of domestic law on forced and only if they allow it[49].

As is the case today, and in almost all European countries, the power of the judge to recognize and declare the enforceability of the judgment does not extend to the substance of the case, hence can not re-judge the legal or substantive validity of the requests accepted[50]. By contrast, until the introduction of the first Turkish Code of Private International and Procedural Law in 1982, art. 540 of the Turkish Code of Civil Procedure stipulated that: "(…) the Court of First Instance shall, at its sole discretion, issue a declaration of enforceability (...)"[51], leaving the judge the opportunity to recognize the foreign decision at its discretion, since there were no specific conditions for recognition[52].

The Court of first instance competent for the recognition and enforcement of foreign judgments is (art. 51 par. 1) the Court of first instance (asliye mahkemesi). However, in some cases, de-

47 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 590ss.

48 Thus, if according to the law of the State of origin of the decision, the limitation period has been reached, it can no longer be enforced within that State and therefore can not even be recognized or enforced in Turkey.

49 E. OMER, Devletler Hususi Hukuku, op. cit. pp. 433ss.

50 . 2. HD 24.04.2009, in stanbul Barosu Dergisi, 2003, pp. 1012-1014.

51 G. TEKINALP, E. NOMER, N. AYSE ODMAN BOZTOSUN, International civil procedure, in B. Verschraegen, R. Blanpain, F. Hendrickx, Turkey, IEL Private international law, Kluwer Law International, 2012.

52 R. KORAL, Milletlerarası hakemlik alanında Yargıtay XI. Hukuk Dairemizin devrim Yargıtay son kararları, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni Cilt 8 Sayı 2, 1988, pp. 45ss.

pending on the subject matter of the dispute[53], competent Court may be the commercial Court (ticaret mahkemesi)[54], the labor Court[55] (i mahkmemesi), or the family Court (aile mahkemesi)[56] in which areas is located.

Local jurisdiction is defined in paragraph 2 of art. 51 whereby the Court of the defendant's domicile is competent to execute and if that person is not domiciled by the Court of his habitual residence. If the defendant is not domiciled or habitually resident in Turkey, recognition and enforcement may be requested by the competent Court of Ankara, Istanbul, or Smyrna. On the other hand, the existence of a defendant's property in some part of Turkey has not bearing on the definition of territorial jurisdiction[57].

5.(FOLLOWS) LEGALIZATION, REQUEST AND REQUIRED DOCUMENTS

The right to seek enforcement of a foreign judgment has "any person having a legitimate interest in its execution" (art. 52 par. 1)[58]. It is noteworthy that this was a wording introduced in the Turkish Code of Private International and Procedural Law of 2007, in order to facilitate persons who were not parties abroad but who acquired a legitimate interest in its recognition, as is the case in particular in matters of inheritance, maintenance and custody[59]. The person concerned must apply to the competent Court: a) details of the the applicant and the defendants or their

53 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit, pp. 596ss.

54 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit, pp. 594ss. B. KURU, Hukuk Muhakemeleri Usulü, Seçkin Yayıncılık, 6.baskı, stanbul 2001, pp. 3927ss. See also contra: C. ANLI, Yabancı Hakem Kararlarının Tanınması ve Tenfizi Davalarında Tahsil Olunacak Karar ve lam Harcına ve Ticaret Mahkemelerinin Bulundu u Yerlerde Görevli Mahkemeye li kin Bazı Sorunlar, in stanbul Barosu Dergisi, 1993, pp. 768ss.

55 Y. 9. HD 09.12.1991, in Hukuku Dergisi, 1992, pp. 151

56 . 2. HD 08.07.2008, E.6987/K.10100, in Yasa Hukuk Dergisi, 2008, 1923 and . 2. HD 25.03.2009 E.18049/K.5516 R.G. 05.06.2009, 27249

57 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 500ss.

58 For the content of the legitimate interest in these cases see. Y. 2. HD 19.12.1994, E.11220/K. 12667 in N. EK Í, Kanunlav Ihtilafi Kurallarina Milletlerarsi Usul Hukuna Vatanda lik ve Yabanilar Hukukuna Pratik Çalı ma Kitabı, Beta, Ístanbul, 2007, pp. 79ss.

59 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 499 and 509ss, with reference to: . 2. HD 21.12.2009 E.9678/K.22090 and . 2. HD 20.01.2010 E.19620/K.1034, in Resmi Kararlar Dergisi, 2010, pp. 802ss. See also: Y. 2. HD 27.03.2008 E.20375/K.4214 and Y. 2. HD 25.06.2008 E.8629/K.9345 (Kazancı Hukuk Otomasyonu).

representatives; b) the State of origin of the judgment, the name of the Court, the number and date of the judgment with a brief summary; and c) only the operative part, clarification of what part is requested (art. 53 par. 1). The original or the copy of the decision certified by the Court which issued it with a certified translation and an official document of the foreign authorities providing the final judgment and a translation thereof must be attached to the application (art. 53 par. 2). It is worth noting that the corresponding wording of the previous law was "the original of the decision certified by the authorities in that country and a certified translation is annexed to the request", causing problems in many cases as the enforcement requests were rejected on the grounds that most Courts give a formal copy rather than the original of the decision[60].

6.(FOLLOWS) CONDITIONS TO BE MET BY THE FOREIGN DECISION

In addition to the essential requirements of art. 50 for the enforcement of a foreign judgment, art. 54 sets out four further conditions which must be met in order for a decision to be enforceable. Art. 54 reads as follows: the competent Court adopts a declaration of enforceability if the following conditions are met: a) there is a contract between the Republic of Turkey and the State which issued the decision based on the principle of reciprocity or a provision of law permitting enforcement judgments handed down by the Turkish Courts or when they are actually carried out in that State; b) the judgment in question concerned an issue which did not fall within the exclusive jurisdiction of the Turkish Courts and the judgment was not delivered by a foreign Court which itself recognized as competent, despite the fact that it had no real connection with the subject and the parties provided that the defendant had raised an objection; c) the decision is clearly non contrary to public policy; d) the defendant person was not properly summoned in accordance with the procedural rules of

60 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 595-596 where also references to relevant decision of the Turkish Court of Cassation (Y. 1HD 22.6.1987, Y. 4 HD 18.3.1993, Y. 2 HD 5.7.1994).

the Tribunal and was either not represented in that Court or was tried in default of the law of that State, and that person did not apply to the Turkish Courts for the enforceability based on one of the above mentioned data[61].

7.(FOLLOWS) THE PRINCIPLE OF RECIPROCITY

In art. 54 par. 1 referring to the principle of reciprocity[62], either the existence of a contract recognizing the execution of foreign judgments or the existence of relevant legislation in the State of origin permitting, or in fact permitting, the recognition of corresponding judgments given by the Turkish Courts. This provision was originally introduced by the first Turkish Code of Private International and Procedural Law of 1982 so far the relevant provisions of the Turkish Code of Civil Procedure allowed the recognition and enforcement of only those decisions originating from countries with which Turkey had concluded a contract of which the number was very small. The new provision has rightly said that apart from the policy on this issue in 2009, Turkey was finally condemned unanimously by the European Court of Human Rights in Fokas v. Turkey, 29 September 2009, in which Turkey finally did not even appeal[63].

For the necessity or not of the principle of reciprocity, two aspects have been supported in Turkish theory. There are the theoreticians who claim[64] that there should be no requirement for recognition of a foreign decision, as it is a political element that

61 D. DAMAR, European and Turkish private international law: Background and methodology, ed. A. Altunka , 2015, pp. 94ss.

62 The principle of reciprocity also applies to other provisions of Turkish law, such as in article 58 of act n. 2644 of 22.12.1934 "On Land Registers" (Tapu Kanunu) according to which (until its last amendment on 3.5.2012) foreign natural persons could acquire real rights in Turkey on the condition of reciprocity. Regarding reciprocity with Greece, the Turkish Court of Cassation had considered that Turkish nationals were able to acquire real estate in Greece, but according to Greek law (as in force until 2011) 55% of the Greek territory was classified as a border regions, and foreigners were deprived of the possibility to acquire real rights in these areas either by a living act either due to inheritance (which was, however, unheard of inheritance). It was therefore considered that there was no reciprocity in the acquisition of real estate in Turkey by a Greek citizen due to inheritance (Y.2 HD 27.06.2002 E.7515/K.8605 and .2. HD 04.06.2002 E.6014/K.8387-Kazancı Hukuk Otomasyonu).

63 C. GEIGER, Research handbook on human rights and intellectual property, Edward Elgar Publishing, 2015, pp. 135-137.

64 A. SAKMAR, Yabancı lâmların Türkiye'deki Sonuçları, stanbul Üniversitesi Hukuk Fakültesi, Fakülteler Matbaası, stanbul 1982, pp. 88ss. R. KORAL, Milletlerarası Özel Hukuku Hakkında Yeni Kanun ve Kar ılıklılık Esası, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1982, pp. 1ss.

should not affect law as well. Furthermore, the requirement of reciprocity and the difficulty of its finding often cause an obstacle which is considered unjustified, since the remaining (b, c, ç) conditions of that article are sufficient to protect the interests of Turkey and Turkish citizens in particular, who on the contrary, they end up being affected when they themselves are able to pass a positive decision to a foreign Court, then they are unable to execute it in Turkey[65].

On the other hand, there are those who defend the principle of reciprocity as an element of the sovereignty of the Turkish State and as a means of pressing for the recognition of judgments handed down by Turkish judicial authorities from other States. The de jure or de facto refusal to execute them constitutes, according to these writers, a legitimate reason for the respective exclusion from the execution of the decisions of those States in Turkish territory [66]. Proponents of reciprocity point out that after the addition of legal or real reciprocity to the law as a disjunctive condition, the recognition and enforcement of the decisions of most of the world's states is achieved[67].

In relation to the verification of de iure of de facto reciprocity in the law of the other State, the following problem often arises: the law of both States requires reciprocity from the other, with the result that one State expects the other to apply a first the principle of reciprocity[68]. However, it has been judged by jurisprudence that a judgment of a State whose law states that: "(…) it is not possible to recognize and execute a foreign judgment if the State in which the judgment is delivered does not recognize the principle of reciprocity (...)"[69], as that provision permits de jure the execution of Turkish judicial decisions in that State[70]. In

65 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 484ss.

66 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 601 and M.S. ERDO AN, Bo anma Kararlarının Tenfizi, in Ankara Barosu Dergisi, 1977, pp. 84.

67 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 598ss.

68 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 484ss.

69 Y. O URLU, B. GÜRPINAR, Introduction to Turkish law, ed. On Iki Levha Yayincilik, 2010, pp. 95ss.

70 The present case concerned the execution of a judgment given in Zurich, Switzerland, and for the purpose of establishing reciprocity the law of the relevant canton, which was considered compatible with article 38 of the previous Code (and already article 54 of the new Code), was examined. Y. 1 HD 06.11.1985, see against Y. HD 13 13.06.1990, but which was subsequently annulled by the Plenary Civil Divisions of the Court of Cassation,

any case, however, the search for reciprocity is necessary either for acceptance or rejection of the application for a declaration of enforceability, and the Court of Cassation of Turkey has set aside a lower Court decision on the grounds that "(…) as regards the issue of reciprocity, the refusal of the relevant application without the Court making any inquiry into reciprocity with the other State is contrary to the provisions of law (...)"[71].

An issue also arises when the law of the other State permits the execution of Turkish Court decisions, but gives the judge the opportunity to examine the merits of the case in order to verify whether the claim is well founded. In this case, it is argued that there can be no legal reciprocity, as foreign law imposes stricter conditions for execution than the Turkish one, and therefore real reciprocity must be investigated, if in practice applications for recognition of Turkish Court judgments which otherwise fulfill the requirements of the law are admissible [72].

It is also important to note the de facto application of reciprocity for countries with which Turkey has bilateral or multilateral agreements. For Turkey, although it has concluded a total of bilateral agreements with 24 countries, if it is found that in this state despite the existence of the Treaty, Turkish decisions are not executed without any other legitimate reason, whereas, on the contrary, national decisions with equivalent content is an obstacle to the execution of the decisions of the States in Turkey due to lack of reciprocity [73].

8.THE PROHIBITION OF THE EXCLUSIVE JURISDICTION OF TURKISH COURTS AND THE NON-DISCHARGE OF JURISDICTION

The second condition of art. 54 has two strands regarding two different issues related to the judgment to be enforced: a) not

which held that: "(…) if foreign law generally permits the execution of foreign judgments, subject to reciprocity by the other State, it must be accepted that the conditions laid down in article 38 relating to the existence of reciprocity are fulfilled (...)". Y. HGK 13.06.1990, in Yargıtay Kararları Dergisi, 1990, 1282.

71Y. 11. HD 30.01.2009 E.1284/K.980, in Banka ve Ticaret Hukuku Dergisi, 2009, pp. 276 as well as: . 2 HD 22.11.1984 E.8148/K.9647, Yargıtay Kararları Dergisi, 1985, pp. 338 and . 2. HD 14.05.1996 E. 2955/K.5085 (Kazancı Hukuk Otomasyonu)

72 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 602ss.

73 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 606ss.

to have been delivered on a question falling within the exclusive jurisdiction of a Turkish Court; b) not to have been issued in excess of jurisdiction of the Court which issued it, that is to say, that there is an adequate link with the case or the parties and that the defendant has challenged the jurisdiction of the Court before it is issued.

Regarding the issue of "exclusive jurisdiction" (münhasir yetkisi)[74], it is clearly stipulated that a foreign decision can not be executed if its subject matter was exclusively under the jurisdiction of a Turkish Court[75]. The assistance of the exclusive competence element is judged in accordance with Turkish law. Of course, the foreign judge could hardly have been aware of these provisions of Turkish law in the course of the case, but that limitation is imposed by the Turkish legal order in order to ensure that certain rights which are reserved for a Turkish Court[76]. It is therefore irrelevant whether, under the law of the Court of the Tribunal, it was responsible for the disputed disagreements[77]. The determination of the jurisdiction of the Turkish Courts in made both by articles of the Turkish Code of Private International Law and Procedural Law and by reference (see art. 40 of Turkish Code of Private International and Procedural Law) to the provisions of the jurisdiction of Turkish Courts which are found in particular in the Turkish Code of Civil Procedure as well as to other specific legislation.

Thus, art. 12 of the new Turkish Code of Civil Procedure is primarily a matter of jurisdiction for proceedings concerning rights in rem or changes in ownership of immovable property in Turkey for which the district Court has jurisdiction. In this category is included the legal treatment when it concerns real estate (miras sebebi ile istihkak davası). It has therefore been ruled that a foreign decision concerning an inheritance immovable proper-

74 A. ÇELIKEL, B. ERDEM, Milletlerarası Özel Hukuk, op. cit.,

75 Z. DERYA TARMAN, Turkey: The treatment of foreign law in Turkey, in Y. Nishitani, Treatment of foreign law: Dynamics towards convergence?, Ius comparatum-Global studies in comparative law, ed. Springer, 2017, pp. 592ss.

76 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 606ss.

77 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 488ss.

ty located in Turkey[78] can not be enforced, since this Court has the exclusive jurisdiction of the deceased's last domicile and if he was not in Turkey, then is the Court of the district [79] (articles 576 of the Turkish Civil Code and 43 of the Turkish Code of Private International and Procedural Law). Similarly, in a divorce lawsuit involving the distribution of common assets, if the property is located in Turkey, it is not the execution of the decision to change the ownership of the property[80], whereas, on the other hand, the part of the decision declaring marriage terminated is recognized[81]. On the other hand, the recognition of a decision on the divorce of a foreign Court to which a joint agreement of the spouses for the distribution of common property in Turkey was annexed[82] on the ground that the subject of the proceedings was not a change in any real right which was transferred not after the decision but due to the common agreement[83].

Another issue considered by Turkish case law to be at the exclusive jurisdiction of the Turkish Courts is the question of the appointment of a legal counsel, as opposed to the declaration of a person in Court, which is deemed not to fall within that exclusive jurisdiction. The reason for this crisis is based on art. 10 par. 3 of Turkish Code of Private International and Procedural Law, according to which: "all matters relating to underwriting (vesayet) or judicial assistance (kısıtlılık), other than the grounds for their declaration or termination, and those of tutelage on the property of the stranger (kayyımlık) are governed by Turkish law"[84].

78 See a decision of the Turkish Invalidity Division declaring that the application for recognition of a judgment given by the Court of First Instance in Rhodes concerning a right of inheritance over property in Turkey was rejected, on the ground that Turkish Courts have exclusive jurisdiction over decisions concerning property rights in Turkey: Y. 2. HD 10.02.1986 YHD 1987,1328

79 Y. 2. HD 22..06.1990 .6373/ .6410 and Y. 2. HD 16.10.2009, in Yargıtay Kararları Dergisi, 2010, pp. 1023ss.

80 Bodrum Asl. H.M. 12.04.1985 E.267/K.109 with remarks in: C. ANLI, Türkiye'de Gayrimenkullerle lgili Bir Yabancı Bo anma Kararının Tenfizi, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1986, pp. 40ss.

81 Y. 2. HD 25.01.1996, in Yargıtay Kararları Dergisi, 1996, pp. 845ss.

82 E. ÖRÜCÜ, Turkish family law: Facing the principles of european family law, in E. Örücü, J. Mair, Juxtaposing legal systems and the principles of european family law on divorce and maintenance, ed. Intersentia, 2007, pp. 184ss.

83 Y. 2. HD 06.12.1994 E. 9963/K.12007 (Kazancı Hukuk Otomasyonu)

84 G. TEKINALP, E. NOMER, N. AYSE ODMAN BOZTOSUN, International civil procedure, in B. Verschraegen, R. Blanpain, F. Hendrickx, Turkey, IEL Private international law, op. cit.,

Pursuant to articles 411 and 419 of the Turkish Civil Code[85] the appointment of the co-defendant and the supervision of legal assistance shall be made by the Court of the place of residence of the assisting party, whereas art. 462[86] states that, for the acts referred to in that article the authorization of that Court is required.

Thus, it has recently been decided[87] that a foreign decision on legal assistance can not be recognized in Turkey, as the reference in art. 10 par. 3 to mandatory application of Turkish law was considered to include not only substantive but also procedural law. In support of the statement of reasons, it is argued that for each act of support referred to in art. 462 of Turkish Civil Code, a new decision should be issued by the foreign Court and then the procedure for its recognition in Turkey is followed. However, both this "practical" reflection of the Turkish Court of Cassation and the interpretation for the application of art. 10 par. 3 are anything but a legal basis, which, in our opinion, was rightly criticized by the minority view in the judgment which supported the recognition of the foreign one, considering that art. 10 par. 3 is a rule that simply indicates the applicable law and not the basis of exclusive jurisdiction[88].

On the contrary, there is no exclusive jurisdiction of the Turkish Courts to resolve marriage by divorce[89], so that recognition of a foreign divorce decree is not impeded even if both the last joint residence of the spouses[90] and the defendant's domicile are in Turkey[91].

85 I. YILMAZ, Islamic family law in secular Turkish Courts, in E. Giunchi, Adjudicating family law in Muslim Courts, ed. Routledge, 2013.

86 M. AKIF AYDIN, Family law in Turkey: The Journey form islamic law to secular law, in A. Singer, M. Jänterä-Jareborg, A. Schlhytter, Family-religion-ratt, ed. Justus Förlag, 2010, pp. 164ss.

87 Plenary Civil Divisions of Cassation Court (Y. HGK) 08.07.2009 E.255/K.527, in Yargıtay Kararları Dergisi, 2010, pp. 998ss.

88 C. ANLI, E. ESEN, . ATAMAN-FIGANME E, Milletlerarası Özel Hukuk, Istanbul: Vedat 2014, pp. 352ss.

89 Turkish government has introduced a bill numbered 1/698 and dated 01.04.2016 concerning Turkey's accession to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance ("Hague Convention"), signed by the Prime Minister and all ministers.

90 Turkish government has introduced a bill numbered 1/697 and dated 30.03.2016 concerning Turkey's accession to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("Hague Convention"), signed by the Prime Minister and all ministers. In particular: "(...) the Government bill regarding the approval of the ratification of the Hague Convention is referred to the Committee on Foreign Relations as primary committee which shall go through the law making process. If enacted, Turkey's accession to the Convention will be an important step forward in the area of Turkish family law in terms of facilitating the protection of children in international situations, avoiding conflicts between multiple jurisdictions, applicable law and recognition and enforcement of measures for the protection of children (...)".

91 Z. AKICI, C.D. GÖYAYLA, Milletlerarası Aile Hukuku, Vedat Kitapçılık, stanbul 2010, pp. 50ss.

The same limitation also applies to disputes arising from certain contracts for which the legislature has reserved greater protection to the place it considers to be economically weak[92]. In particular, articles 44, 45 and 46 of Turkish Code of Private International and Procedural Law establish exclusive jurisdiction in Turkish labor, consumer and insurance disputes where the defendant is the employee, consumer or insured, respectively[93]. For these contracts, a possible conferral of jurisdiction by virtue of a special clause is in accordance with art. 47 par. 2 void in favor of the weaker party, thus confirming the absolute nature of exclusive jurisdiction in favor of those persons[94].

In labor disputes, art. 44 of Turkish Code of Private International and Procedural Law provides that in disputes arising out of an individual employment contract or employment relationship, if the place where the normal work is provided in Turkey, the Court of that place is competent. According to the case law, this competence of the Turkish Courts is exclusive and any other foundation of jurisdiction is void in favor of the employee. It follows that a foreign judgment given in a labor dispute against a worker who resident and habitually worked in Turkey can not be executed in Turkey[95], whereas a foreign judgment may be enforced on a worker's claim against an employer for work done in Turkey[96].

Accordingly, in consumer contracts, a foreign judgment against the consumer[97], if the consumer had his habitual residence in Turkey can not be executed, as the Court of the place of his habitual residence has exclusive jurisdiction under Turkish law (art. 45 of Turkish Code of Private International and Procedural Law). In Turkish theory, there has been a reflection on the extent of this restriction, in which cases exclusive jurisdiction is dee-

92 Z. AKICI, C.D. GÖYAYLA, Milletlerarası Aile Hukuku, Vedat Kitapçılık, op. cit., pp. 210-211.

93 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 486ss.

94 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 547ss.

95 Y. HGK 05.06.1998, E12-287/K.325 (Kazancı Hukuk Otomasyonu).

96 . 9. HD 09.12.1991, in Hukuku Dergisi, 1992, pp. 150ss.

97 N. EK , Türk Mahkemelerinin Milletlerarası Yetkisi, Beta, stanbul 1996, pp. 178ss.

med to exist[98] and on the other hand on the probability of such prohibition in cases where the provisions applied by the foreign Court were more favorable from those of Turkish law and therefore does not affect the protection of the consumer[99]. In our view, it can be argued as a contradiction that a Court proceedings in a foreign country is in itself a barrier to the consumer as he is charged both with extra costs and with practical difficulties (eg translation of documents, failure to produce witnesses) which may thus deprive him of the opportunity of proper defense.

As regards insurance contracts, art. 46 of Turkish Code of Private International and Procedural Law provides that the Courts of the place of residence are exclusively competent for actions against the insurer (sigorta ettiren), the insured person (sigortalı) or the beneficiary of the insurance (lehdar) or habitual residence of such persons if he is in Turkey. Again, however, the restriction on the enforcement of foreign judgments is applicable only to those persons and not to the insurer[100]. In addition, the exclusive jurisdiction of the Turkish Courts has been deemed to have introduced art. 10 of the Aliens of Societes Anonymes and Capital Companies Act[101], according to which a foreign company with a branch in Turkey could sue for any dispute (whether related to the branch) exclusively in the Courts of the place of establishment of the branch. That exclusivity was, however applicable only to third parties who were dealing with the non-resident company. That is, foreign insurance companies in respect of disputes arising from contracts in which extradition of a foreign Court had been agreed could not claim their insured persons, since the case-law considered that there was exclusive jurisdiction of the Courts of the branch in Turkey. They could also not plead lack of jurisdiction or local lack of jurisdiction in actions brought against them at the place of

98 G. GÜNGÖR, Milletlerarası Özel Hukukta Tüketicinin K runması, Yetkin Yanınları, Ankara 2000, pp. 173ss.

99 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 486ss.

100 Y. 11. HD 19.06.1997, .3609/ .5636, in Yasa Hukuk Dergisi, 1998, pp. 80ss.

101 See: O "Ecnebi Anonim ve Sermeyesi Paylara Bölünmü irketler Ecnebi Sigorta irketleri Hakkında Kanunu Muvakkat" of the year 1914, which was a residual of Ottoman legislation, was established with the entry into force of the new Turkish Commercial Code (CCT) on 01.07.2012.

its branch, even when, as mentioned, the dispute was irrelevant to the activity of the branch in Turkey[102].

On the other hand, it was permissible to bring an action in a foreign Court when the company was a defendant[103]. However, after the abolition of this law from 01.07.2012, the Courts of the place of establishment of the branch of a foreign company have jurisdiction only for the disputes arising out of the branch activity, and it should be considered that even for these disputes there is no longer any exclusive the jurisdiction of that Court and, by extension, the exclusive jurisdiction of the Turkish Courts[104]. Moreover, in our view, as the reason for the Turkish case-law based on the above exclusive competence was the protection of customers of the foreign company[105], after the addition of art. 45 on consumer protection to the Turkish Code of Private International and Procedural Law, we consider that such protection is sufficient, any continued acceptance of the above exclusive jurisdiction constitutes a direct discrimination against foreign companies.

Lastly, it has been argued in theory that bases of exclusive jurisdiction are founded on reference to domestic law on industrial and intellectual property issues enshrined in Turkey. In particular, in disputes arising with a claimant who appears to be the party to the right, either the Courts of the place of residence of the beneficial owner of the Courts of the place where the breach of the protected rights or the effects of the breach occurred[106]. In the case where the plaintiff-beneficiary does not reside in Turkey, the Courts of the city in which the registered rights have been enforced are competent. It is therefore argued that, by their very nature, the bases of exclusive jurisdiction of the Turkish Courts

102 V.R. SEVIG, Milletlerarası Özel Hukuku Alanında Yetki Anla masının Ayrıcalı ı, in stanbul Üniversitesi Hukuk Fakültesi Mecmuası, 2000, pp. 181ss

103 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 611ss.

104 C. SÜRAL, Hukuk Mahkemeleri Kanunu'nun Türk Mahkemelerinin Milletlerarası yetkisine etkisi, in Türk Barolar Birli i Dergisi, 2012, pp. 183ss.

105 E. ESEN, Türk hukukunda yabancı mahkeme kararlarının tanınması ve tenfizinde münhasır yetki kavramı, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 2002, pp. 195ss.

106 See also article 137 of Legislative Decree 551/1995 on the Protection of Patents (PatKHK), article 49 of Legislative Decree 554/1995 on the Protection of Industrial Designs (EndKHK), article 25 of Legislative Decree 555/1995 on the Protection of Geographical Indications (Co KHK) and article 63 of Legislative Decree 556/1995 on Trademrk Protection (MarKHK).

laid down by the relevant law constitute respectively bases of exclusive jurisdiction, thereby preventing the recognition of foreign decisions in relation to those matters[107].

9.(FOLLOWS) EXORBITANT JURISDICTION

The second part of paragraph (b) Art. 54 concerns the so--called "over-jurisdiction" (a ırı yetki) as is known, in particular, by the english term: "exorbitant jurisdiction". In other words, there is another negative condition which, if it does, impedes the enforcement of the judgment, namely when i) the Tribunal had wrongly held that it had jurisdiction, although it had no real connection with the subject matter of the dispute and the parties; and ii) the defendant disputed the jurisdiction of the Court with a claim in front of him.

This condition was added for the first time to the Turkish Code of Private International and Procedural Law, and until then the exceeding international jurisdiction of the foreign Court was treated by the Turkish Courts in opposition to the Turkish public order[108]. Starting from the principle of the natural judge, the ratio legis of this arrangement is based on the logic that the choice of a Court irrelevant to the trial may conceal the plaintiff's intention to restrict the judge's access to evidence and eventually the possibility of the adversary to defend his interests.

Thus, according to the theory of Turkish law, some of the principles applicable to the procedural law of certain american States such as "in-state service of process" and in particular "long arm status" are examples of exorbitant jurisdiction in accordance with Turkish law[109]. Therefore, a Court decision which has recognized itself competent for a decision based on one of the above principles without any real link to the case can not be

107 E. ESEN, Türk hukukunda yabancı mahkeme kararlarının tanınması ve tenfizinde münhasır yetki kavramı, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 2002, pp. 202ss.

108 That overstepping was considered to be a violation of the fundamental principles of Turkish law, as the case law violated article 36 of the Turkish Constitution and article 6 of the ECHR in order to ensure a fair trial. See in argument: E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 489ss.

109 C. ANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyu mazlıkların Çözüm Yolları, Beta, stanbul, 2011, pp. 223-224

executed in Turkey as contrary to Turkish law[110]. In any case, a failure by the defendant to propose that the Court is not competent in the course of the proceedings will remedy the impediment of the law on recognition of the decision, and the objection must necessarily indicate which Court actually has jurisdiction in the judgment under appeal[111]. However, even in this case, the possibility of refusing the Turkish Court to declare the judgment enforceable should not be ruled out on the ground that execution of the judgment could at the same time be described as contrary to Turkish public order[112].

Also as opposed to the Turkish public order, could be the enforcement of a judgment given by a foreign Court which did not have any particular link with the subject-matter of the dispute, which was even subject to the express agreement of the two parties to arbitration by a particular arbitration body [113].

10.THE PROHIBITION OF OPPOSITION TO PUBLIC ORDER

The third condition set out in art. 54 of Turkish Code of Private International and Procedural Law it has been perhaps the most debated and for which the more extensive case law has been formulated, despite the fact that the law devotes a very short provision. In particular, the third condition under art. 54 for the enforcement of foreign judgments is to state that: "the decision is clearly not contrary to public order"[114]. The basic but unique element which is clear from this wording is that the opposition to public order must be obvious and not marginal or even simple[115].

This is the second reference to public order in Turkish Code of Private International and Procedural Law, as art. 5 also states

110 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 490ss.

111 N. NAL, Örnek Kararlarla-Açıklamalı | Nüfus-Babalık-Evlat Edinme Yabancı Kararların Tenfizi Velayet, Adalet Yayınevi, stanbul 2002, 384-385.

112 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 490ss.

113 A. ÇELIKEL, E. NOMER, E. ESEN, Devletler Hususi Hukuku (Çözümlenmi Örnek Olaylar-Seçilmi Mahkeme Kararları), Vedat Kitapçılık, 2010, pp. 198ss.

114 C. ANLI, E. ESEN, . ATAMAN-FIGANME E, Milletlerarası Özel Hukuk, op. cit.

115 T. TURHAN, Milletlerarası Söze melerde Yabanı Para Kayıtları, Ankara 1996, pp. 198ss.

that the provisions of applicable foreign law that are obviously contrary to public order are not applicable[116]. However, in relation to art. 5 on the applicable law, it should be made clear that the provision of art. 54 on public order does not refer to any opposition to the law applicable to the Turkish public order, but only to the legal effects which have the execution of the decision in Turkey[117].

The definition of public order, as it has been provided by the case law, is not far from the definition in most European laws. Thus, in order to reject a request for execution of a foreign decision due to its opposition to public order, it should contain a set of provisions opposing the fundamental legal, moral and conscious rules necessary to maintain a peaceful and harmonious coexistence in the society [118].

Of course, because these results are directly dependent on both the substantive law (maddi hukuku) and the procedural rules (usul hukuku), it is not possible to execute the decision in the course of which important procedural rights of the defendant have been violated, with the prohibition of witnesses being examined only against the defendant[119].

Regarding the recognition of foreign Court decisions on a marriage solution by divorce, much debate has arisen in the legal science on the recognition of consensual divorce judgments. Many decisions of the Turkish Court of Cassation[120], have been issued in connection with this issue, according to which such decisions can not be recognized in Turkey because of the contradiction of the institution of the consensual Court in public order! The reasoning behind those judgments was focused on the lack of consensual divorce in Turkish law and the corresponding violation of public

116 C.D. GÖYAYLA, Yabancı mahkeme kararlarının tanınması ve tenfizinde kamu düzeni, Seçkin Yayınleri, Ankara 2001

117 C.D. GÖYAYLA, Yabancı mahkeme kararlarının tanınması ve tenfizinde kamu düzeni, Seçkin Yayınleri, op. cit., pp. 190ss.

118 . 2. HD 17.2.1997, E:675 K:1633, in Yasa Hukuk Dergisi, 1997, pp. 739.

119 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 497ss.

120 See in particular: Y. 2 HD 28.01.1982 RG 1982, 17604, Y. 2 HD 12.04.1983 RG 1983,18042, Y. 2HD 15.05.1984 MHB 1984, 94, YHD 1984, 1356 with remarks in: E. OMER, . 2 HD 26.05.1986, in stanbul Barosu Dergisi, 1987, pp. 139ss.

order by the recognition of a divorce that does not meet the requirements of Turkish law and is therefore disappointed[121].

These decisions were strongly criticized by most of the legal theory, which rightly observed that the reasons for those decisions were in full measure with Turkish Code of Private International and Procedural Law provisions on the recognition and enforcement of foreign judgments. This view was initially followed by a small part of the jurisprudence[122], but the complete conversion was made when the possibility of consensual divorce was introduced in Turkish family law[123].

A very interesting issue is also the recognition of divorces issued in Muslim countries[124] with the implementation of Sharia[125]. As for divorce, Muslim law allows the spouse to "relinquish" his spouse by pronouncing the word "talak" three times before adult witnesses, thus finally resolving the marriage. The problem arising from the recognition of foreign marriage resolutions with talak consists in opposing this institution to the principle of equality enshrined in the Turkish Constitution in art. 10 as the husband can unduly repudiate the spouse regardless of his or her own consent, while the spouse is only entitled to divorce under certain conditions. It has been ruled that it is clearly contrary to the Turkish public order to recognize a talak divorce which was taken without the spouse being asked about her desire to continue or terminate the marriage, as this constitutes a blatant opposition to the principle of fair trial and equality of the law enshrining both the Turkish Constitution and the European Court of Human Rights. On the other hand, the recognition of

121 Y. 2 HD 02.03.1990, in lmi Ve Kazai çtihatlar Dergisi, 1990, pp. 358.

122 Y. 2 HD 25.06.1986 E 3520 E. 5471 (Kazancı Hukuk Otomasyonu) with the opposite minority.

123 Initially by amending article 134 of the old Turkish Civil Code with Law 3444/1988, which many Courts refused to implement it as unconstitutional, a matter finally resolved by the decision of the Turkish Constitutional Court n. 43/1997 and now with article 130 of the new Turkish Civil Code introduced in 2001. See in particular: E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 492ss.

124 It is well known that Turkey, although the vast majority of its population is Muslim, is a secular (laik) state (article 2 of the Turkish Constitution) has adopted a family law based on the corresponding Swiss which certainly has nothing to do with muslim law, which looks alien to the Turkish legal world.

125 R.W. HEFNER, Shari'a politics: Islamic law and society in the modern world, op. cit., N. ABIAD, Sharia, Muslim States and international human rights treaty obligations: A comparative study, ed. British Institute of International and Comparative Law, 2008, pp. 98ss.

a divorce, which was obtained by the unilateral removal of the husband, was not validated (or more correctly: recognized) but subsequently by a judicial authority in which the spouse declared her consensus[126].

Contrary to public order it has been considered the recognition of a foreign judgment, which was issued without any of the grounds for divorce under Turkish law (articles 161-166 Turkish Civil Code)[127].

Another issue is the parental care (velayet) of minors[128]. In many cases the assignment of parental responsibility is at the same time the divorce proceeding of child's parents and the recognition of the foreign decision on marriage is often accepted, but not in the judgment on parental responsibility[129]. Thus, it has been held contrary to public policy to recognize and enforce a foreign decision to resolve a marriage, in its part, which states that the parental responsibility of the minor children will be shared jointly by the two parents. Again, as in the case of consensual divorce, the decisions of the Turkish Court of Cassation are based on the fact that, as Turkish law does not recognize the joint exercise of parental responsibility by divorced parents[130], the execution of such a foreign decision is obviously contrary to the Turkish public order[131].

This view has also been strongly criticized by legal theory, arguing that the assignment of joint parental responsibility can not in any way be regarded as contrary to public order, let alone

126 In Turkish law there are the following six grounds for divorce: 1) adultery; 2) life impunity and ill treatment; 3) crime or elite life; 4) abandonment; 5) mental illness and 6) strong marital shock. For more details see: E. AH N, Aile Hukuku Davaları, Adalet Kitabevi, Ankara 2012, pp. 144ss.

127 Y. 2. HD 28.02.1989 E.859/K.1759, in Yargıtay Kararları Dergisi, 1989, pp. 1087ss.

128 Particular attention is needed on this issue, as in matters of parental responsibility, the relevant international conventions signed by Turkey are in most cases implemented.

129 Z. AKICI, C.D. GÖYAYLA, Milletlerarası Aile Hukuku, Vedat Kitapçılık, stanbul 2010, pp. 161ss, with reference in: Y. 2. HD 05.04.2004 E.3276/K.4252 and Y. 2. HD 02.04.2003 E.3784/K.4670 (Kazancı Hukuk Otomasyonu).

130 Article 336 of the new Turkish Civil Code: "(…) if the parents are married: 1.During the marriage, the father and the mother jointly exercise the parental responsibility of the child; 2.When the marriage is terminated or annulled, the judge may assign parental responsibility to one of the two parents (...) as regards the content of parental responsibility, it shall include article 339 (...)".

131 Y. 2. HD 17.02.1997, in Yasa Hukuk Dergisi, 1997, pp. 739ss. Y. 2. HD 20.03.2003, in stanbul Barosu Dergisi, 2003, pp. 1004ss and . 2. HD 22.11.2004 with minority, see: M. M EK, Aile Mahkemelerinin Görevine Giren Davalar Ve Yargılama Usulü, Vedat Kitapçılık, 2007, pp. 142ss.

"obviously" contrary to art. 54. It should be noted that many international Conventions to which Turkey is party have as their basic principle the best possible protection of the interests of the child and as such can be considered the joint exercise of parental responsibility after the marriage has been resolved, starting with the thought that although the marriage failed, there was no change in the love and interest of the parents towards the child[132].

It has also been ruled out that the application for the enforcement of a foreign decision which has held that a child's parental responsibility has been examined by the parents and the wishes of their parents, but without taking into account the interest of the child. Such an omission in the judge's judgment inevitably leads, in view of both the provisions of the Turkish Constitution for the Protection of Children and the relevant International Conventions ratified by Turkey, to reject the enforcement request because of its apparent opposition to Turkish public order [133].

As regards the issue of kinship, it has recently been ruled that a foreign decision is not incompatible with the Turkish public order, according to which the child is not individually recognized as having the right to prejudice paternity, although this right is provided by Turkish Civil Code [134]. Indeed, this decision refers to the fact that, until the introduction of the new TCC in 2001, Turkish family law did not include the child as a legitimate person for insulting paternity. On the contrary, to these persons are included only the spouse, his heirs and the prosecutor, since in the ratio of the relevant provision of the old Turkish Civil Code of 1926, as interpreted during its term of office, the institution of paternity violation "mainly concerned the father and was set up in his own interest in order to get rid of a foreign child and the financial burden it entails!"[135].

132 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 620ss. B. ERDEM, Yabancı Aile Hukuku Mahkeme Kararlarının Tanıma ve Tenfizi ile Avrupa Birli i Brüksel II Tüzü ü, in Uygulamalı Aile Hukuku Sertifika Programı, Medenî Hukuk ve Milletlerarası Özel Hukuk ile li kili Güncel Aile Hukuku Meseleleri, Ü Yayınarı, stanbul 2006, pp. 145ss.

133 Y. 2. HD 28.02.1991 E.2108/K.3555 (Kazancı Hukuk Otomasyonu).

134 Y. 2. HD 04.05.2009 E.6063/K.8609 (Kazancı Hukuk Otomasyonu).

135 G. PASKOY, Soyba ının Reddi, in Türk Barolar Birli i Dergisi, 2011, pp. 355ss.

As opposed to Turkish public order, has been judged foreign judgment determining the maintenance[136] to be paid by the person liable in excess of his monthly income[137].

With regard to adoption, have been judged contrary to Turkish public order, foreign decisions which accept adoption even though there was a difference between the foster parent and the child between the age of less than 18 years[138] or whether the adoption decision was adopted without regard to the interest of the child[139]. Also, as opposed to the Turkish public order, has been considered the recognition of a foreign adult adoption decision by a foster parent who had other natural children[140], something which is forbidden under Turkish law[141].

In another case, a Turkish Court rejected the request to recognize a German gender based Court ruling, considering it to be contrary to public order. The reasoning of the decision was that the recognition of the decision was obviously contrary to public order, since the gender procedure did not follow that provided for in art. 40 of the new Turkish Civil Code[142]. However, the Turkish Court of Cassation withdrawn (by a majority) the decision, considering that the applicant did not obtain permission from the competent Turkish Court on gender reassignment and that the German decision does not refer to a medical opinion does not in itself constitute an opposition to public order and therefore does not prevent the recognition of that decision[143].

136 J.M. SCHERPE, European family law, vol. II: The changing concept of "family" and challenges for domestic family law, Edward Elgar Publishing, 2016, pp. 356ss.

137 A. SAKMAR, Yabancı lâmların Türkiye'deki Sonuçları, op. cit., pp. 82ss.

138 Y. 2. HD 12.04.2007 RG 08.05.2007-26516

139 Y. HGK 01.10.2003, in stanbul Barosu Dergisi, 2007, pp. 708ss.

140 Y. 2. HD 30.6.2003 E.8317/K.8930 (Kazancı Hukuk Otomasyonu)

141 See article 313 of the new Turkish civil law.

142 Article 40 of the Turkish Civil Code provides, inter alia, that, for a change of sex, the person concerned must first have reached the age of 18 and be not married. In order to proceed with the procedure, he must first seek the permission of the Court, in which he must produce a medical opinion from a hospital medical board proving the necessity of the intervention. Only under these conditions is it possible to register the change in the registry after the intervention.

143 Y. 21.12.2009, E. 9678/K. 10608, in stanbul Barosu Dergisi, 2012, pp. 225

11.(FOLLOWS) PROCEDURAL REASONS

The impossibility of executing a foreign decision due to a clear opposition to Turkish public order exists also where the judge finds that the fundamental procedural rights recognized by Turkish law in the context of the right to a fair trial have not been respected. The violation of these fundamental principles, guaranteed both by the Turkish Constitution and by Internationally ratified treaties, such as the European Convention on Human Rights, during the adoption of the foreign decision prevents its execution in Turkish territory because of the opposition of the latter to the public order of Turkey[144]. Indicatively in this case it has been established by case law that the divorce decision issued by a foreign Court against a defendant spouse who did not reside in the state of that Court and whose residence was known was summoned to the foreign Court as an unknown residence[145], when it is sufficient for the defendant to be summoned abroad to publish it in a local form and not to personally call him[146].

An opposition to public order can also be based on cases where a reason for repeating the process[147] (yargılamanın yenilmesi sebepleri), provided that this is foreseen by the procedural law of the Court seized. Such cases include inter alia the subsequent appearance of a substantive documentary evidence or proof of falsity on which the decision was based, as well as the subsequent conviction by the judge of misconduct against the

144 Turkey is a party to the 1961 European Convention on International Commercial Arbitration ("Geneva Convention") and the 1958 New York Convention, which was ratified on 2 July 1992 and entered into force on 30 September 1992. Turkey also ratified many bilateral and multilateral treaties and conventions, such as the Convention on Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), which entered into force in 1989 and the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), which was published in the Official Gazette in year 2000.

145 . 2. HD 25.06.2009, .12603. This could also be included in the last provision of article 54, if a complaint is made.

146 Y. 2. HD 26.06.1987, K.5571, in Yasa Hukuk Dergisi, 1998, pp. 1457, but where it is stated that if the defendant finally joined the trial, then there is no obvious opposition to the Turkish public order.

147 The term "yargılamanın yenilmesi" or "iade-i muhakeme" as defined in the old HMK could be attributed to greek as a "rejoinder" as the relevant process of Turkish law resembles in many respects the provisions of 539 et seq. of the Greek Code of Civil Procedure. See in particular: Y. ALAGOYA, M.K. YILDIRIM, N.Y. DEREN, Medeni Usul Hukuku Esasları, Beta, 7. baskı stanbul, 2001. A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 566ss.

defendant[148]. If one of the above cases occurs, then this fact may actually prevent the execution of this decision in Turkey because of public order opposition[149].

A question has also been raised in Turkish theory and case law on the execution of a foreign judgment when a judgment has been handed down by the Turkish Courts on the same subject matter and between the same parties. Although the law does not contain any relevant rules, it is consistently stated in the case law[150] that if a foreign judgment whose enforcement is sought is contrary to a decision of a Turkish Court on the same matter, it can not be enforced irrespective of whether the foreign decision was issued before or after the corresponding Turkish[151]. If, therefore, despite the existence of a contrary Turkish decision, the competent Turkish Court has declared the foreign judgment enforceable, this fact gives rise to both a ground of appeal (temyiz sebebi) as well as a reason for rejoicing (yargılamanın yenilmesi sebebi) of the enforceability judgment[152].

On the other hand, it has been rightly assumed that the enforcement of a foreign Court judgment awarding compensation for a road accident can not be considered contrary to public order, but the defendant was found to be unsubstantiated by a decision of a Turkish criminal Court[153]. Moreover, the judgment of the criminal Court on the defendant's fault is consistently accepted by the case law that it does not bind the civil Court hearing the claim for damages[154].

148 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 616ss.

149 See also the reasoning in a Yargitay judgment which dealt with the fact that, following the extradition of the foreign judgment, enforcement of the document on the basis of the documentary evidence (other previous judgment) on which the foreign Court was based for the admissibility of the action. Y. 2DH 15.11.1984, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1986, pp. 200ss.

150 Y. 2. HD 08.12.1993 E. 9648/K.11903, Y. 2. HD 15.12.1998 E.11732/K.13640 (Kazancı Hukuk Otomasyonu)

151 A. SAKMAR, Yabancı lâmların Türkiye'deki Sonuçları, op. cit., pp. 80ss., referring to the lis pendens that had been created since the filing of the claim in the Turkish Courts, stating in particular that the invocation of any "international lawsuit" would be contrary to the Turkish public order.

152 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 497ss. With reference to Y. 2. HD 15.11.1984, however, if the content of those two decisions is the opposite, albeit in part, the appeal is dismissed for lack of interest in bringing proceedings: N. NAL, Örnek Kararlarla-Açıklamalı Nüfus-Babalık-Evlat Edinme Yabancı Kararların Tenfizi Velayet, Adalet Yayınevi, op. cit., 360-361

153 A. SAKMAR, Yabancı lâmların Türkiye'deki Sonuçları, op. cit., pp. 80ss.

154 . 11. HD 23.02.2004, E. 2003/7126 K. 2004/1571 (Kazancı Hukuk Otomasyonu).

However, it was argued that it was not always possible to exclude the execution of such a decision as contrary to the Turkish public order, since in the case that the lawsuit in the Turkish Courts took place after the foreign decision was taken, the action should be considered of bad faith and therefore the enforcement of the former should not be prevented, as the objection to public order would be abused[155]. If, after the application for a declaration of enforceability has been submitted to the competent Court of First Instance, an action is brought before a Turkish Court for the settlement of the same dispute, it is reasonable to raise the issue of lis pendents once the first application has been lodged.

However, the answer given by Turkish theory is negative as no identity is identified in the lawsuits of each trial: in one we have a solution to the dispute in which its substance is examined, while in the other a request for exequatur to examine the conditions of Turkish Code of Private International and Procedural Law and not the substance of the case. In this case, the most appropriate solution is to abstain from the Turkish Court of substance from the examination of the case until the Court takes a decision on the execution of the foreign decision, and if the latter is accepted then the former will be rejected because of res judicata. In any case, however, if the recognition of the foreign decision alone is sought, it may be requested incidentally by the party concerned in the action pending in Turkey, in order to reinforce his allegations with evidence that procedures full proof[156].

Evidently opposed to Turkish public order are also those decisions which are devoid of reasoning, that is to say, those which, after the facts are quoted, end up in the operative part[157]. It has also been ruled that when an application for recognition of a

155 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 617ss. In addition, according to the supporters of that view, the adoption of a second decision on the same parties and subject is forbidden and is the reason for the resumption of proceedings for the second decision under article 445 of the new Turkish Code of Civil Procedure. See in this regard B. KURU, Baki-Hukuk Muhakemeleri Usulü, Seçkin Yayıncılık, 6.baskı, stanbul 2001, pp. 5164.

156 A. ÇELIKEL, E. NOMERE, E. ESEN, Devletler Hususi Hukuku (Çözümlenmi Örnek Olaylar-Seçilmi Mahkeme Kararları), op. cit., pp. 199ss.

157 Y. 2. HD 30.06.1999 E.5858/K.7609 in which it was held that the recognition of a divorce decree issued by the Sydney family Court, but without any such justification, is contrary to the Turkish public order.

foreign judgment is abused, contrary to the rules of good faith, the application for recognition is rejected, because of its abusive nature, its recognition in Turkey would be contrary to the rules of public order[158].

12.RESPECT FOR THE RIGHT TO LEGAL DEFENSE BEFORE THE JUDGMENT IS GIVEN TO THE FOREIGN COURT

The last condition of art. 54 of Turkish Code of Private International and Procedural Law relates to the defendant's enforcement and refers to the right to defend his interests before the foreign Court during the hearing of the claim[159], which is a manifestation of the right to a fair trial guaranteed by the Turkish Constitution and the European Convention of Human Rights[160]. Critical matters to which the law refers relate to a) an appropriate appeal for representation during the hearing of the claim, b) whether he or she was actually represented in the trial, and c) if the case was lawfully discussed in absentia.

However, the basic feature of this provision of art. 54 is that the Court will examine whether the above conditions have been met only if the defendant has complained that none of them is fulfilled. That is to say, in this case, the condition is not investigated by the Court of its own motion, as is done on the condition of public order[161], but only on appeal by the person against whom enforcement is sought[162]. The provisions of procedural law which will indicate how the defendant is summoned and represented in the proceedings and in the absen-

158 Y. HGK 11.10.1972 E.453/K.829, in stanbul Barosu Dergisi, 1974, pp. 548 in which the application for recognition of a divorce decree issued abroad was dismissed as unfair and contrary to public order because the applicant spouse had been represented at the divorce proceedings brought by her husband in Turkey and had refused the basis of the claim for the rejection so that there is no res judicata for marriage on the basis of a decision by a Turkish Court so that it can freely recognize the decision favorable to that foreigner.

159 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 498ss.

160 See article 36 par. 1 of the Turkish Constitution and article 6 of ECHR. According to the Turkish case law, timely summons are therefore a prerequisite for a fair trial, since only so the defendant has the time to prepare himself properly to put forward the allegations and evidence he deems necessary, as well as to challenge his respective claimant, 28.09.1995 .42/ .53 R.G. 16.05.1997, 22991

161 Y. 2. HD 25.06.1987 E. 4539/K.5571, in Yasa Hukuk Dergisi, 1988, pp. 1457ss.

162 . 2 HD 04.11.2004, E; 10683/K.13120, in stanbul Barosu Dergisi, 2007, pp. 709 which states that the examination of whether the foreign judge's procedural rules have been complied with for the summoning or absent minded hearing of the case, doe not constitute a breach of the rule of non examination of the correctness of the foreign decision.

ce of such a hearing shall be those of the foreign Court. It is therefore not lawful for the defendant's assertion to execute, for example, the service of the claim was filed within a shorter time limit than the Turkish Code of Civil Procedure and therefore the last condition of art. 54 is not met. However, in our view, we should not exclude the possibility of refusing to execute the decision in Turkey, for example, in foreign law, the term of service to a foreign resident was very short, but the reason for refusing the enforcement request should be sought in dealing with such execution as contrary to the Turkish public order because of the violation of the right to a fair trial, which of course is being investigated ex officio[163].

As regards the burden of proof of inappropriate summons and representation of the defendant in the foreign Court, proof must be given to the claimant, who must provide all the information required by law for the enforcement of the judgment. On the contrary, the defendant's claim to prove that he was not summoned correctly is far from perfect, since his objection often refers to total ignorance of the trial and therefore no evidence is in his hands, unlike the plaintiff, who also initiated the entire judicial process abroad[164].

In a case which divided theory and case law, the Turkish Court of Cassation was called upon to judge whether it is a violation of the defendant's right to defend himself against the enforcement of the decision, not to represent the defendant in fault, not the plaintiff but the lawyer of the defendant himself. The question was, therefore, that, despite the fact that the defendant was lawfully summoned in time to appear in the trial, and to that end he instructed a lawyer to appear on his behalf, his lawyer was not represented by his own fault, the defendant has to be convicted and the decision against him be issued. The Court held that this case did not fall under the fourth indent of art. 54, as this would in principle require a lawful summoning of the adversary, which was not the case here[165].

163 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 498ss. Also see: Y. 2. HD 04.10.2005 E.10735/K.13428 (Kazancı Hukuk Otomasyonu)

164 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 623ss.

165 Y. 2. HD 12.04.2000 E.2634/K.4605 (Kazancı Hukuk Otomasyonu).

It is noteworthy that the old Turkish Code of Private International and Procedural Law of 1982 laid down art. 38 and a fifth condition: if the defendant was a Turkish resident, the judgment could only be enforced if the foreign Court applied the law which under the rules of association of the Turkish private international law would be applied by a Turkish Court if it had been dealt with. This provision was intended to protect Turkish residents alone, precluding the possibility of coming from abroad even if it had adopted a law other than that applied by Turkish Courts. However, because of its purely subjective nature, this provision was removed from art. 54 of the Turkish Code of Private International and Procedural Law[166].

With regard to the abrogated above provision, in many cases in the past, the question has been raised whether a foreign decision can be enforced, although it has implemented Turkish law, but it has incorrectly applied it because of poor interpretation or application of irrelevant provisions[167] or were wrongly assessed and despite the Turkish law the evidence[168]. Any rejection by the Turkish Court of the application for enforceability due to the incorrect application of the applicable law by the foreign Court would run counter to the basic principle of Turkish private international law that it has no right to review the content of the foreign decision.

The position claimed was that such a decision was contrary to the Turkish public order, but that did not accept the case law of the Turkish Court of Cassation, which reiterated once again that the Turkish Court does not have the power to check the substance of the case[169]. In a relevant plenary decision stating that it is not for the Turkish Court of recognition to determine whether the applicable law was correctly applied, the defendant had the possibility to challenge the foreign decision in a higher Court of the State in which it was issued proposing its political divisions,

166 M. M EK, Aile Mahkemele-rinin Görevine Giren Davalar Ve Yargılama Usulü, Vedat Kitapçılık, 2007.

167 . 11. HD 15.09.1989 E.5912/K.4324 (Kazancı Hukuk Otomasyonu).

168 . 11. HD 15.09.1989 E.5912/K.4324 (Kazancı Hukuk Otomasyonu).

169 Y. 2. HD 27/10/1995 E.10281/K.11167, in Yargıtay Kararları Dergisi,1996, pp. 528ss and Y. HGK 21.06.2000 E.1051/K.1068.

the objection to public order was rejected by our argument, which is very pertinent, that the defendant was able to propose the correct application of Turkish law to the alien Court and exhausting the means provided there[170].

13.(FOLLOWS) SERVICE OF THE APPLICATION

Pursuant to art. 55, the application for recognition of the judgment together with the prescribed date of the trial is served on the defendant. Any failure by the applicant to perform the intended service results in the rejection of the request for recognition of the granting of enforceability, as the defendant denies the right of defense[171]. The same precondition applies to cases of voluntary jurisdiction (ihtlafsiz kaza kararları), but not to those in which there was no other party (hasımsız ihtlafsız kaza kararları), so that there is no question of service to the defendant[172].

It is worth noting, however, that under the Hague Convention on Civil Procedure of 1954[173], a decision of another Contracting State is enforceable in respect of the costs of the proceedings without the need for the defendant to be heard, offense against the wrong interpretation of its law. This is perhaps the only case of Turkish exequatur to declare a foreign decision enforceable without summoning the plaintiff[174].

Cases relating to the recognition and enforcement of foreign judgments are subject, in accordance with art. 55 par. 1, to a special procedure where the so called "simplified procedural

170 HGK 21.6.2000, in Yeni Hukuk içtihat Dergisi, 2000, pp. 1510ss, but left open the possibility of considering the opposition to Turkish public order if, although the defendant put forward the relevant arguments and objections to the highest Court of the foreign state to which he could have recourse under foreign procedural law, Turkish law was nevertheless applied incorrectly.

171 Y. 2. HD 08.04.2008 E.4203/K.4879 R.G. 07.05.08-26869

172 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 630. Unfounded affairs appear for the first time in the new Turkish Code of Private International and Procedural Law, as in the previous 1982 code there was no mention of this, which has the effect of questioning the possibility of recognizing and enforcing such judgments and of issuing negative judgments.

173 "Convention de La Haye relative à la procédure civile" (1954), which has been ratified by the Turkish National Assembly and entered into force on July 11, 1973 as well as by other 39 States, but not Greece and other european States.

174 Ö. GÜNSEL , Türk Hukukunun Yorumunda Hata Yapılmasına Ili kin Yargıtay Hukuk Genel Jurulunun 21.06.2001 Tarihi Kararı, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1999-2000, pp. 767ss.

rules"(basit yargılama usulü hükümleri)[175] are applied. The inclusion of these cases in this process was preferred by the legislato[r 176] for two main reasons: a) the desire not to delay the completion of recognition and enforcement; and b) the choice of carrying out the whole process in writing and with facts and figures they are notified from the outset to the other party as all the facts are known and by definition the evidence is documents[177].

The objections to the enforcement or recognition of the defendant are referred to in the second paragraph of art. 55. The defendant is therefore entitled to plead before the Court either that one of the conditions laid down in paragraphs 50 to 55 of Turkish Code of Private International and Procedural Law is not fulfilled or that all or part of the operative part of the decision has already been executed in Turkey or anywhere else (eg in the country where the decision was made). These reasons are restrictive and not indicative and therefore, as we have seen above, are not legitimate the defendant's objection concerning the legal or substantive correctness of the foreign decision.

Under art. 56, the Court accepts totally (tamamen) or some (kısmen) the application for a declaration of enforceability or rejects the request in its entirety. The decision issued subsequent to the test of the foreign decision, bearing at the end the stamp and the signature of the issuing judge[178].

175 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 509ss, Akıncı/Gökyayla, 57, Eyüp Asl. H.M. E.766/K.6 in N. EK , Kanunlar htilafı Kurallarına Milletlerarası Usul Hukukuna Vatanda lık ve Yabanılar Hukukuna Pratik Çalı ma Kitabı, Beta, op. cit., pp. 86ss.

176 See also articles 316-322 of the new Turkish Code of Civil Procedure (HMK), which entered into force on 12.1.2011 and replaced the previous (old) Turkish Code of Civil Procedure of 1926, which governed this special procedure in articles 507-511. The main differences identified in this "simplified procedure" are: a) the extension of the time limit which the defendant may require for his first reply to the application and the exclusion of the rejoinder or the second response of the applicant and the defendant respectively, b) the mandatory reporting of all the facts and evidence relied on or will be provided by the applicant subsequently, without being able to be invoked or referred for the first time in the trial, while it is forbidden any change or extension of the claimant's and defendant's claims after the applicant's filing of the application and the first reply of the defendant respectively, c) the possibility for the Court to take a decision without the parties being summoned to the proceedings and only with the information contained in the file, while d) a particular feature of this procedure is the possibility of initiating the decision without explanation in the form of a report in the reasoned judgment of the Court is also published at the latest within one month of the publication of the minutes. For more information, see B. KURU, Hukuk Muhakemeleri Usulü, Seçkin Yayıncılık, 6.baskı, op. cit., pp. 576ss.

177 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 632ss.

178 A. ÇEL KEL, B.B. ERDEM, *Private International* Law, op. cit.

The exequatur decision shall have the force of res judicata, such as any decision by a Turkish Court, after the deadline for review has been set aside or if an appeal is made after it has been rejected[179]. This means that no new legal remedy may be ruled in the Turkish Courts, if this is the case, the defendant may propose an objection to the existence of a res judicata[180] (kesin hüküm itirazı) which may be raised at each stage of the trial[181].

The execution of the decision is made in accordance with art. 57 par. 1 as any other decision of the Turkish Courts, in accordance with the provisions of the Code of Conduct and Bankruptcy (cra ve flas Kanunu)[182]. However, it is not possible to execute those judgments which do not comply with the provisions of art. 297 of the new Code (art. 389 of the old Turkish Code of Civil Procedure) requiring that the operative part of a decision be clear without giving rise to any doubt or uncertainty (açık, üphe ve tereddüt uyandırmayacak ekilde)[183].

Also, the decisions on recognition and enforcement issued by the Turkish Courts can be appealed in accordance with the grounds for appeals set aside by the new Turkish Code of Civil Procedure, while it is explicitly stated that the appeal will suspend their execution. It is interpretive that these decision are also appealed by a re-enactment if there is any reason for renunciation[184].

179 A. ÇEL KEL, B.B. ERDEM, *Private International* Law, op. cit.

180 Y. 14. HD 30.01.1978, E.4822/K.546, in Yasa Hukuk Dergisi, 1978, pp. 473ss.

181 Y. HGK 20.01.1988 E.517/K.37, in Yasa Hukuk Dergisi, 1988, pp. 1629ss.

182 Law 2004 ratified by the Turkish National Assembly on 9.6.1932. For more information on Turkish law enforcement, see: B. KURU, R. ARSLAN, E. YILMAZ, cra ve flas Kanunu ile Nizamnamesi ve Yönetmeli i, Yetkin Yayınevi Ankara 2008, and the extensive recent amendments to this code, T. UYAR, G. UYAR, 6352 Sayılı, 2.7.2012 Tarihli Kanun ve 6103 Sayılı, 14.1.2011 Tarihli Kanun ile cra ve flas Kanunu'nda Yapılan De i likler ve Yenilikler, in stanbul Barosu Dergisi, 2005, pp. 33ss.

183 In that paragraph, it is possible to present obstacles to the enforcement of those decisions which, without specifying the amount to be paid, simply refer to "payment of legal interest on late payment" or "legal value added tax" without being easily identifiable by based on the decision, see in this: E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 502 with references to case law.

184 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 634ss.

14. REQUEST FOR THE RECOGNITION OF FOREIGN JUDGMENTS

A part form the request for execution of a foreign decision within Turkey, a request can only be made for the recognition of a decision. This is the case either when the applicant has no voting rights (eda hükümleri) or when the applicant wishes for his/her own purposes only the recognition and not his/her execution[185] or, finally, when the condition a) of art. 54 required for the execution but not for recognition.

Recognition of the foreign decision may be made either by way of interruption in an action already brought before the Turkish Courts or by a separate application specifically requesting its recognition. These two possibilities are expressly referred to in art. 58 of Turkish Code of Private International and Procedural Law, which reads as follows: 1. In order for a foreign judgment to be admissible as a complete proof (kesin delil) or as a res judicata (kesin hüküm), the Court must investigate if the conditions for the execution of foreign judgments are met. The first paragraph a) of art. 54 shall not apply to recognition. 2. Voluntary cases are subject to the same provisions. 3. The same procedure applies to any administrative action in Turkey based on a foreign judgment.

Thus, as regards the conditions for recognition of foreign judgments, art. 58 par. 1 refers to the general provisions of articles 50 to 54 which must be fulfilled for their enforcement, with the exception of the case referred to in a) art. 54 which is not applicable[186]. It is not necessary, therefore, to establish the principle of reciprocity in order to (only) recognize in Turkey a judgment of a foreign Court. This exception has been perceived by Turkish theory as corresponding to the provision of paragraph 5 of the

185 In this case, however, it is argued that the legitimate interest of the applicant for recognition should be investigated, see, A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 636, footnote 146. See also Y. 13.HD 30.06.1983 in Yasa Hukuk Dergisi, 1990, pp. 1029 in which it was held that the application for recognition of a foreign decision concerning a debt claim was properly rejected since the applicant had no legal interest in recognizing it but instead had to demand her declaration as an executor. In Contrast: stanbul Asl. H.M. 03.05.1997 E.1278/K.374 in N. EK I, Kanunlar htilafı, op. cit., pp. 95ss, in which it was held that the applicant for recognition of a foreign judgment has a legitimate interest in seeking only its recognition as the claimant's claim is not the recovery of the claim but also the recognition by Turkey of a final judgment so that the other party can not raise future action on the same subject matter in the Turkish Courts.

186 M. M EK, Aile Mahkemele-rinin Görevine Giren Davalar Ve Yargılama Usulü, op. cit.,

German ZPO[187], which states that while reciprocity is a prerequisite for the recognition of a foreign decision, its absence is not an obstacle to the recognition of those provisions which do not refer to asset related claims[188]. This view has been criticized by some theorists in the thought that it allows the recognition of foreign judgments without guaranteeing the corresponding recognition of Turkish in these states.

Regarding the procedural aspect, as mentioned before, recognition can be done either incidentally or independently. In the first case referred to in the first paragraph of art. 58, a foreign decision may be sought in an existing trial before a Turkish Court by a party in order to be used either as a matter of res judicata for the subject matter of the dispute or on a question referred for a preliminary ruling by which depends on the outcome of the dispute[189], or, in the absence of an identical subject matter and of the parties to the dispute[190], as proof that it produces full evidence of its content. In any case, since there is no need to have an identity between the claim in the Turkish Court and the operative part of the foreign judgment, of the foreign divorce decision, is not prevented from examining the same other claims of the plaintiff which have not been judged abroad, such as the claim of the non liable spouse for compensation for pecuniary damage or non pecuniary damage resulting from the division of marriage[191]

187 German Code of International Private and Procedural Law. See, H.C. AKSOY, Impossibility in modern private law. A comparative study of German, Swiss and Turkish laws and the unification instruments of private law, ed. Springer, 2014.

188 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 502ss.

189 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 639ss. States, inter alia, the following examples: a) German A submits a Turkish claim Courts against the Turkish citizen B, claiming compensation of E. 20,000. B puts forward a res judicata (kesin hokum itirazı) seeking the recognition of a German Court ruling on the same subject matter and the same parties, which dismissed an action for damages for A for the same cause. If the Court finds that the conditions for recognition of the judgment are satisfied, it will reject the claim brought before him by A. b) A is filed against the B claim for fulfillment of a liability. B puts forward a set off of a similar claim against A. A in turn asks for recognition of a foreign decision that has recognized the non existence of the claim relied on by B. In this case the Court must again dismiss the lawsuit; c) The brother of the deceased B carries out as her heir the clerical suit against C, who has the same inheritance right as B's married spouse. However, A requests the recognition of a foreign divorce decree before B's death, and hence claims that C has no inheritance right. The Court, if the conditions for recognition are met, will reject the claim of the same inheritance right of C.

190 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 502ss.

191 . 2. D 25.12.2007 E.21926/K.17735 (Kazancı Hukuk Otomasyonu). Similarly, the Tribunal for the recognition of a foreign divorce may itself consider issues of maintenance or custody of children of there are

(art. 174 of Turkish Civil Code). It has also been ruled that it is possible to convert (ıslah) divorce proceedings[192] which has been brought before the Turkish Courts in a claim for recognition of a foreign divorce decree when there is a final foreign divorce judgment between the same parties[193].

In any case, it has been judged by jurisprudence that a foreign decision can be freely assessed as evidence in a trial in the Turkish Courts and assessed together with the other means of evidence for the formation of the judge's judgment even if not explicitly requested by a party its recognition[194].

The second case is that of the recognition of a trial specifically raised for that purpose by the person concerned, when required, as is typically stated in art. 58 par. 3, "to carry out any administrative action in Turkey" (Türkiye'de idarî bir i lemin yapılmasında). In this case, it is clearly a matter of identifying treatment (tesbit davası)[195]. The provision of art. 62 par. 3 concerns in particular family law decisions such as divorce, adoption, paternity recognition which, although not amenable to enforcement, must be recognized by the Turkish authorities in order to be registered in the registry. It is also characteristic that the Turkish "Registry Service Act" for the registration of changes resulting from foreign Court rulings requires a decision to recognize them from the Turkish Courts. This law was apparently taken into account by the legislator by referring to "administrative actions", thus defining the procedure for the required recognition of the foreign decision[196].

With regard to the issue of recognition in particular, two questions have been raised in theory and case law: a) whether the procedural provisions laid down for enforceability cases and

no relevant provisions in the foreign decision or if they can not be enforced in Turkey, see in particular: Z. AKICI, G.D. GÖYAYLA, Milletlerarası Aile Hukuku, Vedat Kitapçılık, op. cit., pp. 59-60

192 C. ANLI, E. ESEN, . ATAMAN-FIGANME E, Milletlerarası Özel Hukuk, op. cit.

193 Y. 2. HD 05.06.1998 E.5745/K.7116

194 Y. GK 24.10.2001 E: 13-1003, K: 763 (Kazancı Hukuk Otomasyonu)

195 A. SAKMAR, Yabancı lâmların Türkiye'deki Sonuçları, op. cit., pp. 80.

196 P.B. BURCU YUKSEL, Turkish and EU private international law. A comparison, ed. On Iki Levha Yayincilik, 2014.

in particular those for service to the opposite party are applied proportionally; and b) whether the effects of recognition came retroactively from the final judgment of the foreign decision or from the date of recognition by the Turskish Court.

Concerning the first question, it was argued that since there is no explicit reference to art. 58, it is not necessary to summon the opposing party in cases where recognition is sought by a separate document and therefore the judge makes the decision only by studying the file without discussion. However, the majority of the theory, as well as the case law, accept that it is necessary to summon the other party, arguing that otherwise it is not possible to raise the defendant's objection to the foreign Court, which, as we have seen, is a prerequisite for the enforcement (and therefore recognition) of a foreign decision under art. 54 par. (ç), but it is not investigated on its own initiative but only upon objection![197] It was therefore reasonably believed in many cases that the adoption of the recognition decision without the summoning of the adversary contravenes the law which clearly protects the defendant's right of defense[198].

As regards the question of the beginning of the recognition of foreign judgments, it was argued that, by their nature, as "rule making" (in ai yenilik do urucu kararlar), they also produce legal effects in Turkey, not from the day of its adoption recognition decision but by the final judgment of the recognized foreign judgment[199]. There has been a debate on this issue for many years, but this has been definitively resolved by art. 59 of the Turkish Code of Private International and Procedural Law, which now explicitly states that "(…) the res judicata or the full probative force of a foreign judgment shall be governed by the final judgment of the foreign decision (...)"[200].

197 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 640-641

198 . 2. HD 16.05.2002, E. 2458/K..2905 and . 2. HD 07.10.2002, E. 10804/K. 11537 (Kazancı Hukuk Otomasyonu) in which the decision to recognize a foreign divorce decision (Turkish) was issued without the summoning of the other divorced spouse.

199 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 504ss.

200 See, Ö. GÜNSEL , Türk Hukukunun Yorumunda Hata Yapılmasına Ili kin Yargıtay Hukuk Genel Jurulunun 21.06.2001 Tarihi Kararı, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1999-2000, pp. 768ss, with references to jurisprudence that has often been unclear about this issue.

Lastly, in relation to the recognition of decisions of voluntary jurisdiction, art. 58 par. 2 reiterates that the same provisions apply to their recognition. It is, however, worth mentioning the case of these decisions, which have a formal resolutive but not essential, such as, for example, the decision to issue a certificate (mirasçilik belgesi), which is externally in the form of a judicial decision and therefore ends after the prescribed period has expired, but has no effective judicial resonance in the sense that the content of the certificate can be modified at any time subsequent decision[201]. In such cases, the Turkish Courts have refused to recognize these judgments because of the absence of the element of the substantive res judicata of the decision[202], but the foreign decision can not be excluded as evidence of the person concerned for the request for the issue of a certificate by the competent Turkish Court[203].

15.SPECIAL PROCEDURES FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT IN MULTILATERAL INTERNATIONAL CONVENTIONS

Except of articles 50 to 59 of Turkish Code of Private International and Procedural Law, the recognition and enforcement of judgments relating to certain matters, in particular family law, are governed by more specific international treaties, of which Turkey is a contracting party. These provisions override the common law, under art. 90 of Turkish Constitution, as amended in 2004, and of course only concerns decisions taken by a State party to the Convention.

In the Hague Convention on "the Protection of Children and Cooperation in Transnational Adoption" of 1993[204], art. 24 states that after the completion of the procedure between the Central Authorities provided for in the Convention, the com-

201 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 642ss.

202 . 2. D 10.02.1986, E. 86/K. 802- . 2. D 11.06.1990, E. 12861/K. 5906- . HGK 28.12.1994, E. 2-625/K. 905 (Kazancı Hukuk Otomasyonu).

203 A. SAKMAR, Yabancı lâmların Türkiye'deki Sonuçları, op. cit., pp. 50ss.

204 "Convention du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale" which has been ratified by the Turkish National Assembly and came into force on 1.9.2004, and was recently ratified by Greece under law 3765/2009.

petent authorities of a Contracting State "refuse to recognize an adoption if it is manifestly contrary to public order, taking into account the interest of the child"[205]. Therefore, the refusal to recognize a transnational adoption by a Contracting State is not sufficient to prevent the adoption of a manifest public opposition in its national public order, provided that it is in the interest of the adopted child.

In the Hague Convention on "Recognition and Enforcement of Decisions on Maintenance Obligations" of 1973[206], art. 4 and 5 lay down the more specific conditions for the recognition and enforcement of such judgments given by Courts of the Contracting Parties. Among these is the second paragraph of art. 4, which states that: "(…) interim enforceable judgments and interim measures, even if they are subject to regular legal remedies, are recognized or declared enforceable in the State of enforcement if such decisions are issued and enforced to this". These are few cases in which enforcement of provisional enforcement order or precautionary measures of foreign Courts are accepted[207].

Special provisions also include art. 1 of the 1967 Luxembourg Convention on "the Recognition of Marriage Related Matrimonial Matters"[208], which provides as conditions for the recognition of judgments relating to marital affairs: a) not to be the foreign judgment contrary to another final judgment given or recognized in that State; b) the parties have had an opportunity to appear in the case; and c) the decision is not manifestly contrary to the public order of the host State. Art. 2 refers to the so-called

205 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 504ss.

206 "Convention du 2 octobre 1973 sur la loi applicable aux obligations alimentaires" which was ratified by the Turkish National Assembly and came into force on 1.11.1983 and has been ratified by Greece with Law 3171/2003. It should also be noted that both Greece and Turkey have expressed a reservation on the recognition of decisions and compromises in food affairs between relatives in a line of law and between relatives of marriage, while Turkey has also expresses a reservation regarding the recognition of decision and compromises that do not provide for periodic maintenance payments.

207 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 505ss.

208 "Convention de Luxembourg du 8 septembre 1967 sur la reconnaissance des décisions relatives au lien conjugal". This Convention was signed in 1990 by seven States, including Greece, but only three of them, namely Germany (with effect from 10.12.1977), the Netherlands (with effect from 30.7.1981) and Turkey (which entered into force on 14.7.1975), therefore applies only to cases of recognition and enforcement between them which fall within the scope of the Treaty (see, E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 506). As already mentioned, Greece has not yet ratified it.

"exorbitant jurisdiction" of the Court of First Instance, which, according to that article, does not constitute a legitimate reason for rejecting a request for recognition of a foreign judgment, unless both parties have the nationality of State recognition.

Finally, in relation to the 1980 Luxembourg Convention on "Recognition and Enforcement of Custody Decisions"[209], art. 10 par. 1 of the Convention identifies certain arrangements different from ordinary law. In particular, it is stipulated that if, owing to a change in the circumstances (not including a mere change in the child's residence due to an illegal movement), the effects of the original decision are no longer in conformity with the child's interest, then recognition and enforcement of this judgment may be refuted by a Contracting State (sub par. b). In addition, this right is granted to the Contracting States when either the child has the nationality of the requested State or has been habitually resident in that State, while no such link existed with the issuing State, either the child had at the same time the nationality of the issuing State and the requested State and his habitual residence in the requested State (sub par. c). We see, therefore, that in these cases the Convention places particular emphasis on the nationality or habitual residence of the child, thus building a "firewall" on the jurisdiction of the competent Courts.

16. LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRATION DECISIONS

In addition to the recognition and enforcement of foreign judgments, the second part of Turkish Code of Private International and Procedural Law and in particular articles 60 to 63, refers to the recognition and enforcement of foreign arbitration judgments (yabancı hakem kararları). The reference to specific articles of the Law in arbitration judgments reveals the importance that the legislator has given to the need to apply foreign arbitration decisions.

209 "Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants" which was ratified by the Turkish National Assembly and came into force on 2.11.1999, and Greece had already ratified it by Law 2104/1992.

The importance of the recognition of foreign arbitration judgments has also been shown by the fact that they were recognized and applied in Turkey even before 1982, although art. 532 of the old Turkish Code of Civil Procedure did not mention anything about them[210]. It is even mentioned in the bibliography that between 1927 and 1949 the case law accepted the application of arbitration judgments which related to all the disputes from a contract as a performance of contractual obligations of the parties and after 1949 and until 1982 the case law of the Turkish Court of Cassation applied to them proportionate provisions on the recognition and enforcement of foreign judgments[211].

However, apart from Turkish Code of Private International and Procedural Law provision, there are many other relevant legislation in Turkish law on recognition and enforcement of foreign arbitration judgments, Of course, the 1958 International Convention "on the recognition and enforcement of foreign arbitral judgments"[212] is in dominant position[213], while Turkey has also signed and ratified other multilateral conventions such as the 1965 International Convention on Settlement of Investment Disputes-"ICSID", the 1988 Multinational Investment Agency Agreement-"MIGA", while there is also a series of bilateral conventions which establish arbitration for differences between foreign investors and the Turkish State[214].

210 A. ÇELIKEL, Milletlerarası Özel Hukuku, Beta Kitabevi, op. cit., pp. 652ss.

211 As regards the provisions governing the arbitration procedure in Turkey, the provisions of 407 to 444 of the new Turkish Code of Civil Procedure apply in principle, and arbitration's with a foreign element (also referred to by the term "international arbitration's"), the most important piece of legislation is Law n. 4686/2001 on International Arbitration (Milletlerarası Tahkim Kanunu), which entered into force on 05.07.2001 and which was mainly based on the standard UNCITRAL law on International Commercial Arbitration and the 1987 Swiss private international law, and there is, of course, a significant number of multilateral or bilateral conventions on arbitration issues, most notably the European Convention on International Commercial Arbitration's of 1961. See in argument: N. EK , General Evaluation of the Turkish International Arbitration Act, in International Arbitration Law Review, 2005, pp. 88ss.

212 Which has been ratified by the Turkish National Assembly and entered into force on 30.9.1992 and has already been ratified by Greece under L.D 4220/1961 .

213 Turkey is a party to the 1961 European Convention on International Commercial Arbitration ("Geneva Convention") and the 1958 New York Convention, which was ratified on 2 July 1992 and entered into force on 30 September 1992. Turkey also ratified many bilateral and multilateral treaties and conventions, such as the Convention on Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), which entered into force in 1989 and the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), which was published in the Official Gazette in year 2000.

214 Z. AKINCI, Arbitration law of Turkey practice and procedure, Juris Publishing, 2011.

It should therefore be noted in principle that, in cases where a bilateral or multilateral agreement ratified by Turkey is in force, then the provisions of the applicable Convention will apply (art. 1 par. 2 of Turkish Code of Private International and Procedural Law). As regards the 1958 International Convention on New York, it should be noted that it concerns only arbitration judgments originating in Contracting States which deal with disputes of commercial law.

Although the text of the Convention in principle did not limit its scope to certain categories of disputes, it allowed the contracting States to declare that the Convention would apply only to legal, contractual or non contractual disputes, which are considered by their law commercial (art. 1 par. 3), a statement made by Turkey[215], as is the case with the largest number of Contracting States. Therefore, for any arbitration on a trade dispute arising from a State party to the New York Convention, the provisions of the Treaty shall apply.

For the international Conventions referred to above, there will be no particular reason in this study, as there is extensive literature, focusing on the present research on the study of the provisions of articles 60 to 63 of Turkish Code of Private International and Procedural Law with a comparative reference to corresponding provisions of the Conventions and references to case law. Articles 60 to 62 refer to the procedure for the enforcement of foreign arbitration judgments, and article 63 refers in turn to the provisions of those articles, stating hereafter that "the recognition of foreign arbitration judgments is subject to the provisions on their execution"[216].

17.THE "ALIENITY" OF THE ARBITRATION JUDGMENT

A key element and starting point for recourse to Turkish Code of Private International and Procedural Law art. 60 et seq.

215 C. ANLI, Türkiye'de Yargıtay Kararlarına Göre Yabancı Hakem Kararlarının Tanınması ve Tenfizi, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1997-1998, pp. 479ss.

216 C. ANLI, Türkiye'de Yargıtay Kararlarına Göre Yabancı Hakem Kararlarının Tanınması ve Tenfizi, op. cit., pp. 478ss.

is the determination of the foreign element in an arbitration judgment since only then is the process of recognition and enforcement in Turkey necessary. Therefore, the first question to be answered is: how will we determine whether an arbitration decision is domestic or foreign and whether the answer is the second then how will its "nationality" be determined? Unlike art. 1 of the New York Convention[217], Turkish Code of Private International and Procedural Law does not contain a provision specifying which arbitration decision is foreign. Thus the relevant judgment is left to the judge to declare its execution.

As to whether the arbitration judgment is domestic or foreign, the following criteria have been formulated in theory and case law[218]: a) the nationality of the parties; b) the place of arbitration (principle of territoriality); c) the nationality of the procedural rules applied to arbitration and d) the combination of the principle of territoriality and the nationality of the procedural rules applied.

The first historic decision of the Plenum of the Turkish Court of Cassation[219] in 1951 defined foreign arbitration judgments as those which were "enacted in a foreign legal order" (yabancı bir kanun otoritesi altında verilmi), thus rejecting the criterion of the nationality of the judge or the place this was issued. According to that judgment, an arbitration judgment carries the nationality of the legal order in which the arbitration proceedings were conducted[220].

However, in 1976, the 5th Political Section of the Turkish Court of Cassation, considered the alienity of an arbitration decision solely on the basis of the place where the arbitration hearing and the issue of the contested decision took place[221]. Indeed, a

217 Which states that the Convention applies to the recognition and enforcement of arbitration judgments issued in the territory of another Contracting State.

218 As for the general theoretical considerations see: E. NOMER, N. EK , G. GELGEL, Milletlerarasın Tahkim, op. cit., pp. 120-125.

219 Y. HGK 07.11.1951, in Tatbikatta Yargıtay Kararları, 1952, pp. 890 as well as a subsequent decision which broadly uses the same reasoning: Y. 11. HD 28.12.1978, Kuru VI, 6158

220 A. ÇELIKEL, E. NOMER, E. ESEN, Devletler Hususi Hukuku (Çözümlenmi Örnek Olaylar - Seçilmi Mahkeme Kararları), op. cit., pp. 654ss.

221 Y. 5. HD 10.03.1976, E. 1617/K. 1052, in lmi Ve Kazai çtihatlar Dergisi, 1977, pp. 5671.

few years later, in 1985, the Turkish Invalidate Service gave an answer to this question, using at the same time both the criterion of procedural law and of territoriality[222].

Today, following the introduction of Turkish Code of Private International and Procedural Law, the criterion prevailing in the case law is the nationality of the procedural rules applied to arbitration. It has also been argued by the theory that this was also the will of the legislator, who mentions the procedural rules of arbitration in several points[223] (cases e, f and h) of art. 63 of Turkish Code of Private International and Procedural Law for the execution of foreign arbitration judgments. It is therefore crucial that the process be applied whether it is chosen by the parties or is left to the discretion of the arbitrator[224]. If, therefore, the arbitration is conducted in accordance with Turkish law, then the decision will be classified as Turkish, or if the procedure applied is not that provided for by the Turkish law, it will be considered as a foreign.

18.TERMINATION AND CAPACITY TO EXECUTE THE DECISION

According to art. 60 par. 1 of Turkish Code of Private International and Procedural Law: "Foreign arbitration judgments which are either final and enforceable or binding on the parties may be executed". The second paragraph of the same article states that "(…) the execution of foreign arbitral judgments is requested by an application to the Court of First Instance of the place agreed by the parties in writing. In the absence of such an agreement between the parties, the Court of the place of residence in Turkey shall be responsible for the decision, if not the place where he has his habitual residence, and, failing that, the place where the asset is situated be the subject of enforcement (...)".

222 Y. 11. HD 19.12.1985 E.7355/K.7099, which was considered to be Turkish the arbitration judgment as the choice of the arbitrator and the secretary was made by the Chamber of Commerce of Paris, however, the old Turkish Code of Civil Procedure (HUMK) procedures have been implemented while the decision was issued on Turkish soil, facts which both refer to the judgment as Turkish. See: E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 298ss.

223 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 521ss.

224 A. ÇELIKEL, Milletlerarası Özel Hukuku, op. cit., pp. 655ss.

According to the first paragraph of art. 60, the basic requirement is that the foreign arbitration judgment must be final (kesinlesmi) and enforceable (icra kabiliyeti kazanmı) or, alternatively, be binding on the parties (taraflar için ba layıcı). In principle, it is investigated if this decision is judged to be final under the procedural rules followed in arbitration and if it is enforceable under the same procedural law, in other words whether that decision can be enforced in the State of origin[225].

From this wording of the law, we find that if foreign arbitration law requires the Court to ratify the arbitration decision in order to obtain enforceability or final judgment, such ratification must in any case be preceded. It can not therefore be filed directly with the Turkish Court to be declared enforceable in Turkey without first being declared enforceable in the State of origin. Thus, the double exequatur phenomenon is spoken, but this can not be avoided since the law explicitly requires the decision to have already been enforceable under the law of the State of origin[226].

However, if, for some reason, the judgment has not become final or enforceable, the law goes a step further by stipulating that it is sufficient to implement the decision in Turkey, and only the parties agree that it will bind them[227]. This condition, which was set apart from the first, was introduced for the first time with the new Turkish Code of Private International and Procedural Law in the attempt of the legislator to facilitate the recognition of foreign arbitration decision, in particular to overcome the obstacle of double recognition for which it has just there was talk. It is worth noting that Turkish Code of Private International and Procedural Law does not refer to the term of reciprocity as re-

225 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 522ss. However, attention should be paid to the definition of the country of origin of the decision, which, as we have seen above, is not necessarily the country where the arbitral Tribunal met.

226 A. ÇELIKEL, Milletlerarası Özel Hukuku, op. cit., pp. 667ss. This finding is fully in line with the law on the recognition and enforcement of judgments in which, as we have seen, the recognition and enforcement of a foreign judgment which ratifies an enforceable third party judgment is not permissible.

227 Which alone is sufficient for the execution of the foreign arbitration judgment in Turkey even if it has not become final and enforceable. In this respect see Y. HGK 09.06.1999 E.467/K.489, in Yargıtay Kararları Dergisi, 2000, pp. 185 with reference to the corresponding New York Convention of 1958.

gards foreign arbitration. On the contrary, art. 44 of the abrogated Turkish Code of Private International and Procedural Law of 1982 stipulated that the judge must determine whether there is a bilateral agreement on the mutual recognition and enforcement of arbitration judgments, or whether there is legal or de facto reciprocity with the State of origin of the arbitration judgment. This condition was correctly omitted in the new Code as the concept of reciprocity is inconsistent with the institution of arbitration[228].

The Court of First Instance is also a competent Court for the declaration of enforceability of the arbitration judgment. With regard to local jurisdiction, the parties are in principle given the option of choosing the city to which the Court will be seized. If there is no such agreement, the choice of the local Court is the choice of the arbitrator, as provided for in hierarchical order: the place of his domicile or habitual residence, and in the absence thereof the place where his property is located for which enforceability may be sought[229].

19. (FOLLOWS) CONTENT OF THE APPLICATION AND PROCEDURE

In line with articles 52 and 53, the content of the application to the Court of First Instance to execute the foreign arbitration judgment is defined in article 61[230]. The application is therefore filed together with as many copies as the number of defendants of the application[231] together with a) the original or a certified copy of the arbitration agreement or of the document containing the arbitration clause; b) the original or a certified copy of the decision; c) a translation and certified true copies thereof under a) and b) documents. For the rest, the provisions of articles 55 (on

228 A. ÇELIKEL , Milletlerarası Özel Hukuku, op. cit., pp. 669ss.

229 A. ÇELIKEL , Milletlerarası Özel Hukuku, op. cit., pp. 667ss.

230 Which distinction would become relevant in some cases where the party is not always identified with the defendant, such as, for example, in a decision against a joint venture, the res judicata of which extends also to the partnership members.

231 In so far as the recognition and enforcement of arbitration judgments are subject to the special procedure for simplified procedural rules (basit yargılama usulü hükümleri), Turkish Code of Private International and Procedural Law: articles 61 and 55 par. 1 must all be regarded as inadmissible by the applicant together with the submission of the application to the Court of First Instance, A. ÇELIKEL , Milletlerarası Özel Hukuku, op. cit., pp. 668ss.

performance and procedural proceedings), 56 (on the adoption of the decision) and 57 (on how to enforce and revoke the decision) apply mutatis mutandis. If, as we will see below, one of the grounds for refusal of the application for a declaration of enforceability referred to in article 62 is not met, the Court will issue a judgment which is enforced within the country and is subject to legal remedies like any other decision of Turkish Court.

20.(FOLLOWS) POSSIBLE COMPLAINTS

As with the recognition and enforcement of foreign judgments, the Turkish Court of recognition or enforceability, respectively, does not have the right to investigate the substance of the judgment[232]. On the other hand, the only specific reasons why the competent Court of first instance can reject the request are limited to article 62 par. 1 of Turkish Code of Private International and Procedural Law. The first three of them are dealt with by the Court of its own motion, for the other six the burden of proof is borne by the applicant (par. 2).

The nine reasons for refusal referred to in article 62 are the following:

1)if an arbitration agreement has not been established or an arbitration clause has not been entered into the main contract. This provision refers to the self-evident condition of the existence of either a special arbitration agreement, ie a written agreement whereby the parties agree to make one or more disputes between each other at the discretion of an arbitral Tribunal or a clause in a contract which defines a way of resolving of the dispute to an arbitral Tribunal. This plea is an expression of the provision of article 37 of the Turkish Constitution, according to which no one is unwittingly denied access to the natural judge[233]. This provision includes not only the absence of an arbitration agreement from the outset but also the cases where the contract was concluded, but this is invalid and therefore does not have any legal consequences.

232 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 524ss.

233 Concerning article 71 of the Turkish Constitution, see: A. YÜRÜK, Tülin-Anayasa Hukuku, Anadolu Universitesi, 2003, pp. 71ss.

Such a case is e.g. The conclusion of a contract for arbitration by a person who is not provided with the power of attorney, and it is assumed that in the absence of a valid declaration of will (explicit or implied) for the approval of the contract, it does not bind the principal and the dealer also[234]. Another issue that has been raised repeatedly with regard to the validity of the arbitration agreement is the language that has been formulated, whether it is a void the relative contract drawn up in the Turkish language. The answer to the case law was that because of the specificity of the arbitration agreement, the language in which it was drafted has no bearing on its validity, even if the place where it was drawn was Turkey[235];

2)whether the arbitration judgment is contrary to public order or morality. As we have seen with the execution of foreign judgments, the basic condition for the issue of the relevant Court decision by the Turkish Court of First Instance is the enforcement of the decision in Turkey not to contradict the Turkish public order. This condition also applies to the execution of foreign arbitration decision, while to public order (kamu düzeni) morality is added (genel ahlak), while it is worth noting that article 62 does not refer to "obvious opposition" to public order. The fact that this article does not explicitly mention "obvious" (açıkça) opposition to public order should rather be attributed to the inadvertent omission of the legislator which is probably due to the fact that the provisions of the New York Convention have been transposed into the law. In our opinion, therefore, in the case of arbitration decisions, it would also be necessary to support the element of obvious contradiction in public order. Any other interpretation that would give the judge the discretion to dismiss requests for enforcement simply because of a simple opposition to public order would be excessive and under no circumstances would a rigorous treatment of arbitrators be

234 Plenary Civil Divisions of Cassation Court (Y. HGK) 11.10.2000 E.1122/K.1256, in lmi Ve Kazai çtihatlar Dergisi, 2009, pp. 1079 with remarks E. ESEN, Hakem Kararının Tenfizi veya ptali Davalarında Tahkim Anla masının Yetkisiz Temsilci Vasıtasıyla Yapıldı ı tirazı ve Konuya li kin 11.10. 2000 Tarihli Yargıtay Hukuk Genel Kurulu Kararı, Prof. Dr. Gülören Tekinalp'e Arma an, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 2003, pp. 404ss. As well as . 19. HD 11.03.2004 .2654/ .2603 (Kazancı Hukuk Otomasyonu)

235 See, . 11. HD 07.10.1986, in Yargıtay Kararları Dergisi, 1987, pp. 66 in particular, because of its specificity as a "procedural contract" (usul kukuku sözle mesi), the arbitration agreement does not fall within the scope of the Law on the Compulsory Use of the Turkish Language in Commercial Enterprises of 1926.

justified in relation to foreign judgments[236]. In the paragraph for foreign Court judgments, reference has been made to exemplary cases which have been found to be contrary to the Turkish public order. However, there are also special cases in relation to arbitration which have been considered to be in opposition to Turkish public order and which are worth mentioning. Thus, foreign arbitration decisions issued under an arbitration clause or arbitration agreement drawn up by both parties on account of the exploitation of their economic superiority towards the other party have been judged to be contrary to public order[237]. Also, the term which gives the choice of arbitrators exclusively in one place is also contrary to public order. These terms of the arbitration clause or the arbitration agreement are deemed to be contrary to Turkish morality, so any such arbitration must be excluded[238]. It should also be noted that if the validity of the alleged arbitration agreement is governed by Turkish law, any contradiction in the contract or the arbitration clause in morality are rejected as reasons for refusal of the enforceability (case a)and b) of article 62 par. 1). This is because, in our opinion, there is also a question as to the validity of the contract or the clause, since under Turkish law contracts contrary to public order or morality are completely invalid, and if the opposition concerns part of them, then the nullity relates only to these provisions, unless it is obvious that without them the contract would not be drawn[239]. Very interesting is also an old historical decision[240] of the 1976 Turkish Court of Cassation, which considered that the order of the International Chamber of Commerce (ICC) rules of arbitration requiring the draft decision to be submitted to the International Court of Arbitration before its final adoption, is contrary to the

236 Constitutional Court (AYM) 02.12.2004, in Resmî Gazete 21.10.2005, 25973 which refers to devices which are at a disadvantage on one side, thus compromising the proper procedural balance (hakkaniyete uygun bir denge) between the two parties. See comments: E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 499ss.

237 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 525ss.

238 Y. 13. HD 25.04.1991, in Yargıtay Kararları Dergisi, 1991, pp. 1222-1225.

239 Article 27 of the new Turkish Code of Complaints (Borçlar Kanunu) of 04.02.2011. As regards in particular the arbitration clause, it would be difficult to accept that the parties would not proceed to the conclusion of the contract without this clause, and it is therefore more appropriate, in our opinion, that the nullity be limited only to the clause and not to the main contract as a whole.

240 Y. 15. HD 10.3.1976, in İlmi Ve Kazai İçtihatlar Dergisi, 1977, pp. 567 with a lesser opposed opinion.

Turkish public order as a violation of the principle of arbitrators' independence[241]. This decision divided scientific world with its supporters arguing that the possibility for the Court to propose amendments to the draft decision, inter alia, as to the applicable law of the reasoning of the decision[242], is a clear violation of the arbitrator's independence[243]. However, its critics point to both the fact that the Court does not enter the substance of the case, expressing its observations only in legal matters[244], as well as the fact that the parties are a priori aware of the Court's participation in the arbitration proceedings in accordance with the relevant rules of the ICC lay down and therefore do not doubt the independence of the arbitrators[245], as this interference by the Court gives more security to the parties and works to the benefit of arbitration[246];

3)if the dispute which is the subject of the arbitration judgment can not be resolved through arbitration under Turkish law. This case refers to disputes that can not by law be resolved by arbitration. It is a mandatory provision restricting the parties' freedom to make certain disputes in arbitration. Thus, according to Turkish law[247], disputes concerning real rights in immovable property[248] and the expulsion of the lessee can not be subject to arbitration, disputes arising from the horizontal and vertical co-ownership, as a rule disputes of voluntary jurisdiction, affinity issues and divorce[249], as well as disputes relating to forced execution and bankruptcy[250];

241 A. ÇELIKEL, Milletlerarası Özel Hukuku, op. cit., pp. 669-670.

242 See article 22 of ICC Rules of Arbitration.

243 S. ÜSTÜNDAG, Medeni Yargılama Hukukunda Kanun Yolları ve Tahkim, Yeniden. Gözden Geçirilmi ve Geni letilmi 2. Bası, stanbul 1971, pp. 4ss.

244 E. NOMER, Yabancı Hakem Kararlarını Ba ımsızlı ı, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 1984, pp. 26ss.

245 A. ÇELIKEL, Milletlerarası Özel Hukuku, op. cit., pp. 676ss.

246 T. KALPSÜZ, Hakem Kararlarının Milliyeti, in Banka ve Ticaret Hukuku Dergisi, 1978 , pp. 626ss.

247 See articles 408 of Turkish Code of Civil Procedure (HMK) (former 518 of old Turkish Code of Civil Procedure (HUMK)) and 1 of Turkish Code of Civil Law (MTK) as well as the relevant case law.

248 . 13. HD 25.04.1991, in Yargıtay Kararları Dergisi, 1991, pp. 1222 which also raised a question of public order opposition.

249 See Y. 2 HD, 13.04.1995 E.3612/K.4567 which reject the application for divorce issued by the City of Copenhagen on the ground that it was not a Court decision and which states in its reasoning that even if it wanted to be considered as an arbitration judgment, it can not be recognized again as the divorce may not be subject to arbitration under Turkish law. A.C. RUH , Y. KAPLAN, Yabancı Mahkeme ve Hakem Kararlarınn Tenfizi Açısından Kamü Düzeni, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 2002, pp. 121ss.

250 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 528ss.

4)if one of the parties was not lawfully represented before the arbitrator and the actions taken were not expressly approved ex post;

5) if the party against whom enforcement is sought has not been legally informed of the choice of the arbitrator or has been deprived of the possibility of submitting allegations and defense. In such a case, the person against whom enforcement of the foreign judgment is to be served should not have been deprived of the right to participate in the trial, showing his claims and defense. The Court must therefore examine whether the defendant had been informed in good time of the arbitration and whether he had the time to prepare for it, to collect and produce evidence[251] and to examine the documents in the case so that he could respond to them. The law according to which the degree of violation of one party's rights of defense is judged is the one agreed to govern the arbitration procedure[252]. It is also worth noting that in particular the violation of the obligation to inform the other party in due time and the defendant's impediment to the submission of allegations (savunma hakkı) may also be regarded as constituting an opposition to the Turkish public order in case b) of article 62[253];

6) if the arbitration judgment is invalid under the law chosen by the parties to govern the arbitration agreement or the arbitration clause or if there has been no agreement on this matter under the law of the State in which the decision was taken. The foreign arbitration judgment to be enforced should be not invalid (hükümsüz) in accordance with the applicable law specifically chosen by the parties for the contract or the arbitration clause. Where the text of the arbitration agreement or the main contract to which the clause has been issued states that the laws or the relevant provisions of the law are applicable, it has been held in the case law that this provision includes the provisions

251 It has been held, however, that a decision rejecting a written testimony following its assessment that it is not an admissible means of proof does not constitute a breach of the party's right to a fair hearing. Y. 19. HD 09.11.2000, E.7171/K.7602, in Yargıtay Kararları Dergisi, 2001, pp. 1057ss.

252 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 527

253 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 532

of both substantive and procedural law[254]. Conversely, if the contract or arbitration clause does not explicitly state the applicable law, then the validity of the judgment should be judged in accordance with the law of the place where the arbitration judgment was made;

7) if the choice of arbitrators or the arbitration rules applied by the arbitrators are contrary to the parties' agreement, in the absence of such an agreement if they are contrary to the law of the State in which the judgment was given. This condition concerns the legality of the choice of the arbitrator or the rules of arbitration that have been applied and which must have been made within the parties' agreement to bring the dispute to arbitration, in the absence of such agreement and the choice must be taken in accordance with the law of the country where the decision was made. With regard to the selection of arbitrators, it has been judged by jurisprudence that the choice of the arbitrator by one party, despite the fact that it was expressly agreed that this would be by common agreement between the parties, is valid if a reasonable period has elapsed after the invitation of one party to the other for the selection of the arbitrators and the latter did not respond[255]. With regard to the rules of procedure, it was right in our opinion the position of the Turkish Court of Cassation that the choice of the parties to define the law of a State as applicable, without further specifying, includes both the substantive and the procedural law of arbitration. It follows that the foreign decision which applied the arbitration rules of the State in which it was issued, despite the fact that the parties had generally opted for Turkish law, constitutes a breach of the agreement as regards the procedural rules applied and thus hinders its execution[256];

254 See: Plenary Civil Divisions of Cassation Court (. HGK) 05.05.1993 E.235/K. 273 and Y. 15. HD 25.12.1997, E.4213/K.5603 (Kazancı Hukuk Otomasyonu), see also: E. NOMER, Yargıtay Kararlarinda Devletler Özel Hukuku Kanunu in Dr. O uz mregün'e Arma an, stanbul, 1998, pp. 727ss.

255 Plenary Civil Divisions of Cassation Court (Y. HGK) 19.03.2003 E.42/K.182 (Kazancı Hukuk Otomasyonu).

256 Plenary Civil Divisions of Cassation Court (Y. HGK) 05.05.1999 E.235/K.273 in N. EK , Kanunlar htilafı Kurallarına Milletlerarası Usul Hukukuna Vatanda lık ve Yabanılar Hukukuna Pratik Çalı ma Kitabı, op. cit., pp. 112ss.

8) if the arbitration judgment concerns an issue that was not included in the contract or the arbitration clause or if it exceeded the conditions specified in the contract or clause and only in that part. This case concerns decisions which the arbitral Tribunal has decided on matters which were not included in the contract or arbitration clause. Exceeding the jurisdiction to rule on the dispute provided under the Arbitration Agreement is generally a breach of the obligations under that agreement. As such, was the choice of the foreign arbitral Tribunal to apply to the dispute in addition to the agreed law and provisions of the law of a third country which, in the opinion of the Court, was appropriate in view of the dispute;

9)if the arbitration judgment has not become enforceable or binding under either the law of which it was subject or the law of the State in which it was issued or the arbitration rules applied or annulled by the competent authority of the State in which it was issued. The last case referred to in article 62 concerns the assistance of the elements of final judgment and enforceability or the binding nature of the arbitration judgment. Such information shall suffice either in accordance with the law to which it was subject or under the law of the State in which it was issued or in accordance with the arbitration rules applied. If, therefore, there is finality and enforceability or binding of the decision in accordance with one of the alternatively mentioned laws, this is sufficient to reject the defendant's plea[257]. For the rest, regarding the content of final judgment and enforceability apply what has already been mentioned above.

In accordance with this provision, an appeal may also be lodged as a plea, annulment or revocation of the arbitration judgment by a competent foreign body, since after its disappearance it is logical that it no longer has legal effects and therefore can not be enforced in Turkey[258].

257 T. ANSAY, Yabancı Hakem Kararlarının Tanınması ve Tenfizine ili kin New York Antka ması ve Yeni Türk Devletler Özel Hukuku Kanunu, Tahkim Haftası, op. cit., pp. 135ss.

258 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 529ss.

21.TURKISH CODE OF PRIVATE INTERNATIONAL AND PROCEDURAL LAW MAIN DIFFERENCES WITH THE NEW YORK CONVENTION

Finally, contrary to the 1958 New York Convention, Turkish Code of Private International and Procedural Law does not contain any specific provision on the law applicable to the question of the validity of the arbitration agreement or the ability of the parties to prepare it[259]. Thus, the applicable law in these matters will be sought in accordance with articles 9 and 24 of Turkish Code of Private International and Procedural Law on legal capacity[260] (ehliyet) and contractual obligations[261] (sözle meden do an borç ili kilerinde) respectively.

Another major difference between the Convention and the Code concerns the burden of proof[262]. According to the Convention, of one of the conditions for execution of the foreign judgment is not fulfilled, the burden of proof in the cases referred to in article 5 par. 1 lies with the person claiming to be absent for the remainder referred in paragraph 2 of that article, the Court is seized of its own motion. On the contrary, Turkish Code of Private International and Procedural Law states, as we have seen, that the firs three cases (a, b, c) of article 62 are dealt with by the Court of its own motion, for the remaining six (ç, d, e, f, g, h) of the proof shall be borne by the applicant.

Finally, as to the "maturity" of foreign arbitration decisions, the Convention stipulates that the decision should be binding on the parties (article 5 par. 1-e), whereas Turkish Code of Private International and Procedural Law, as we have seen, applies the alternative criteria to final judgment and enforceability of the judgment abroad or of their binding on the parties [263].

259 See article 5 par. 1 a) of the Convention, which states that the Court of Justice shall examine "whether the parties had an incapacity under the applicable law or whether the agreement is invalid under the law to which the parties have been subjected, and in the absence of such indication, under the law of the country in which the decision was issued".

260 This Article defines in principle the law of the person's nationality (par. 1).

261 Which lays down as the applicable law what the parties have explicitly chosen (par. 1), and in the absence thereof the law with which it is more closely connected with the contract (par. 4), with the elements constituting this close relationship.

262 C. ANLI, New York Konvansionuna Göre Hakem Kararlarının Tanınması ve Tenfizi, in illetlerarası Hukuk ve Milletlerarası Özel Hukuk Bülten, 1994, pp. 96ss.

263 E. NOMER, Devletler Hususi Hukuku, op. cit., pp. 534ss.

22. CONCLUDING REMARKS

After examining the provisions of Turkish private international law on the recognition and enforcement of foreign judgments, we can surely come to a first conclusion: Turkish law generally is very little different from that of European States. As the case law shows, the current legal status in Turkey is an achievement of the development and maturation of Turkish legal science in the neighboring country, which has largely taken place the last 10 to 20 years. Indeed, what might be noticed is that, in particular, Turkish case law has often been skeptical about the recognition of certain judgments, it is difficult to accept cases where the foreign Court gave a solution unknown to Turkish law but not unreasonable as to the conscience of law. However, the dialogue of theory and jurisprudence, as well as the legislative reforms in almost all the Codes in which Turkey proceeded in view of its European perspective, had a direct impact on the decisions of the Turkish Courts. The ongoing reforms as reflected both at the legislative and the judiciary level are rapidly evolving in the Turkish legal system with the ultimate goal of full adaptation to European legislation, which is, moreover, a prerequisite for the country's accession to EU. If and when this happens, it will have a direct impact on the applicable Turkish international law with respect to the rest of the european States, by applying most of the european Regulations, so the present study will be more historical rather than practical.