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POSSIBLE IMPACT OF THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS ON TURKISH LAW

INTRODUCTION

The parties have the opportunity of granting jurisdiction to a Turkish court or to a foreign court in the field of law of obligations under Turkish law. This is considered as the reflection of the principle of freedom of will inherent in the field of law of contracts.¹

The jurisdiction agreements granting jurisdiction to Turkish courts are subject to the Civil Procedure Code (CPC)² Articles 17-18; whereas, the competence of foreign courts through the agreement of parties is subject to the Private International Law Act (PILA)³ Article 47.

The recognition and enforcement of foreign court decisions are provided in Articles 50-60 of the PILA.

Turkey did not sign the Hague Convention on Choice of Court Agreements (Hague Convention).

In this article, I will give basic information on the validity of jurisdiction clauses; and recognition and enforcement of foreign court judgments under Turkish law in comparison with the Hague Convention. I will try to demonstrate the consequences of future ratification of the Hague Convention by Turkey to these issues.

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1) C. ŞANLI/E. ESEN/İ. ATAMAN FİGANMEŞE, *Milletlerarası Özel Hukuk*, Vedat Kitapçılık 2015, p. 384.

2) O.G. 04.02.2011/27836.

3) O.G. 04.12.2007/26728. Private International Law Act first entered into force in 1982. In 2007, a new version of the Act was adopted and it is currently the main legal source for conflict of laws, international jurisdiction of Turkish courts and recognition and enforcement of foreign judgments. For a detailed review of jurisdiction agreements according to the previous Act, see, F. SARGIN, *Milletlerarası Usul Hukukunda Yetki Anlaşmaları*, Yetkin 1996.

I. Validity of Jurisdiction Clauses under Turkish Law

A. Choice of a Turkish Court by the Parties

The international jurisdiction of Turkish courts is provided in Article 40 of the PILA, which makes a referral to the domestic jurisdiction rules. Therefore, the validity of jurisdiction clauses granting jurisdiction to a Turkish court is subject to the CPC Articles 17-18 concerning jurisdiction clauses in domestic cases.

In the light of these two articles, the conditions for a valid jurisdiction agreement are as follows:

- i The jurisdiction agreement should be enacted by merchants or public entities.

Both parties of a jurisdiction agreement should either be a merchant⁴ or a public entity. Therefore, a consumer may not be a party to a jurisdiction agreement. The reason of such a restriction is to protect consumers who are deemed to be the weaker parties of agreements compared to merchants. In other words, the restriction aims to prevent the merchants to force the consumers out of their jurisdiction by way of jurisdiction agreements.⁵

Similarly, the Hague Convention does not apply to exclusive choice of court agreements to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party (Article 2/1/a).

- ii The subject matter of the dispute should be a matter that the parties can freely dispose upon.

The Hague Convention shall not apply to the following matters that are deemed to be matters that the parties cannot freely dispose upon by Turkish law (Article 2/2). These matters that are left out of the scope of the Hague Convention are as follows: i. the status and legal capacity of natural persons; ii. maintenance obligations; iii. other family law matters, including matrimonial property regimes and other rights or ob-

4) According to Article 12 and 16 of the Turkish Commercial Code, a merchant is a real or legal person or a public entity that operates a commercial enterprise.

5) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 386. This reason is criticized in the doctrine of not being satisfactory. The restriction results that all real and legal persons are entitled to choose foreign courts as competent courts; whereas the opportunity of choosing Turkish courts is only given to certain real and legal persons. This will prevent some Turkish non-merchants from choosing Turkish courts. E. NOMER, *Devletler Hususi Hukuku*, Beta 2013, p. 466; A. ÇELİKEL/B. ERDEM, *Milletlerarası Özel Hukuk*, Beta 2014, p. 585.

ligations arising out of marriage or similar relationships; iv. wills and succession; v. insolvency, composition and analogous matters; vi. liability for nuclear damage; vii. the validity of entries in public registers; viii. anti-trust (competition) matters.

On the other hand, following matters that are left out of the scope of the Hague Convention may be subject to a jurisdiction clause according to the CPC. These are: i. the carriage of passengers and goods; ii. marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; iii. claims for personal injury brought by or on behalf of natural persons; iv. tort or delict claims for damage to tangible property that do not arise from a contractual relationship.

iii The legal relationship that gave rise to the dispute should be clearly identified or identifiable.

The contract or any such legal relationship that may give rise to the dispute should be identified.

Similarly, the definition of an exclusive choice of court agreements found in Article 3/a of the Hague Convention refers to “*disputes which have arisen or may arise in connection with a particular legal relationship*”.

iiii The competent court should be a specific court.

Any stipulations granting competence to Turkish courts in general such as “Any court located in Turkey shall have jurisdiction” or “The Turkish courts that one of the parties will wish to resort shall have competence” are not valid. The jurisdiction agreement should indicate the exact location of the court in Turkey, such as the courts in Istanbul, Ankara, Izmir etc.⁶ However, it is possible to determine the “courts located in the district where the contract was signed” or “the courts where the office of the lawyer of one of the parties is located at the time of initiation of a lawsuit”; therefore, such stipulations are also valid.⁷

According to the definition of an exclusive choice of court agreements found in Article 3/a of the Hague Convention, “*the courts of one Contracting State or one or more specific courts of one Contracting State*” may be chosen. According to Article 5/3/b, the internal alloca-

6) NOMER, p. 467; ÇELİKEL/ERDEM, p. 584; ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 387.

7) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 387.

tion of jurisdiction among the courts of a Contracting State is not affected. Therefore, it is possible to grant jurisdiction to the courts of a certain state in general, such as Turkish courts, German courts, Bosnian courts etc.

iiii Another Turkish court should not have exclusive jurisdiction.

The courts where the immovable property is located have exclusive jurisdiction to solve disputes concerning rights *in rem* (Article 12 CPC). The courts where the premises of the relevant legal entity are located have exclusive jurisdiction to solve disputes concerning the legal entity between the shareholders and the legal entity (Article 14 CPC). The jurisdiction rules brought for disputes concerning patents, industrial designs, geographical signs and trademarks in the relevant legislation are also considered to be exclusive jurisdiction clauses.⁸

These matters are also excluded from the scope of the Hague Convention (Article 2/2/1-o).

iiiiii The jurisdiction agreement should be made in writing.

According to the Hague Convention Article 3/c, an exclusive choice of court agreement must be concluded or documented i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference. However, under the CPC, written form is a prerequisite of the validity of the jurisdiction agreement; therefore, it needs to be undersigned by both parties.

A valid jurisdiction agreement grants exclusive jurisdiction to the court chosen by the parties unless otherwise provided by the parties. Therefore, if one of the parties initiates a lawsuit at a court other than the designated court, the other party may object to the jurisdiction. Such objection is subject to Article 19 of the CPC, according to which, such objection should be set forth latest with the statement of reply which is supposed to be submitted in two weeks as of the receipt of the statement of claim.⁹

8) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 389.

9) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 409. It is stated in the doctrine that such provision may be disadvantageous for foreign respondents because they may need a longer period of time to arrange for their defence before a Turkish court and the proceedings may initially start at their absence. Therefore, in such cases, the Turkish courts should accept jurisdiction objections made until the respondent is present or duly represented before the court. ÇELİKEL/ERDEM, p. 586.

B. Choice of a Foreign Court by the Parties

The choice of a foreign court by the parties is provided in Article 47 of the PILA.

According to this Article, a jurisdiction clause granting competence to a foreign court is valid under Turkish law under the following conditions:

i The Turkish courts should not have exclusive jurisdiction over the subject matter of the dispute.

The courts where the immovable property is located have exclusive jurisdiction to solve disputes concerning rights *in rem* (Article 12 CPC). Therefore, a jurisdiction agreement concerning disputes arising out of rights *in rem* over an immovable property located in Turkey will not be valid.¹⁰

The courts where the premises of the relevant legal entity are located have exclusive jurisdiction to solve disputes concerning the legal entity between the shareholders and the legal entity (Article 14 CPC). For example, a lawsuit initiated for cancellation of a general assembly decision of a company whose center is located in Turkey cannot be brought before a foreign court.¹¹

The jurisdiction rules brought for disputes concerning the registration, termination, cancellation, amendment, or protection, determination or confiscation of patents, industrial designs, geographical signs and trademarks in the relevant legislation are also considered to be exclusive jurisdiction clauses.¹²

These matters are also excluded from the scope of the Hague Convention (Article 2/2/1-o).

ii The dispute shall carry a foreign element.

The dispute carries a foreign element in various cases. One or both parties to the dispute may be a foreigner; the place where the contract was concluded or the place of performance may be in a foreign state; the subject matter of the dispute may be located in a foreign state; or the

10) NOMER, p. 469; ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 385.

11) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 396.

12) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 396.

applicable law to the contract may be a foreign law.¹³

According to Article 1/1 of the Hague Convention, the Convention applies in international cases. The term “international” is defined in Article 1/2: “*a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*”.

iii The dispute shall arise out of obligations.

The use of “obligations” in Article 47 shows that the dispute should not necessarily arise out of a contract; but disputes arising out of tort or unjustified enrichment may also be subject to a jurisdiction agreement.¹⁴

It is not possible to enter into jurisdiction agreements for the disputes arising out of the status and legal capacity of natural persons; maintenance obligations; other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships, which are matters that are left out of the scope of the Hague Convention.

120

On the other hand, certain matters that are left out of the scope of the Hague Convention are considered as “obligations” under the Turkish law. These are: the carriage of passengers and goods; marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; anti-trust (competition) matters; liability for nuclear damage; claims for personal injury brought by or on behalf of natural persons; tort or delict claims for damage to tangible property that do not arise from a contractual relationship.

iiii The jurisdiction agreement should be evidenced in writing.

The jurisdiction agreement may take place in a document exchanged by the parties or in a document referred to by the parties. It does not necessarily have to be undersigned by the parties.¹⁵ This complies with the Hague Convention Article 3/c where it is stated that an exclusive choice of court agreement must be concluded or documented i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

13) NOMER, p. 473.

14) NOMER, p. 473; ÇELİKEL/ERDEM, p. 571; ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 393; V. DOĞAN, *Milletlerarası Özel Hukuk*, Savaş Yayınevi 2015, p. 75.

15) NOMER, p. 472; ÇELİKEL/ERDEM, p. 571; ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 399.

Furthermore, it is opined in the doctrine that jurisdiction agreements should indicate a specific court.¹⁶The parties do not have to indicate the name of the place such as Berlin, Sarajevo or Stockholm; they may decide upon the competence of “the courts located in the place of performance” etc. In other words, it is sufficient that the competent court is clearly indicated.¹⁷ Agreements granting jurisdiction to the courts of a state in general, such as German courts, Bosnian courts, Swedish courts are not valid.¹⁸However, it must be possible for the parties to choose more than one court, such as the courts in Berlin, Sarajevo or Stockholm. In such case, it will be the claimant who will decide in which of these courts to initiate a lawsuit.¹⁹

It must be noted that Article 47 seems to enable consumers and employees to be parties to a jurisdiction agreement, whereas according to the Hague Convention, consumer contracts and contracts of employment are out of the scope. The international jurisdiction of Turkish courts in consumer contracts is provided in Article 45 of the PILA. Accordingly, the Turkish courts located in the domicile, habitual residence of the consumer; or business place, domicile or habitual residence of the other party to the contract have jurisdiction. The consumer has the right to make a choice out of these courts. However, for the cases to be initiated against the consumer, the Turkish courts located in the habitual residence of the consumer have jurisdiction. According to Article 44 of the PILA, the Turkish courts where the employee habitually performs his labor have jurisdiction. The Turkish courts located in the domicile of the employer, and domicile or habitual residence of the employee have jurisdiction for cases initiated by the employee against the employer. According to Article 47/2, the competence of the Turkish courts mentioned in Articles 44 and 45 may not be removed by a jurisdiction agreement. Consequently, the parties are free to enter into jurisdiction agreements; however, they may not eliminate the jurisdiction of the

16) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 393; EKŞİ, Nuray, Uluslararası Ticarete İlişkin İki Güncel Sorun: Sözleşme Bedelinin Yabancı Para Olarak Ödenmesi ve Yabancı Mahkemenin Yetkisinin Tesisi, *Istanbul Bar Association Law Review*, 10-11-12/1998, p. 873.

17) DOĞAN, p. 76.

18) In its decision dated 07.12.2006 and numbered E.2006/8585, K.2006/12877, the 11th Civil Chamber of the Court of Cassation decided that the jurisdiction agreement granting jurisdiction to “English courts” is not valid. See, ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 394. There are conflicting views in the doctrine which opine that the general indication of the courts of a certain state (German courts, English courts etc.) should be valid. NOMER, p. 474; SARGIN, p. 171.

19) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 394.

relevant courts mentioned in Articles 44 and 45. In other words, the consequence of a jurisdiction agreement relating to consumer and employment contracts is the determination of an alternative competent court and not the abolishment of the competence of the relevant statutory courts.²⁰ It must be noted that, similar provisions exist in Article 46 for insurance contracts. Accordingly, the Turkish courts located in the main business place of the insurer or where its branch or agency that enacted the insurance contract have jurisdiction for disputes arising out of insurance contracts. However, in cases that will be initiated against the policyholder, insuree or the beneficiary, the Turkish courts located in the domicile or habitual residence of them will have jurisdiction. The competence of the Turkish courts granted by Article 46 may also not be eliminated by a jurisdiction agreement. As insurance contracts are within the scope of the Hague Convention²¹, it must be noted that the effect of jurisdiction agreements concerning insurance contracts is different in the Convention than that of the Turkish law.

According to Article 47, the competent Turkish court will have jurisdiction despite a jurisdiction agreement only if the chosen court decides that it has no jurisdiction or if the respondent does not object to the jurisdiction of the Turkish court. Therefore, in principle, the jurisdiction agreement grants exclusive jurisdiction to the chosen court.²²

The validity of a jurisdiction agreement granting competence to a foreign court may be reviewed by a Turkish court in the following cases: i. One of the parties may initiate a lawsuit before a Turkish court despite the existence of a jurisdiction agreement; ii. One of the parties may initiate a lawsuit before a Turkish court although the same case is pending before the court that is competent according to the jurisdiction agreement.²³

If a lawsuit is initiated before a Turkish court despite the existence

20) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 397-398; DOĞAN, p. 75.

21) Hague Convention Article 17: “1. Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply. 2. Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of - a) a matter to which this Convention does not apply; or b) an award of damages to which Article 11 might apply.”

22) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 399.

23) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 395.

of a jurisdiction agreement, the respondent party should object to the jurisdiction of the court latest with the statement of claim; otherwise, the Turkish court becomes competent.²⁴

If a lawsuit is initiated before a Turkish court while the same lawsuit is pending before the chosen foreign court, the respondent may make an objection of *lis pendens*. According to Article 115 of the CPC, the objection of *lis pendens* is a prerequisite of a lawsuit; therefore can be taken into consideration *ipso jure* by the judge and can be set forth at any stage of the proceedings by the parties.²⁵

C. The Possible Impact of the Hague Convention to the Validity of Jurisdiction Agreements

According to Article 5/1 of the Hague Convention, “*The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.*”

In case Turkey ratifies the Hague Convention, in international cases within the meaning of Convention Article 1/2²⁶, the competence of Turkish courts according to a jurisdiction agreement will be subject to the Convention. As the Convention refers to the law of the forum state, the relevant provisions of the CPC will also be applicable. Therefore, if there is an exclusive choice of court agreement valid according to the

24) NOMER, p. 475; ÇELİKEL/ERDEM, p. 575; ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 409. It might be discussed whether this provision is in line with Article 6 of the Convention. Article 6 brings an obligation to dismiss the case to any court not chosen. Furthermore, “*it is an obligation imposed by international rule, and it thus overrides inconsistent provisions of national law*”. R.A. BRAND/P.M. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements Commentary and Documents*, Cambridge University Press 2008, p. 87. Therefore, it might be concluded that Article 6 overrides Article 19 of the CPC because according to Article 6, the court not chosen is under the obligation to dismiss the case without taking into consideration inconsistent national restrictions such as rules bringing a time limit to the jurisdiction objection. This might cause a problem if the respondent tries to use this opportunity as a delaying tactic by not bringing forward a jurisdiction agreement in the beginning but using it afterwards at a later stage of the proceedings. However, according to Article 29 of the CPC, the parties are under the obligation to act in good faith. According to Article 327 of the CPC, the party that caused the extension of court proceedings may be condemned to whole or part of the court expenses even though his case is accepted and he is found fully right. These provisions may be applied against a respondent acting in bad faith.

25) NOMER, p. 475; ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 409.

26) “*a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.*”

Hague Convention, the Turkish court should hear the case if the conditions of CPC are met.

According to Article 6 of the Convention, “*A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless - a) the agreement is null and void under the law of the State of the chosen court; b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised; c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or e) the chosen court has decided not to hear the case.*”

Therefore, after the ratification of the Hague Convention, when a case is brought before a Turkish court despite the existence of a jurisdiction agreement granting jurisdiction to a court of a Contracting State, the Turkish court should apply Article 6 of the Hague Convention and dismiss the case if necessary under Article 6. Accordingly, the Turkish court should not apply Article 47 of the PILA but seek the validity of the jurisdiction agreement according to the law of the state of the chosen court.

II. The Effect of Valid Jurisdiction Agreements to the Recognition and Enforcement of Foreign Judgments

A. Recognition and Enforcement under the Hague Convention

The purpose of the Hague Convention is to ensure that the recognition and enforcement of judgments given by courts validly chosen by the parties is possible. This purpose is clearly stated in the Preamble of the Hague Convention as follows: “*Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,*”

According to Article 9 of the Hague Convention, recognition or enforcement may be refused if:

- i the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
- ii a party lacked the capacity to conclude the agreement under the law of the requested State;
- iii the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - a. was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - b. was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
 - i the judgment was obtained by fraud in connection with a matter of procedure;
 - ii recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
 - iii the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
 - iv the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

B. Recognition and Enforcement under Turkish Law

Under Turkish law, however, there are only four grounds provided by Article 54 PILA that will render the recognition and/or enforcement of a foreign judgment impossible.

- i According to Article 54(a), a multilateral or bilateral agreement between Turkey and the State from whose courts the foreign judgment was given provides for the mutual enforcement

of foreign judgments. If no such agreement is in place, a statutory provision must be in place in the relevant foreign State enabling the enforcement of Turkish court decisions in the relevant foreign state; or at least the Turkish court decisions shall *de facto* be enforced in that state. Article 54(a) does not apply to recognition of foreign judgments (Article 58/1).

iii According to Article 54(b) PILA, foreign judgments given on issues that the Turkish courts have exclusive jurisdiction to resolve may not be enforced. Additionally, if the foreign court's jurisdiction is based on an exorbitant jurisdiction rule,²⁷ and the party against whom enforcement is sought objects to the enforcement, the foreign judgment may not be enforced in Turkey.

iv Article 54(c) of the PILA allows for the refusal of recognition and enforcement of foreign judgment based on the ground that it is manifestly contrary to Turkish public policy.²⁸

Certain grounds that are listed in the Hague Convention are covered under the public policy ground in Turkish law. If the foreign judgment has been obtained by means of fraud in connection with a procedural matter, the principle of prohibition of *revision au fond* will be ignored. By taking into account the presence of false witnesses or false documents, the Turkish judge has to assess the new evidence that had not been submitted before the court of origin at the stage of recognition and enforcement.²⁹ It is accepted in Turkish case law that Turkish public policy may intervene, when there is a foreign judgment that is inconsistent

27) For example, Article 14 of the French Civil Code grants jurisdiction to the French court on the sole ground that the claimant is a French national. Article 23 of the German Code of Civil Procedure lays down that, where no other German court has jurisdiction, actions relating to property instituted against a person who is not domiciled in the national territory come under the jurisdiction of the court for the place where the property or subject of the dispute is situated. Dutch Code of Civil Procedure Article 127 provides that a foreigner, even if he does not reside in the Netherlands, may be sued in a Netherlands court for the performance of obligations contracted towards a Dutch citizen either in the Netherlands or abroad. C. SÜRAL, *Avrupa Birliği'nde Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi*, Güncel 2007, p. 127. For further information on exorbitant jurisdiction rules see N. EKŞİ, *Devletler Özel Hukukunda Aşırı Yetki Kuralları, Selahattin Sulhi Tekinay'ın Hatırasına Armağan*, İstanbul 1999; N. EKŞİ, *Türk Mahkemelerinin Milletlerarası Yetkisi*, Beta 2000, p. 50 *et seq.*; N. EKŞİ, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi*, Beta 2013, p. 235 *et seq.*

28) For further information, see C. DEMİR GÖKYAYLA, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzeni*, Ankara 2001.

29) ŞANLI/ESEN/ATAMAN FIGANMEŞE, p. 515; C. SÜRAL/Z. D. TARMAN, Recognition and Enforcement of Foreign Court Judgments in Turkey, *Yearbook of Private International Law*, V. 15, 2013-2014, p. 237.

with a prior judgment rendered by a Turkish court in a legal dispute between the same parties on the same cause of action.³⁰

v According to Article 54(ç) PILA, if the defendant has not been duly served to appear before the court according to the law of the state of which the judgment rendered and given opportunity to be represented or if the judgment was rendered in the absence of defendant in contrary to the law and if the defendant has objected to the enforcement before the Turkish court, the enforcement may be refused.

B.The Possible Impact of the Hague Convention to the Recognition and Enforcement of Foreign Judgments under Turkish Law

As seen above, the jurisdiction of the foreign court of origin may not be subject to scrutiny by the Turkish court at recognition or enforcement stage.³¹ Therefore, in cases where the relevant foreign court was granted jurisdiction as a result of a jurisdiction agreement, it is too late for the respondent to claim the invalidity of such jurisdiction agreement or to question the competence of the chosen court. It will be contrary to Turkish law if the judge considers such objection at recognition or enforcement stage and refuse recognition or enforcement of a foreign judgment due to the invalidity of a jurisdiction agreement. In other words, the invalidity of a jurisdiction agreement may not be an obstacle to the recognition or enforcement of a foreign judgment in Turkey.³²

If Turkey becomes a party to the Hague Convention, the Turkish courts will have to examine the validity of the choice of court agreements within the meaning of the Hague Convention at recognition and enforcement stage if the foreign judgment was rendered in a state party to the Hague Convention. At this stage, the Turkish courts will not apply Article 47 PILA to the validity of the relevant jurisdiction agreement but will seek for a valid jurisdiction agreement according to the law of the state of the chosen court. Therefore, the Turkish courts will have to examine the whether the jurisdiction agreement is valid and also has to apply a foreign law in order to decide this issue. Therefore, it may be resolved that the ratification of the Hague Convention will not facilitate but complicate the recognition and enforcement of foreign judgments given by courts chosen by the parties.

30) NOMER, p. 512; SÜRAL/TARMAN, p. 237.

31) NOMER, p. 472.

32) ÇELİKEL/ERDEM, p. 569.

On the other hand, it might be questioned whether the Hague Convention brings a minimum standard for recognition and enforcement and that it does not prevent the application of more favorable rules of a contracting state. The issue whether less favorable rules concerning recognition and enforcement found in certain bilateral or multilateral agreements have been abolished by the PILA had been discussed in the Turkish doctrine. According to Article 1/2 of the PILA, the international agreements shall prevail. There is no distinction based on the scope or subject matter of the international agreements and it is not taken into account whether the international agreements bring more favorable rules or not. Therefore, the international agreements shall prevail in all cases.³³ However, it is also stated in the doctrine that the PILA should be applicable as general rule if the international agreement provides for less favorable rules on recognition and enforcement of a foreign judgment.³⁴ In line with this opinion, Kadıköy Commercial Court, in its decision dated 17.06.2008, chose to apply PILA instead of the bilateral agreement concerning judicial assistance on civil and commercial matters between Turkey and Uzbekistan to enforcement of a judgment rendered by an Uzbek court.³⁵

It may be suggested that exclusive jurisdiction of Turkish courts will cease to be an impediment to recognition and enforcement when the Hague Convention is applied. However, the cases where the Turkish courts are considered to have exclusive jurisdiction are left out of the scope of the Hague Convention in Article 2: “*l) rights in rem in immovable property, and tenancies of immovable property; m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; n) the validity of intellectual property rights other than copyright and related rights; ... p) the validity of entries in public registers.*” Therefore, the Turkish courts will continue to deny enforcement to judgments rendered by foreign courts concerning these issues.

On the other hand, the reciprocity can become a serious obstacle to the enforcement of foreign judgments in practice. The requirement of reciprocity has been criticised in the Turkish doctrine. It is not easy for the Turkish judge to ensure the existence of reciprocity; the information provided by Turkish authorities may not be reliable on this matter

33) EKŞİ, *Tanıma Tenfiz*, p. 482-483.

34) ŞANLI/ESEN/ATAMAN FİGANMEŞE, p. 536.

35) See, EKŞİ, *Tanıma Tenfiz*, p. 482-483.

and the application in different countries may rapidly change.³⁶ Furthermore, most states would first expect the other State to start enforcing its judgments.³⁷ Additionally, the other grounds of non-enforcement aim to protect either the interests of Turkish citizens or the public policy. However, reciprocity in no way serves to the interests of persons, as it is an entirely political criterion.³⁸ The ratification of the Hague Convention by Turkey will result that enforcement of a foreign judgment is not refused due to lack of reciprocity where the jurisdiction of the foreign court relies on a choice of court agreement; thereby, providing predictability and certainty to the parties.

The ratification of the Hague Convention will serve to the interests of those who have chosen the Turkish courts as the competent court and seek the recognition or enforcement of the Turkish judgment in a foreign contracting state; because the parties will in advance know that the recognition and enforcement will be subject to the Hague Convention in the other state parties.

CONCLUSION

The ratification of the Hague Convention will have two different effects in Turkish law. First concerns the validity of jurisdiction agreements; and second concerns the recognition and enforcement of foreign judgments.

In case Turkey ratifies the Hague Convention, in international cases within the meaning of Convention Article 1/2, the competence of Turkish courts according to a jurisdiction agreement will be subject to the Convention. As the Convention refers to the law of the forum state, the relevant provisions of the CPC will also be applicable. Therefore, if there is an exclusive choice of court agreement valid according to the Hague Convention, the Turkish court should hear the case if the conditions of CPC are met.

When a case is brought before a Turkish court despite the existence of a jurisdiction agreement granting jurisdiction to a court of a Contracting State, the Turkish court should apply Article 6 of the Hague Convention and dismiss the case if necessary under Article 6. Here, the Turkish court should not apply Article 47 of the PILA but seek the

36) NOMER, p. 498; EKŞİ, *Tanıma Tenfiz*, p. 174.

37) NOMER, p. 498.

38) A. SAKMAR, *Yabancı İlamların Türkiye'deki Sonuçları*, İstanbul 1982, p. 88; NOMER, p. 499; EKŞİ, *Tanıma Tenfiz*, p. 177.

validity of the jurisdiction agreement according to the law of the state of the chosen court.

On the other hand, it may be concluded that the ratification of the Hague Convention by Turkey, will not facilitate the recognition and enforcement of a foreign judgment in Turkey as evaluation of the validity of the jurisdiction agreement according to a foreign law, i.e. the law of the state where the judgment was rendered, will be required. However, the elimination of the reciprocity obstacle may be considered as a major advantage.

Furthermore, the ratification of the Hague Convention will be advantageous for those who choose a Turkish court as the competent court but will seek to enforce the Turkish decision in another contracting state, as they will know that the recognition and enforcement of the Turkish decision in a foreign state party to the Hague Convention will be subject to the Convention.

ABSTRACT

The parties have the opportunity of granting jurisdiction to a Turkish court or to a foreign court in the field of law of obligations under Turkish law. This is considered as the reflection of the principle of freedom of will inherent in the field of law of contracts. The jurisdiction agreements granting jurisdiction to Turkish courts are subject to the Civil Procedure Code (CPC) Articles 17-18; whereas, the competence of foreign courts through the agreement of parties is subject to the Private International Law Act (PILA) Article 47. The recognition and enforcement of foreign court decisions are provided in Articles 50-60 of the PILA. Turkey did not sign the Hague Convention on Choice of Court Agreements (Hague Convention). In this article, I will give basic information on the validity of jurisdiction clauses; and recognition and enforcement of foreign court judgments under Turkish law in comparison with the Hague Convention. I will try to demonstrate the consequences of future ratification of the Hague Convention by Turkey to these issues.

Keywords: Hague Convention on Choice of Court Agreements; Turkish Private International Law; Recognition and Enforcement of Judgments in Turkey.

MOGUĆI UTICAJ HAŠKE KONVENCJE O PROROGACIONIM SPORAZUMIMA NA TURSKO PRAVO

SAŽETAK

Prema turskom pravu, stranke imaju mogućnost prorogiranja međunarodne nadležnosti u korist turskih ili stranih sudovima u oblasti obligacionog prava. Ovo se smatra odrazom principa autonomije volje inače svojstvenog obligacionom pravu. Prorogacioni sporazumi kojima se ustanovljava nadležnost turskih sudova regulisani su Zakonom o građanskom postupku, čl. 17.-18., dok je prorogirana nadležnost stranih sudova regulisana Zakonom o međunarodnom privatnom pravu (PILA), čl. 47. Priznanje i izvršenje stranih sudskih odluka je regulisano čl. 60.-60. PILA. Turska nije potpisala Hašku konvenciju o prorogacionim sporazumima (Haška konvencija). U ovom članku dat ćemo osnovne informacije o valjanosti jurisdikcijskih klauzula, kao i priznanju i izvršenju stranih sudskih odluka prema turskom pravu u poređenju sa Haškom konvencijom. Pokušat ćemo ukazati na posljedice koje bi buduća ratifikacija Haške konvencije od strane Turske imala po navedena pitanja.

Ključne riječi: Konvencija o prorogacionim sporazumima, Tursko međunarodno privatno pravo, priznanje i izvršenje presuda u Turskoj.