

Enforcement of Foreign Judgments 2020

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Patrick Doris

Gibson, Dunn & Crutcher LLP

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Enforcement of Foreign Judgments*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Brazil, Canada (Quebec), Cyprus, Germany, Hong Kong, Jordan, Luxembourg, the Netherlands and Sweden.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick Doris of Gibson, Dunn & Crutcher LLP, for his continued assistance with this volume.



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LEGISLATION

Treaties

- 1 | Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties, and what, if any, amendments or reservations has your country made to such treaties?

Except for multilateral treaties on family law, Turkey is not a signatory to multilateral treaties for the reciprocal recognition and enforcement of foreign judgments. However, Turkey is party to conventions such as the Convention on the Contract for the International Carriage of Goods by Road 1956 and the Convention concerning International Carriage by Rail 1985, which contain provisions for the recognition and enforcement of foreign judgments, but only for disputes in relation to the application of the aforementioned conventions.

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.

In addition, Turkish courts recognise and enforce the judgments of many countries, such as Germany, the United Kingdom and the United States, on the basis of de facto reciprocity between these countries and Turkey. The evaluation of de facto reciprocity is conducted on a state-by-state basis for the United States.

Intra-state variations

- 2 | Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

There is uniformity in the law on the enforcement of foreign judgments within Turkey.

Sources of law

- 3 | What are the sources of law regarding the enforcement of foreign judgments?

The Act on Private International Law and International Procedural Law No. 5718 (PIL) dated 27 November 2007 is the main legislation that regulates the recognition and enforcement of foreign judgments.

By virtue of article 90 of the Turkish Constitution, international agreements duly put into effect bear the force of law. Therefore, relevant international agreements also constitute a source of law regarding the enforcement of foreign judgments.

Precedents of the Supreme Court are also important. However, in principle, the precedents of the Supreme Court are not binding in Turkish law apart from decisions on the unification of conflicting judgments.

Hague Convention requirements

- 4 | To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Turkey is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

BRINGING A CLAIM FOR ENFORCEMENT

Limitation periods

- 5 | What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Under Turkish law, there is no specific limitation period for the enforcement of a foreign judgment. However, article 8 of the PIL regulates the statute of limitations for legal transactions and relationships that carry foreign elements. According to this article, the statute of limitations is subject to the law applicable to the legal transaction or relationship. The Supreme Court, in its various decisions, has stated that limitation periods are not related to public order and provisions of foreign law should be applicable to this issue (Fourth Chamber of the Supreme Court (Merit No. 2003/10163, Decision No. 2004/1408) and 11th Chamber of the Supreme Court (Merit No. 1998/383, Decision No. 1998/3945)). In addition, as to the precedents of the Supreme Court, in case a foreign judgment is recognised but not yet enforced, the statute of limitations specific to the merits (subject matter) of that judgment regulated by related Turkish provisions will be applied to that judgment as if it were a judgment rendered by a domestic court.

Types of enforceable order

- 6 | Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Pursuant to article 50 of the PIL, foreign judgments regarding civil law matters are enforceable as long as they are final under the laws of the foreign country.

In addition to the matters determined in article 50 of the PIL, it has been opined that not only judgments rendered by civil courts but also decisions rendered by administrative courts are enforceable, provided that they are in relation to civil law matters.

The enforcement of interim injunctions is not regulated under the PIL. With reference to article 50 of the PIL, there is a view in Turkey that interim decisions will only be enforceable if the dispute has been finally resolved by the foreign court that issued these interim decisions. However, there is also the opinion that, in practice, interim injunctions are not enforceable under Turkish law since they are not final decisions.

Article 50 of the PIL further sets forth that foreign judgments that are rendered by criminal courts with regard to personal rights or monetary compensation are enforceable too.

Competent courts

7 | Must cases seeking enforcement of foreign judgments be brought in a particular court?

Cases seeking enforcement of foreign judgments must be brought in a particular court. Article 51 of the PIL regulates the competent courts for enforcement of foreign judgments. According to this article, the civil courts of first instance are competent for the enforcement of foreign judgments. Nevertheless, there is no unity in practice, because some civil courts of first instance reject the applications owing to lack of jurisdiction and send the file to the relevant commercial, intellectual property or labour courts.

Paragraph 2, article 51 of the PIL also regulates the jurisdiction of the courts. Pursuant to this provision, a case regarding enforcement of a foreign judgment must be filed before the court where the party against which the enforcement is sought, is domiciled. If there is no domicile address for this party, then the case can be filed before the court on this party's place of residence. If none of these exists, the case can be filed before one of the courts in Ankara, Istanbul or İzmir.

Separation of recognition and enforcement

8 | To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

The process for obtaining judicial recognition for a foreign judgment is almost the same as the process for enforcement. However, contractual or de facto reciprocity is not required for the recognition of a foreign judgment (see below for detailed explanations on requirements of recognition and enforcement).

OPPOSITION

Defences

9 | Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Under Turkish law, defendants cannot raise merits-based defences. Pursuant to article 55 of the PIL the defendant is limited to narrow grounds for challenging a foreign judgment.

Pursuant to articles 54 and 55 of the PIL the defendant may challenge the foreign judgment by alleging that:

- there is no contractual or de facto reciprocity;
- the judgment is on an issue subject to the exclusive jurisdiction of Turkish courts;
- the foreign judgment was rendered by a court unrelated to the matter in dispute and the parties;
- the judgment explicitly violates Turkish public order;
- the foreign court did not respect the right of defence of the party against which enforcement is sought, in Turkey;
- the foreign judgment is not final under the laws of the foreign country;

- a ground exists that would prevent enforcement of the foreign judgment (eg, a reason for restitution of the judgment (see question 18)); or
- the foreign judgment has been already wholly or partially executed.

Injunctive relief

10 | May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

No. A party cannot obtain injunctive relief to prevent foreign judgment enforcement proceedings. The decisions that can be given by the enforcing court are regulated under article 56 of the PIL and, according to which the court can either accept or dismiss the enforcement of the foreign judgment. In this regard, the court cannot grant injunctive relief to prevent foreign judgment enforcement proceedings.

REQUIREMENTS FOR RECOGNITION

Basic requirements for recognition

11 | What are the basic mandatory requirements for recognition of a foreign judgment?

The requirements for recognition of a foreign judgment are regulated under articles 54 to 58 of the PIL and can be summarised as follows:

- the foreign court must have respected the right of defence of the party against which enforcement is sought in Turkey;
- the foreign judgment must be final under the laws of the foreign country;
- the foreign judgment should not be on an issue subject to the exclusive jurisdiction of the Turkish courts; and
- the foreign judgment must be in compliance with Turkish public order.

If these conditions are met, the court will decide for the recognition of a foreign judgment.

Other factors

12 | May other non-mandatory factors for recognition of a foreign judgment be considered and, if so, what factors?

There are no non-mandatory factors. As explained in question 11, the factors for recognition of a foreign judgment are explicitly regulated in articles 54 to 58 of the PIL.

Procedural equivalence

13 | Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction and, if so, how is that requirement evaluated?

There is no explicit regulation, as the judicial proceedings where the judgment was entered shall correspond to due process in Turkish jurisdiction. However, foreign judgments that violate Turkish public order cannot be recognised or enforced. Since provisions similar to the due process of law are explicitly stated by the Turkish Constitution – that as each person is equal before the law and shall be judged by impartial and independent courts – judgments that do not comply with these provisions may not be recognised owing to their explicit violation of public order.

JURISDICTION OF THE FOREIGN COURT

Personal jurisdiction

- 14 Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant and, if so, how is that requirement met?

Turkish law does not recognise the concept of personal jurisdiction, and therefore the enforcing court will conduct such an examination.

Subject-matter jurisdiction

- 15 Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy and, if so, how is that requirement met?

According to article 54 of the PIL, upon the objection of the defendant, the Turkish court will examine the jurisdiction of the foreign court over the controversy. The court, upon the objection of the defendant, will examine whether or not the judgment was granted by the court of a country that considered itself competent although it had no actual relation with either the matter in dispute or the parties. Therefore, the Turkish court shall not ex officio examine the subject-matter jurisdiction of the foreign court, except upon the objection of the defendant. If the foreign court has no jurisdiction over the dispute, the foreign judgment cannot be enforced.

According to the same article, the court will ex officio examine whether or not the judgment was rendered on an issue that falls under the exclusive jurisdiction of Turkish courts.

Service

- 16 Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Pursuant to article 54 of the PIL, the defendant must be properly served with the original action in the foreign jurisdiction. Also, there is an opinion that all procedures made during the action should be duly served, since this is part of a fair trial. Therefore, the notice of the original action should also be formally served.

Fairness of foreign jurisdiction

- 17 Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The court will not conduct a fairness examination of the foreign judgment. The court's examination will be limited to the enforcement requirements determined in articles 54 and 55 of the PIL (prohibition of *révision au fond*). However, intervention of the court will come into question if the judgment explicitly violates Turkish public order. The foreign judgment must be in compliance with Turkish public order.

EXAMINATION OF THE FOREIGN JUDGMENT

Vitiating by fraud

- 18 Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

The vitiating of the foreign judgment by fraud is not regulated under the PIL.

However, pursuant to the judgment of the Second Chamber of the Supreme Court dated 15 November 1984 (Merit No. 1984/9293 and

Decision No. 1984/9484), the reasons for 'restitution of the judgment' constitute a breach of the public order.

The reasons for the 'restitution of the judgment' are regulated under the Turkish Procedural Code. According to the Procedural Code, if the judgment is affected by the fraudulent acts of the winning party, this constitutes a reason for restitution of judgment. In this regard, it can be concluded that the court will ex officio examine the foreign judgment in terms of fraud.

Public policy

- 19 Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

In principle, the court will not examine the foreign judgment for consistency with substantive laws. However, the foreign judgment rendered should not be on an issue that is subject to the exclusive jurisdiction of the Turkish courts, such as cases arising from rights in rem in immovable property and in cases arising from consumer or insurance agreements.

With regard to public policy, the Turkish court will ex officio examine whether or not enforcement of foreign judgment explicitly violates Turkish public order. The foreign judgment cannot be enforced if it explicitly violates Turkish public order.

Conflicting decisions

- 20 What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Enforcement of conflicting decisions is not regulated under the PIL. However, there is a scholarly opinion that if the foreign judgment is in conflict with another final and conclusive judgment, the foreign judgment cannot be enforced by the Turkish court. It should be noted that, in order to speak of conflicting decisions, the parties and the subject matter of the foreign judgment must be the same as those in the final and conclusive judgment. The final and conclusive judgment can be either the Turkish court's judgment or another foreign judgment that has already been recognised or enforced by the Turkish court.

Enforcement against third parties

- 21 Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

No. The Turkish court cannot enforce a judgment against a party other than the named judgment debtor. As a general principle, the judgments are binding only on the parties in the dispute.

Alternative dispute resolution

- 22 What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

There is no explicit provision in the PIL on this issue. In the decision of the Kadikoy Fourth Commercial Court dated 17 June 2008 (Merit No. 2007/1020 and Decision No. 2008/386), the court rejected the defendant's objections regarding alternative dispute resolution on the basis of the following grounds:

'There is no dispute that the Uzbekistan judgment becomes final and conclusive after the appeal process in Uzbekistan where the defendant submitted his arbitration objection. Thus, the final and

conclusive judgment containing no provisions which may violate the Turkish public order should be enforced since all requirements stated in article 54 of PIL were met.'

Although the Supreme Court has not discussed this issue until now, provided that the *numerus clausus* conditions of the enforcement have been met, it is highly likely that the courts will accept an enforcement of judgment case disregarding the parties' objections as to an agreement on alternative dispute resolution, probably on the basis that an objection regarding the existence of alternative dispute resolution clauses between the parties is something that should have been evaluated by the court that rendered the actual decision on the merits of the dispute.

Favourably treated jurisdictions

23 | Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Turkey does not give greater deference to judgments from some foreign jurisdictions. However, it should be noted that determination of *de facto* reciprocity may take longer for certain foreign jurisdictions since the courts sometimes prefer to confirm the reciprocity with the Turkish Ministry of Justice.

Alteration of awards

24 | Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The Turkish court will examine a foreign judgment in order to determine whether or not the requirements for enforcement are met. The court may decide to enforce the foreign judgment as a whole or in part as per article 56 of the PIL.

However, the court may not alter or limit the damage award as long as the award does not violate Turkish public order. It should be noted that there is an opinion that, since punitive damages are considered incompatible with the principles of Turkish liability law, they are considered, because of their nature, incompatible with Turkish public order. In other words, material damages exceeding actual loss are considered incompatible with Turkish public order.

Note that, according to the general principle of 'civil courts' commitment to the request of the plaintiff', in Turkish law, if the claimant requests only a part of the judgment to be enforced, the said part will be enforced by the court.

AWARDS AND SECURITY FOR APPEALS

Currency, interest, costs

25 | In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Turkish courts do not convert the damage award into local currency. However, during the collection process, the debtor may prefer to make the payment in Turkish. The court costs and the official attorneys' fees, which will be determined in favour of the successful party according to the annual tariff of the Turkish Bar Association, will be in the local currency.

With regard to interest, it should be noted that the interest rate determined in the foreign judgment shall be applied until the collection procedure in Turkey.

Security

26 | Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Pursuant to article 57 of the PIL, court decisions regarding the recognition and enforcement of a foreign judgment can be appealed as per the general provisions of the Turkish Procedural Code.

Under Turkish law, the courts first render their short decisions. After two or three weeks, reasoned decisions are issued. The decision of the civil court of first instance can be appealed within two weeks of notification of the reasoned decision before the regional appellate court. The parties are also entitled to appeal the decision rendered by the Regional Appellate Court before the Supreme Court within two weeks of notification of the regional appellate court's decision.

The appeal process prevents execution of the Turkish court's decision regarding enforcement of the foreign judgment. In other words, the foreign judgment cannot be executed until the Turkish court's decision regarding enforcement of a foreign judgment becomes final and cannot be appealed.

It should also be noted that if the debtor does not comply with the Turkish court's decision regarding enforcement of the foreign judgment, the claimant can have the decision executed by application to the bailiff's office. The debtor must comply with the executive order within seven days of the notification. Otherwise, the claimant can apply for the attachment of assets that the debtor may have.

ENFORCEMENT AND PITFALLS

Enforcement process

27 | Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Under Turkish law, recognition and enforcement of a foreign judgment are regulated separately. In principle, enforceable judgments can be enforced whereas declaratory judgments can be recognised. The party can request an enforceable judgment to be recognised as well. However, in such a case the party cannot enforce this judgment. The recognised judgment can be used as conclusive evidence and decision.

The process of enforcement of a foreign judgment is regulated under articles 50 to 57 of the PIL.

The claimant must file a case for enforcement of a foreign judgment before the civil court of first instance that has jurisdiction.

The petition must include:

- the names and addresses of the parties and their attorneys, if any;
- the country, court, date, number and summary of the judgment; and
- the claimant's request of the said part if only a part of the judgment is to be enforced.

The original or an approved copy of the judgment, the approved letter, and translations showing that the judgment is final must be attached to the plaintiff's petition.

The requirements for enforcement of a foreign judgment are as follows:

- there must be contractual or *de facto* reciprocity;
- the foreign court must have respected the right of defence of the party against which enforcement is sought in Turkey;
- the foreign judgment that is subject must be final under the laws of the foreign country;
- the foreign judgment should not be on an issue subjected to the exclusive jurisdiction of the Turkish courts; and
- the foreign judgment should not violate the Turkish public order.

If these conditions are met, the court will grant enforcement of the foreign judgment.

Once the enforcement decision granted by the court becomes final and binding, the plaintiff can make an application to the bailiff's office and request the office to send an execution order to the defendant. The defendant must comply with the execution order within seven days. If the defendant fails to comply with the execution order, the claimant can apply for the attachment of assets that the debtor may have.

Pitfalls

28 | What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

One of the most common pitfalls is the duration of the proceedings. In practice, recognition and enforcement of a foreign judgment takes about six to 18 months. If the decision is appealed before a regional court and finally before the Supreme Court, the process will take longer.

Public order is another common pitfall, since the laws do not regulate the definition of the public order. In principle, Turkish public order is interpreted narrowly by the courts and in this respect only judgments that contradict indispensable and essential Turkish legal principles are considered as violating Turkish public order.

There have been Supreme Court precedents stating that judgments, where there is no discussion of reasoning, cannot be enforced, since they do not enable the courts to assess the requirements for enforcement and therefore breach Turkish public order. For example, summary judgments under common law have been problematic with respect to recognition and enforcement. Nevertheless, the decision of the Joint Chambers of the Court of Cassation, dated 10 February 2012, Merit No. 2010/1, Decision No. 2012/1, stated that the mere fact that a foreign decision lacks reasoning does not prevent that decision from being enforced. Decisions rendered by the Joint Chambers of the Supreme Court are binding on other chambers of the appeal court as well as the local (ie, first-instance) courts. Therefore, the recognition and enforcement of a foreign judgment can no longer be denied owing to the violation of Turkish public order merely because the judgment does not include a discussion of reasoning.

Contractual or de facto reciprocity can be another pitfall for the enforcement of a foreign judgment. Although Turkey has signed bilateral treaties with 29 countries, there are still many countries whose decisions cannot be enforced in Turkey owing to the principle of reciprocity.

Furthermore, the competent court issue is also one of the pitfalls. Although civil courts of first instance are competent for the enforcement of foreign judgments, there is no unity in practice because some civil courts of first instance reject applications owing to a lack of jurisdiction, sending the file to the relevant specialised court, such as a commercial, intellectual property or labour court. Even though there are different Supreme Court precedents regarding this issue and this affects the duration of the proceedings, recent Supreme Court precedents point towards specialised courts. Confusion may still arise between specialised courts owing to complex and multi-faceted subject matter. For instance, for disputes arising from intellectual property law, according to some Supreme Court precedents, the intellectual property courts are the competent courts, whereas other precedents indicate the commercial courts as the competent courts. In those cases, there is a risk that the court may reject the case because of a lack of competence and the counterparty may appeal this decision to prolong the proceedings.

Finally, the issue of court fees is another important pitfall. According to the Turkish Act on Fees, if the subject matter of the judgment seeking to be enforced is monetary, a proportional fee (6.831 per cent of the total amount in dispute) shall be applicable to enforcement applications, and one-quarter of this amount is payable on filing the application. If the judgment's subject matter is not monetary, a fixed court fee, depending

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on the subject matter, will be applied. However, although the general approach regarding court fees has been explained, there is no firmly settled practice in this regard in Turkey, and some courts apply fixed fees for enforcement applications, whereas some chambers of the Supreme Court seldom apply fixed court fees.

UPDATE AND TRENDS

Hot topics

29 | Are there any emerging trends or hot topics in foreign judgment enforcement in your jurisdiction?

There have been no significant recent developments in this area in Turkey.

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