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List of Abbreviations

COREPER:	Committee of Permanent Representatives
EC:	European Commission
EC:	European Community
ECJ:	European Court of Justice
EEC:	European Economic Community
EFTA:	European Free Trade Association
E.G.:	Exempli Gratia
EU:	European Union
PIL:	The Turkish Code on Private International and Civil Procedural Law

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Abstract

As a result of sovereignty, states themselves, conduct judicial activities of their countries. These activities are the reflection of sovereignty rights. Hence, states do not allow foreign interference when performing these activities. Consequently, a domestic dispute has to be resolved by the national courts of the states. However, due to increased international interactions, many disputes began to have foreign elements; thus, a judgment of a national court must also have legal effect in the state in which one of the parties is national. Otherwise, the strict implementation of the rule that the national court judgments are effective solely within the country where they are issued can result in negative consequences in interstate relations and within the relationships between natural persons. For the reasons discussed above, the international community has adopted the procedure of recognition and enforcement in which the national court judgments would be allowed to have extraterritorial legal effect in another country under certain conditions.

Introduction

The European Community was one of the first to adopt the recognition and enforcement procedure; simplification of formalities concerning the recognition and enforcement of judicial judgments and arbitral awards under Article 220 of the Treaty of Rome was among the issues to be negotiated by the Member States. Therefore, ‘‘Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters’’ was enacted in 1968 per the Treaty of Rome. Towards the end of the 1990s, Member States began to work on a new Convention on recognition and enforcement aiming to eliminate the problems that occurred in the implementation of the Brussels Convention of 1968.

Consequently, ‘‘Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters’’ numbered 44/2001 was adopted on 22 December 2000. However, rapprochement between the Member States proved it necessary to make another change in the legislation to answer the needs of the EC. Finally, on 21 April 2009, the Commission’s report on the implementation of the Brussels I Regulation was acknowledged.

In the report, it was expressed the Regulation 44/2001 was functioning properly. However, there was a need of more ‘‘liberal’’ regulation. Since many amendments were foreseen in the report, it was decided to adopt a new regulation for legal certainty.

Accordingly, 'Regulation No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' also known as the 'Recast Brussels I Regulation' entered into force on 10 January 2013 and began to be implemented on 10 January 2015.

The recognition and enforcement procedure significantly reduce the work-load of the national courts and prevent the loss of money and time by eliminating the need to hear the same case in more than one country. Moreover, the interests of the persons concerned are protected and most importantly, the legal security is established by preventing different interpretations of the same disputes¹. In international practice, a foreign court judgment must be "recognized" to be regarded as conclusive evidence or *res judicata* ². On the other hand, the partial or full enforcement of foreign court judgments require a decision of *exequatur* given by the competent court³. However, the European Union has removed the *exequatur* procedure with the Brussels I Regulation. There are theoretical and practical differences in the procedural law concerning the recognition and enforcement of foreign court judgments.

As the Brussels I Regulation does not extend to public and criminal matters unlike its Turkish counterpart Law No 5718 of 27 November 2007 the Turkish Code on Private International and Civil Procedural Law, the thesis shall focus on the recognition and enforcement of court judgments in civil and commercial matters.

In the first part of the thesis, the Brussels Convention of 1968, which is the original instrument that accomplished the recognition and enforcement of these judgments within the European Community will be thoroughly discussed. Then, the Lugano Convention of 1988 which had extended the recognition regime to EFTA members who were not signatories of the Brussels Convention will also be briefly examined concerning its purpose and scope. The Lugano Convention of 1988 was based on the Brussels Convention of 1968 and materially the same as the latter. Thus, it could be regarded as a parallel Convention to the Brussels Convention ⁴. Therefore, it is not possible to make a healthy examina-

¹ Ergin Nomer and Şanlı Cemal, *Devletler Hususi Hukuku* (14th edn, 2006) 427

² Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 71

³ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 69

⁴ Robert Reuland, 'The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention' [1993] 14(4) *Michigan Journal of International Law*
<<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1600&context=mjil>> accessed 7 January 2019

tion of the Brussels Convention 1968 without a brief review of the Lugano Convention of 1988.

The second part of the thesis shall begin with the recognition and enforcement procedure in the EU under the current legislation Brussels I Regulation. In the third and final part, the thesis shall continue with discussing the procedural rules concerning recognition and enforcement of foreign court judgments in civil and commercial matters under the Private International Law of Turkey and end the thesis with a comparison of both laws.

Chapter 1

Sources of the European Union's Recognition and Enforcement of Foreign Court Judgments Procedure

The Brussels Convention of 1968

A. Background

The Brussels Convention of 1968 (hereinafter referred to as ‘the Convention’) initially fulfilled the recognition and enforcement of foreign court judgments in civil and commercial matters. It is now superseded by the new Brussels I Regulation and only applies to 15 pre-2004 Member States.

Before the Convention was enacted, the issue of recognition and enforcement was regulated by each state's private international law resulting into uncertainty in international law and legal insecurity. For example, the German law required reviewing many aspects of the foreign judgment subject to recognition and enforcement. On the other hand, in the Netherlands, it was not possible to enforce a foreign court judgment⁵.

Under Article 220 of the Treaty of Rome, which established the European Economic Community, ‘simplification of the formalities regarding the recognition and enforcement of judicial judgments and arbitral awards’ was stated as a topic to be negotiated by the Member States. As it is also said in the introductory part of the Convention, this Article constitutes the basis for the Convention. On 22 October 1959, upon the letter sent to the Member States by the EEC, official efforts to establish the Brussels convention began through the Committee of Permanent Representatives⁶.

⁵ Peter Byrne, *The EEC convention on jurisdiction and the enforcement of judgments* (1990) 1

⁶ Trevor Hartley, *Civil Jurisdiction and Judgments* (1984) 2

The committee consisting of experts and observers, who were appointed by COREPER and the representatives of the Commission, was chaired by the German Minister of Justice Prof. Bülow and the Foreign Affairs Minister of Belgium, Jenard. The final version of the draft was submitted to Member States as well as a report by Jenard⁷. The six founding members of the European Economic Community had signed the ‘‘Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters’’ on 27 September 1968⁸ and the Convention entered into force on 1 February 1973. Under Article 63 of the Convention, the Signatory States and any state that shall become a member of the Community were obliged to recognize the Convention as the foundation for the negotiations to be held regarding the Article 220 of the Treaty of Rome.

B. Purpose of the Brussels Convention of 1968

The goal of the European Community was to establish a customs free common commercial market. The Convention was enacted as a legal instrument to serve to this purpose. The aim of the Convention is to set common rules on private international law to ensure stability as well as to simplify the formalities in this area to allow free movement of court decisions within the Community⁹.

C. Position of Brussel Convention of 1968 in the Community Law

International agreements can be defined as the convergence of the will between international legal persons¹⁰. For an international agreement to bind a state, it must be reviewed and approved by the competent body of the state. Each state’s constitution regulates the method of approval. International agreements which have been put into force per the state’s procedure, bind the national legislative, executive and judicial bodies¹¹.

⁷ Günseli Öztekin, *Brüksel Anlaşması Anlamında Yabancı İlamların Tanınması ve Tenfizi* (1990) 200

⁸ Suriyakumari Lane, *Free Movement of Judgments within the EEC* (International and Comparative Law Quarterly 1986) 629

⁹ Ata Sakmar and Nuray Ekşi, *Hukuki ve Ticari Konularda Mahkemelerin Milletlerarası Yetkisi ve Mahkeme Kararlarının Tanınması Tenfizi Hakkında AB Konsey Tüzüğü* (2002) 721

¹⁰ Melda Sur, *Uluslararası Hukukun Esasları* (2nd edn, 2006) 18

¹¹ Melda Sur, *Uluslararası Hukukun Esasları* (2nd edn, 2006) 48

As a rule, international agreements are implemented as a whole. However, unless otherwise is stated, parties of the agreement may modify certain provisions of the it¹².

Technically, the Convention is an international multilateral agreement which requires approval by the competent authority of each Contracting State in order to enter into force. The features of international agreements which have been discussed above apply to the Convention as well; thus, the Convention could not come into effect without proper approval by each Member State¹³.

However, given that the legal basis of the Convention is the treaty of Rome and the authorized body to interpret the Convention is the ECJ¹⁴, the Convention can be regarded as a *sui generis* source of Community law¹⁵.

D. Implementation of the Brussels Convention of 1968

The Convention is a set of rules regulating the jurisdiction of Signatory States courts on international commercial and civil matters and recognition and enforcement of judgements issued by these state's courts. The Convention applies to foreign court judgments regardless of the parties nationality or whether they are domicile in one of the signatory states. It should be noted that the domestic law of the Signatory State has to be applied to a judgement issued by a non-Signatory State court¹⁶.

The Convention superseded previous bilateral and multilateral agreements on the recognition and enforcement. According to the Article 56 of the Convention, these bilateral and multilateral agreements will apply to the matters that fall outside the scope of the Convention. On the other hand, according to the Article 57 of the Convention, the Convention does not affect agreements between the Signatory States which have already been concluded or to be reached in the future, including

¹² Melda Sur, *Uluslararası Hukukun Esasları* (2nd edn, 2006) 54

¹³ Haris Tagaras, *Guidelines for the Round Table Discussion on the Relationship between the Brussels Convention and Community Law* (1999) 173

¹⁴ Nils Wahl, *The Lugano Convention and legal integration: the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and its effect on legal integration between the European Community and the EFTA states* (1990) 59

¹⁵ Haris Tagaras, *Guidelines for the Round Table Discussion on the Relationship between the Brussels Convention and Community Law* (1999) 173

¹⁶ Ata Sakmar and Nuray Ekşi, *Hukuki ve Ticari Konularda Mahkemelerin Milletlerarası Yetkisi ve Mahkeme Kararlarının Tanınması Tenfizi Hakkında AB Konsey Tüzüğü* (2002) 726

extraordinary provisions on specific matters, jurisdiction, recognition and enforcement. One crucial problem arising is the relationship between an international agreement which grants a state exclusive jurisdiction and the Convention.

For example; International agreements on the liability arising from oil pollution have granted exclusive jurisdiction to the courts of the country where the damage occurs. However, the Signatory States of the Convention are not parties to this ad hoc agreement. What would happen if the recognition or enforcement of a court judgment issued by a non-party country is requested from a country which is a party of this agreement? According to Dashwood, Hacon, and White, in this case, the court may reject the request on the grounds of public order¹⁷.

E. The Scope of Application of the Brussels Convention of 1968

First of all, it should be noted that the provisions of the Convention are only applied to disputes involving foreign elements. The Convention applies to civil and commercial matters which are not restrictively envisaged by Article 1 of the Convention.

a. Civil and Commercial Matters

According to the Article 1 of the Convention, the Convention applies to civil and commercial matters whatever the nature of the court or tribunal. Again, under the same article it is openly expressed that the Convention does not apply to tax, customs and administrative law¹⁸. In its judgment of *Steenbergen v. Baten*, the Court of Justice ruled that the civil and commercial matters should not be interpreted differently by each contracting state to ensure that the rights arising from the Convention are equal¹⁹.

In the interpretation of civil and commercial matters, first of all, the purpose and the structure of the Convention; then, the general principles arising from the essence of national legal systems should be taken into account. Accordingly, the cases in which one of the parties exer-

¹⁷ Alan Dashwood and others, *A Guide to the Civil Jurisdiction and Judgments Convention* (Kluwer Law and Taxation Publishers 1987) 49

¹⁸ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 67

¹⁹ Case C-271/00 *Steenbergen v. Baten* [2002] ECR I-10489.

cises its authority based on authority shall not be considered civil and commercial matters and the Convention shall not apply²⁰.

As the nature of the court will not be taken into consideration, criminal court judgments on civil or commercial matters are also within the scope of the Convention²¹. For a judgment in a criminal court to carry a civil or commercial character, the sentence imposed must concern the personal interests of the plaintiff or a third party. In such cases, the recognition and enforcement of judgments in favor of third persons will be possible under the Convention.

Moreover, the Convention also applies to cases before administrative courts which involve civil and commercial disputes as well as cases concerning labor law²².

The court that examines the request for recognition and enforcement is not bound by the interpretation of the foreign court who rendered the judgment. Thus, although the foreign court had based its jurisdiction on the Convention, the examining court is free, or it may reject the request for recognition and enforcement if it considers itself not competent. However, if the court regards itself competent, it may examine the application per domestic law²³.

The purpose of the Convention is to simplify the procedure for recognition and enforcement. Reexamining for whether the request for recognition and enforcement according to Article 34 of the Convention is in civil or commercial nature would be inconsistent with the designated purpose of the Convention.

b. Private Law Matters That Fall Outside The Scope of Brussels Convention of 1968

Some of the civil and commercial matters have been excluded from the scope of the Convention due to the differences between the contracting state's conflict of laws.

aa. Status and Legal Capacity of Natural Persons

²⁰ Günseli Öztekin, *Brüksel Anlaşması Anlamında Yabancı İlamların Tanınması ve Tenzifi* (1990) 203

²¹ Alan Dashwood and others, *A guide to the Civil Jurisdiction and Judgments Convention* (1987) 10

²² Peter Byrne, *The EEC convention on jurisdiction and the enforcement of judgments* (1990) 11

²³ A.V. Dicey and others, *The Conflict of Laws* (15th edn, Sweet & Maxwell 2018) 11

The laws of Contracting States on the status of natural persons, conflict of laws and jurisdiction vary considerably from each other. Therefore, it would be difficult for the contracting states to recognize or enforce each other's court judgments²⁴.

According to Article 1 of the Convention, the status or legal capacity of natural persons, rights in property arising out of a marital relationship, wills and succession are excluded²⁵.

bb. Right in Property Arising Out of a Matrimonial Relationship

Matrimonial property regimes in the contracting states are subject to very different regulations. In the Anglo-American system, the concept of the matrimonial property regime does not exist. Besides, unlike the continental law, there are not any special provisions to regulate this matter²⁶. On the other hand, in the continental system, the marital property regime exists, and it depends on the choice of the spouses²⁷.

Disputes concerning the marital property regimes adopted in the continental system are under the scope of the Convention. However, it should be noted that the disputes arising from the matrimonial property regimes fall under the scope of the Convention only when they concern the merits of the matter²⁸.

E.g., Disputes where one of the spouses make property claimant are not under the scope of the Convention. Therefore, the recognition and enforcement of a judgment concerning such claim between a third person and the spouse shall fall under the scope of the Convention.

²⁴ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 85

²⁵ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 2 299/1

²⁶ Peter Byrne, *The EEC convention on jurisdiction and the enforcement of judgments* (1990) 16

²⁷ David Hodson, 'EU matrimonial property regime regulation' (*Family Law*, 29 October 2018) <https://www.familylaw.co.uk/news_and_comment/EU-Matrimonial-Property-Regime-Regulation> accessed 7 January 2019

²⁸ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 99

cc. Wills and Succession

According to Article 1 of the Convention, matters regarding inheritance are not under the scope of the Convention²⁹. The rules of conflict of laws, as well as the substantive law of the contracting states, are majorly different from each other.

E.g., in some countries, the share in the inheritance of the spouse is a certain amount of the heritage.

On the contrary, in some countries, the share of both the spouse and the children is the same. Again, while some states apply the national law of the deceased on their property, some states implement the law of the country where the property is³⁰. Therefore, the matters concerning inheritance has been kept outside the scope of the Convention.

dd. Bankruptcy, Proceedings Relating to the Winding-up of Insolvent Companies or Other Legal Persons

According to Article 1 of the Convention, bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons are not under the scope of the Convention³¹. In the Jenard Report, debt moratorium, compulsory liquidation of the property involving the intervention of judicial authorities have been enumerated as matters that fall outside the scope of the Convention³². However, the Convention kept voluntary liquidations under its scope as they are based on the will of the parties and qualify as legal contracts³³.

ee. Social Security

²⁹ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 2 299/1

³⁰ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 117

³¹ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 2 299/1

³² Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 117

³³ Peter Byrne, *The EEC convention on jurisdiction and the enforcement of judgments* (1990) 21

Social security is subject to public law in many countries. However, the distinction between private and public law in some countries is not clear. Additionally, while civil courts are the competent court in some countries concerning social security disputes, administrative courts are in others. These differences in both substantive and procedural laws of Contracting States resulted in social security to be kept out of the scope of the Convention³⁴.

ff. Arbitration

Given the fact that arbitration is already regulated by international conventions like the New York Convention and the EU Arbitration Convention, it is not strange that the arbitral awards have been kept outside the scope of the Convention³⁵. As the arbitration has been kept out of the scope of the Convention, the recognition and enforcement of the arbitral awards are not possible. Besides, the recognition and enforcement of a court decision which is based on an arbitral award or which modifies or orders the enforcement of an award will not be possible³⁶.

A competent court under the Convention may decide lack of jurisdiction in accordance with the New York Convention or its domestic law³⁷. However, sometimes in practice, it can be observed that despite the arbitration agreement between the parties, courts decide that they have jurisdiction over the dispute and adjudicate on the matter. In this case, it may be possible to recognize and enforce such court judgments according to some scholars³⁸.

In Articles 27 and 28 of the Convention, the barriers to recognition and enforcement are restrictively counted. Thus, it will not be in accordance with the Articles aforementioned to prevent the recognition and

³⁴ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 132

³⁵ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 146

³⁶ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 148

³⁷ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 185

³⁸ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 186

enforcement of such court judgments without one of the barriers enlisted being present³⁹.

1. The Lugano Convention of 1988

A. Background

With the removal of customs and quota restrictions between the European Community and the European Free Trade Association (EFTA) states in the early 1970s, the economic relationship between two communities has greatly improved. In 1984, both the EC and EFTA states agreed that the legal cooperation granted with the Brussels Convention would benefit both the EC and EFTA states. Accordingly, on 9 April 1984, a joint declaration was issued by the EC-EFTA Ministerial Meeting in Luxembourg. The declaration expressed the intent necessary for legal cooperation. Consequently, an EC-EFTA working group was given the authorization to prepare a convention parallel to Brussels Convention⁴⁰. At the end of these talks and preparations, ‘‘The Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters’’ (Lugano Convention) was signed⁴¹. It should be noted that the Lugano Convention of 1988 has been superseded by the Convention enacted in 2007 however, it continues to apply to disputes arose before the revised Convention came into force.

B. Purpose of the Lugano Convention of 1988

The objectives pursued by the Brussels Convention, the strengthening of the legal protection of persons, the determination of the international jurisdiction of the courts and the simplification of the enforcement procedure are the objectives of the Lugano Convention. In brief, the main aim of the Lugano Convention was to make free movement of judgments easier within the EC and EFTA states.

C. Implementation of the Lugano Convention of 1988

³⁹ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 150

⁴⁰ Nils Wahl, *The Lugano Convention and legal integration: the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and its effect on legal integration between the European Community and the EFTA states* (Norstedts Juridik 1990) 2

⁴¹ Nils Wahl, *The Lugano Convention and legal integration: the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and its effect on legal integration between the European Community and the EFTA states* (Norstedts Juridik 1990) 2

Lugano Convention regulates the determination of the international jurisdictions of the courts of the Contracting States and recognition and enforcement of the judgments issued by the courts of these states. It should be pointed out that the domestic law of the Contracting State applies to the recognition and enforcement of a non-Contracting State's court decision.

According to Article 60 clause a, states which were already members of the EC and EFTA at the time of opening of the Convention for signature can be parties to Lugano Convention⁴². Yet, according to Article 60 clause b of the Lugano Convention, it is not a requirement to be a member of the EC and EFTA at the time of opening of the Convention for the signature⁴³.

Articles 62 regulates the membership requirements. Accordingly, unanimous agreement of the signatory States and the Contracting States is required for a state to be invited⁴⁴.

The relationship of the Lugano Convention with the Brussels Convention is regulated by Article 54B of the former. Accordingly, the Brussels Convention will continue to be implemented among the EC Member States⁴⁵.

However, the Lugano Convention shall apply in matters of jurisdiction where the defendant is domiciled in Contracting State which is not a member of the European Communities and matters where Article 16 or 17 of the Convention confer a jurisdiction on the courts of a Contracting State which is not a member of the European Communities⁴⁶. Again, in matters where the same object and cause of action are brought between the same parties or related actions, the Lugano Convention will apply to determine the jurisdiction⁴⁷.

⁴² Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/23

⁴³ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/23

⁴⁴ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/24

⁴⁵ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/21

⁴⁶ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/21

⁴⁷ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/21

Lastly, the Lugano Convention will apply to recognition and enforcement of a court judgments issued by a Contracting State which is not a member of the European Communities⁴⁸. Finally, Article 55 of the Lugano Convention envisages that the Convention shall supersede the agreements concluded between two or more Contracting States concerning recognition and enforcement⁴⁹.

D. The Scope of Application of the Lugano Convention of 1988

Like the Brussels Convention of 1968, the Lugano Convention of 1988 regulates the jurisdiction of Contracting States on civil and commercial matters which have foreign elements and recognition and enforcement of court judgments in European Communities and EFTA states.

Article 1 of the Lugano Convention is the same as the Brussels Convention of 1968. Therefore, the Convention applies to civil and commercial matters that are not enumerated by Article 1.

Chapter 2

Private International Law of the European Union

1. The Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

A. Background

Article 220 of the Treaty of Rome which established the European Economic Community, envisaged “the simplification of formalities governing the reciprocal enforcement of judgments of courts or tribunals and of arbitration awards” among the issues to be negotiated by the Member States to realize. Accordingly, “Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters” was enacted in 1968. The Brussels Convention of 1968 was the initial legislation in which the recognition and enforcement were accomplished.

The expansion of interaction between the Community Members has led the original Convention to be superseded in 2001. However, albeit being successful, some Articles of the new Regulation was problematic; in

⁴⁸ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/21

⁴⁹ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ 2 319/22

some Member States, an exequatur decision was required for judgments given by courts of the Member States. This process was causing a considerable amount of time and money to be wasted and was conflicting with Article 220 of the Treaty of Rome. Eventually, the Brussels Regulation of 2001 was repealed with recast Brussels I Regulation.

Today, the Brussels I Regulation constitutes the backbone of European Union Private International Law on jurisdiction, recognition and enforcement of foreign court judgments in civil and commercial matters. The Brussels I Regulation (hereinafter referred to as ‘the Regulation’) solely applies to civil and commercial matters excluding the matters in public and criminal nature. It should be noted that the scope of the Regulation concerning civil matters is also narrow as it does not cover the status of individuals, matrimonial property, wills and succession, social security and arbitration⁵⁰.

B. Recognition and Enforcement of Foreign Court Judgments in Civil and Commercial Matters Under the Brussels I Regulation

Recognition is the consideration of a foreign court judgment as conclusive evidence or *res judicata* under the Brussels I Regulation. In other words, with such action, the legal existence of the foreign court judgment and the rights conferred thereof is recognized. On the other hand, enforcement is an action in which the enforceability of a foreign court judgment is secured as if it is a judicial decision given by the courts of the country taking the action of enforcement.

Brussels I Regulation of 2012 constitutes the backbone of European Union’s primary legislation concerning the recognition and enforcement of foreign court judgments. The Regulation applies only to ‘legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015’⁵¹. Also, According to Article 36 and Article 39 of the Regulation, only the judgments given in a Member State shall be subject to the Regulation⁵².

⁵⁰ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/6

⁵¹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/18

⁵² Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

Unlike its predecessor, the Regulation does not require any special procedure in order for a judgment given in a Member State to be recognized or enforced⁵³.

a. Eligibility of Foreign Court Judgments for Recognition and Enforcement Under the Brussels I Regulation

First of all, the judgment must be in civil or commercial matter and must include foreign element. Second precondition is that the foreign judgment should have been given by a ‘‘court’’. A decision given by an administrative authority or an arbitration committee does not fall under the scope of the Regulation and cannot be recognized or enforced⁵⁴.

The nature of the court is insignificant for the recognition and enforcement of a judgment, a judgment given by an administrative court or a criminal court on a matter that is envisaged by the Regulation can be recognized and enforceable⁵⁵. The Regulation only covers the recognition and enforcement of the judgments given by the national courts of the Contracting States; thus, the recognition and enforcement of the judgments given by international courts in which the Contracting States recognizes their jurisdiction is out of Regulation’s scope⁵⁶.

The name given to a judgment is insignificant. According to Article 2(a) of the Regulation, a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court will be regarded as a judgment⁵⁷. The subject matter of the judgment is also insignificant; judgments ordering the payment

⁵³ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁵⁴ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1358

⁵⁵ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 207

⁵⁶ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1350

⁵⁷ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/6

of a certain amount or the execution of a certain act may be recognized or enforced⁵⁸.

The Regulation does not require for the judgment to be final under the laws of the state in which it was given thus; it may be possible for interim awards to be recognized and enforced⁵⁹. It should be noted that interim judgments which are not relevant to the legal relationship of the parties such as recalling of witnesses cannot be recognized or enforced⁶⁰.

A judgment that is not enforceable per the law of the court who rendered it shall not be subject to a judgment of enforcement⁶¹. Judgments in that nature shall not qualify for judgment of enforcement even it suffices the eligibility criteria for recognition per the law of another Member State⁶². Besides, if an appeal against the judgment is made in the state where the judgment was given and the appeal stops the execution of the judgment, it will not be possible to enforce the judgment in the other Contracting States as well⁶³.

C. Recognition of Foreign Court Judgments Under the Brussels I Regulation

According to Article 36 of the Regulation, ‘a judgment given in a Member State shall be recognized in the other Member State without any special procedure being required’⁶⁴. In other words, recognition is

⁵⁸ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 288

⁵⁹ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 288

⁶⁰ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 150

⁶¹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁶² Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1429

⁶³ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1430

⁶⁴ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

*'ipso jure'*⁶⁵. Interpretation of “without any special procedure” is varied in the doctrine. According to one opinion, all judgments rendered by the Member State courts that fall under the scope of the Regulation, shall be recognized without the need of any approval or legal action⁶⁶. In other words, it is a rebuttable presumption that the Member States shall recognize each other’s judgments without any special procedure.

Contrarily, another opinion argues that “without any special procedure” does not necessarily mean that the judgment shall be recognized directly. Wherein said “special procedure” are the procedures other than what is stipulated by Article 33/2 and Article 3. In other words, requirements and procedures stipulated by national laws cannot be applied to judgments that fall under the scope of the Regulation⁶⁷. In fact, clause 26 of the Regulation’s preamble openly states that mutual trust in the administration of justice in the Union justifies the principle of *ipso jure* recognition⁶⁸. Therefore, it is clear that the recognition of judgments shall not be subject to any special procedure.

Finally, recognition shall be required under three circumstances; firstly, a judgment has to be recognized before it can be enforced. Again, a decision may be used for defense in a case in that case, recognition will be required. Lastly, recognition will be sufficient to conduct an action involving a change in records of official registry⁶⁹.

a. Request for Declaratory Decision

In an event in which the recognition of a judgment is raised as the principal issue in a dispute, any interested party may apply for a decision that the judgment be recognized.

⁶⁵ Ata Sakmar and Nuray Ekşi, *Hukuki ve Ticari Konularda Mahkemelerin Milletlerarası Yetkisi ve Mahkeme Kararlarının Tanınması Tenfizi Hakkında AB Konsey Tüzüğü* (2002) 734

⁶⁶ Peter Byrne, *The EEC convention on jurisdiction and the enforcement of judgments* (1990) 105

⁶⁷ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1376

⁶⁸ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/4

⁶⁹ Şeref Ertaş, 'Yabancı İlamların Tanınması ve Tenfizi' [1987] 3(1) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi <<http://acikerisim.deu.edu.tr/xmlui/bitstream/handle/12345/1998/ertas10.pdf?sequence=1&isAllowed=y>> accessed 10 January 2019

E.g., A cheque, which was decided to be false by an Italian court has been presented to a bank in France. The French bank may request for the recognition of the Italian court's decision in France to avoid lawsuits in which one of the parties may bring due to the refusal of payment⁷⁰. It should be stressed that a declaratory decision cannot be given to not to recognize a court judgment as this will contradict the Regulation's purpose to avoid the risk of conflicting judgments within the Union⁷¹.

On the other hand, per Article 36/2 of the Regulation, 'any interested party may, in accordance with the procedure for in Subsection 2 of Section 3, apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45.'⁷² As a result, a person who is domicile or have property in the Member State where the recognition or enforcement request shall be made may initiate the procedure to refuse the recognition and enforcement.

b. Determination of an Incidental Question

According to Article 36/3 of the Regulation, 'if the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question.'⁷³ In other words, a court who reviews the judgment must determine the incidental question of recognition before it can give a decision on the matter.

E.g., Recognition of a court judgment in a matter concerning breach of a contract where one of the parties alleges that the contract is void⁷⁴.

⁷⁰ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1387

⁷¹ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1395

⁷² Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁷³ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁷⁴ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1399

It should be noted that the court who reviews whether the decision in question will be recognized or not can refuse the recognition only for the reasons mentioned in Article 45 of the Regulation. It is not possible for the court to refuse the recognition on the grounds stipulated in its domestic law.

The decision of the court of the Member State shall not constitute a final verdict. Finally, the courts of that state shall not be bound by that decision⁷⁵.

D. Enforcement of Foreign Court Judgments Under the Brussels I Regulation

Article 39 of the Regulation stipulates, ‘a judgment given in a Member State which is enforceable in that Member State shall be enforceable in that Member State without any declaration of enforceability being required’⁷⁶. The purpose of the Regulation to make cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed⁷⁷.

A decision rendered by a Member State court should be regarded as if it was given by a court of the Member State addressed. As a result, the procedure of ‘exequatur’ has been removed and the procedure has been simplified with the Regulation.

According to Article 41/1 of the Regulation, ‘the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed.’⁷⁸ ‘A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.’⁷⁹ Additionally, Article 41/2 of the Regulation stipulates that ‘the grounds for refusal or suspension of enforcement under the law of the Member State addressed shall apply in

⁷⁵ Şeref Ertaş, 'Yabancı İlamların Tanınması ve Tenfizi' [1987] 3(1) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi <<http://acikerisim.deu.edu.tr/xmlui/bitstream/handle/12345/1998/ertas10.pdf?sequence=1&isAllowed=y>> (accessed 10 January 2019) 417

⁷⁶ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁷⁷ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/4

⁷⁸ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁷⁹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

so far as they are not incompatible with the grounds referred to in Article 45.’⁸⁰

E.g., Requirements such as the prohibition of abuse of rights may be applied on the enforcement of a foreign court judgment. However, a provision concerning the reviewing of the jurisdiction of the court which rendered the decision during the reviewing stage contradicts Article 45 thus, cannot be applied⁸¹.

E. Refusal of Recognition and Enforcement

According to Article 47 of the Regulation, the application has to be submitted to the court which the Member State concerned has designated as the court to which the application for refusal of enforcement is to be submitted⁸². Upon a gap in law concerning the procedure, the of the Member State addressed shall govern⁸³.

In the event of an application for refusal of enforcement of a judgment, the addressed court may, on the application of the person against whom enforcement is sought⁸⁴:

- (a) limit the enforcement proceeding to protective measures;
- (b) make enforcement conditional on the provision of such security as it shall determine; or
- (c) suspend, either wholly or in part, the enforcement proceedings.

Therefore, the application for the refusal of enforcement does not by itself stop the execution of the judgment; the competent court must review both sides arguments as *prima facie* and then, must give a decision on the execution of the concerned judgment.

According to Article 51, if the judgment is challenged in the Member State of origin or if the time for such an appeal has not yet expired, the

⁸⁰ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁸¹ Philippe Hovaguimian, 'The Enforcement of Foreign Judgments under Brussels 1 bis: False Alarms and Real Concerns' [2015] 11(2) Journal of Private International Law 229

⁸² Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁸³ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/14

⁸⁴ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/15

court to which an application for refusal of enforcement is submitted or the court which hears an appeal lodged under Article 49 or Article 50 may stay the proceedings⁸⁵.

Finally, the application for refusal of recognition shall be made in accordance with the procedures provided for the refusal of enforcement⁸⁶.

F. Barriers to Recognition and Enforcement Under the Brussels I Regulation

a. General

The enforcement of a foreign court judgment shall be refused where one of the grounds stipulated in Article 45 is found to exist upon the application of the person against whom enforcement is sought⁸⁷. Besides, Article 45 provides the requirements for refusal of recognition which are also applicable for refusal of enforcement in accordance with Article 46⁸⁸.

As a rule, the examination whether the barriers to recognition and enforcement are existent or not shall only be done upon the application of the person whom enforcement is sought. Therefore, the addressed court is not obliged to examine the judgment in that sense *ex officio* under the Regulation.

According to Article 45/3 the court cannot review the jurisdiction of the court of origin⁸⁹. However, point (e) of the same Article stipulate an exception to this principle; the recognition and enforcement of a judgment shall be refused if the judgment conflicts with the rules of jurisdiction in matters relating to insurance, consumer and employment contracts where the policyholder, the insured, a beneficiary of the insur-

⁸⁵ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

⁸⁶ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

⁸⁷ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 67

⁸⁸ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 67

⁸⁹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

ance contract, the injured party, the consumer or the employee was the defendant and in matters governing exclusive jurisdiction⁹⁰.

b. Public Policy

First and foremost, the recognition of a judgment which manifestly contradicts the public policy of the Member State addressed, shall be refused per Article 45/1(a)⁹¹. It is important to define what the concept of public policy is to understand the purpose of the barrier. Law, is the legacy of the history and it is the outcome of different customs, beliefs, traditions and religion. Therefore, there is no specific definition or particular elements which can draw the framework of the public policy concept. In other words, public policy is an unclear, general and comprehensive notion. In doctrine, public policy is seen as a set of rules with the purpose of protecting the fundamental values and the interests of a nation⁹².

The basic framework of the public policy concept is not defined by the European Union as well. However, it is understood from the wording of the Article 45/1(a), that the law of the Member State addressed shall define and apply the public policy. This practice has also been reflected in *Krombach v. Bamberski*⁹³ judgement of the European Court of Justice. Accordingly, while the national court shall apply their own public policy, the ECJ shall determine the boundaries of these practices. Finally, in doctrine, it has been put forth that the national courts of the Member State have the initiative to make sense and interpret the concept of public order but should always take the European Union's legislation's purpose into account⁹⁴.

Since the purpose of the European Union is the integration of the Member States, the concept of public policy should be interpreted as narrowly as possible. The recognition or enforcement of a judgement which does not constitute a violation of the addressed court's mandatory law should not be refused⁹⁵. Besides, in *Trade Agency Ltd v Seramico*

⁹⁰ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 67

⁹¹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/15

⁹² Cemile Demir Gökyayla, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizde Kamu Düzeni* (Seçkin Yayıncılık 2001) 26

⁹³ Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-01935.

⁹⁴ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 300

⁹⁵ Şeref Ertaş, 'Yabancı İlamların Tanınması ve Tenfizi' [1987] 3(1) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergi

*Investments Ltd*⁹⁶ the ECJ ruled that public policy barrier should only be applied to judgments which constitute an unacceptable breach of an inalienable principle of the addressed court's domestic law.

A breach of fundamental rights and freedoms that have been adopted by all Contracting States may face public policy intervention. Accordingly, Article 6 of the Treaty on European Union stipulates that the union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union⁹⁷. Again, Article 2 of the Treaty on European Union envisages that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights⁹⁸. Therefore, when the court of a Member State reviews a recognition and enforcement request, it shall take these principles into account. The recognition and enforcement of a judgment which constitutes a violation of the fundamental principles other than stated above which are adopted by all civilized countries shall be refused.

E.g., The recognition and enforcement of a judgment which accepts a contract on assassination and orders a payment to the plaintiff shall violate public policy and there have to be refused.

Foreign court judgments that might contradict the public interest, economic or foreign policy of the addressed Member State may also be subject to public policy intervention⁹⁹. It should also be noted that the grounds for refusal are not concerned with the foreign judgment itself but the outcome of the recognition of that judgment¹⁰⁰. Therefore, in an event where the merits of the case are not manifestly contradicting the public policy, the recognition of the judgment may be refused on the grounds of public policy infringement if the decision is given in the absence of the defendant or given in an unfair trial¹⁰¹.

si<<http://acikerisim.deu.edu.tr/xmlui/bitstream/handle/12345/1998/ertas10.pdf?sequence=1&isAllowed=y>> (accessed 12 January 2019) 420

⁹⁶ Case C-619/10 *Trade Agency Ltd v. Seramico Investments Ltd* [2012] ECLI:EU:2012:531

⁹⁷ Treaty on European Union [2012] OJ 1 326/19

⁹⁸ Treaty on European Union [2012] OJ 1 326/17

⁹⁹ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982* (Oxford: Professional Books 1987) 1442

¹⁰⁰ Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 1 59/44

¹⁰¹ Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments: the application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and the En-*

Additionally, Article 52 of the Regulation prohibits the court to review the substance of a judgment¹⁰². Therefore, an error concerning the merits of the judgment or *justa causa* cannot justify the public policy intervention¹⁰³. Again, according to the Jenard Report, application of a law other than that would have been applicable per the rules of private international law of the addressed court shall not constitute grounds for refusal¹⁰⁴.

c. Violation of Right to Fair Trial

Right to a fair trial is a fundamental human right that has been proclaimed by many modern constitutions as well as international agreements. It has also been stipulated by the Brussels I Convention as well. Albeit being a matter of public policy, the Right to a Fair Trial has been regulated separately to avoid misuse of public policy barrier¹⁰⁵. Five elements must coexist to prevent recognition¹⁰⁶;

- The judgment must be given in the absence of the defendant. It is not important at which stage the defendant participates in the proceedings.

In *Sonntag v. Waidmann*¹⁰⁷, the ECJ ruled that the defendant who was represented in the court by an advocate could not be considered absent as he was capable of knowing the legal claims against him. When determining whether the judgment was given in the defendant's absence, the defendant capability to affect the final judgment should be taken into consideration.

forcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982 (Oxford: Professional Books 1987) 1438

¹⁰² Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/17

¹⁰³ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 294

¹⁰⁴ Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 1 59/46

¹⁰⁵ Şeref Ertaş, 'Yabancı İlamların Tanınması ve Tenfizi' [1987] 3(1) Dokuz Eylül Üniversitesi Hukuk Fakültesi Derg
Isi<<http://acikerisim.deu.edu.tr/xmlui/bitstream/handle/12345/1998/ertas10.pdf?sequence=1&isAllowed=y>> (accessed 12 January 2019) 421

¹⁰⁶ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/15

¹⁰⁷ Case C-172/91 *Sonntag v. Waidmann* [1993] ECR I-01963

- The document which instituted the proceedings or with any equivalent document in sufficient time to enable the defendant to arrange his defence must not be served.

In *Hengst v. Campese*¹⁰⁸ the ECJ ruled that the ‘document’ is all kinds of document that can enable the plaintiff to request the recognition and enforcement of a judgment in a Contracting State. And that it has to be served in accordance per the law of state origin.

- The defendant must not have sufficient time to arrange his defence

It is not clear how much time is sufficient. The addressed court should evaluate whether the time given to arrange defence was sufficient or not according to the characteristics of each case.

- The defendant must be failed to commence proceedings to challenge the judgment when it was possible for him to do so.

With this condition, it was aimed to prevent the rejection of the recognition or enforcement due to a minor error in the notification procedure. In *Minalmet GmbH v. Brandeis Ltd*¹⁰⁹, the proceedings before a British court, the lawsuit notification had been served to the defendant per the German law. However, the competent German court had not carried out the notification process duly. As a result, the defendant company had not been notified of the lawsuit. The decision given in the absence of the defendant had also been served in the same method, but the defendant had heard about the decision. However, the defendant did not appeal the decision in England; instead, the defendant requested the refusal of enforcement application that the plaintiff did in Germany based on the grounds that the lawsuit notification had not been served duly. The ECJ ruled that the enforcement application had to be refused on the grounds that it is easier, faster and cost-effective for the defendant to defend his case while the case is continuing than to make an appeal. However, with the current legislation in force, it is no longer possible to refuse the enforcement of a judgment in favour of a defendant like the one in the case discussed.

d. Incompatibility

¹⁰⁸ Case C-474/93 *Hengst v. Campese* [1995] ECR 2113

¹⁰⁹ Case C-123/91 *Minalmet GmbH v. Brandeis* [1992] ECR I-05661

aa. Incompatibility with a Judgment Already Given in the State in Which Recognition is Sought

According to Article 45/1(c) of the Regulation, if the judgment irreconcilable with a judgment given between the same parties in the Member State addresses, its recognition shall be refused¹¹⁰.

Article 45/1(c) requires the following conditions to be present;

- (a) There has to be a judgment given in the state addressed. Whether a judgment is rendered in other words, finalized or not shall be decided by the law of origin¹¹¹.
- (b) The parties of the dispute have to be the same. The same cause of action is not required¹¹².
- (c) There has to be an irreconcilability between a judgment given in the Member State and the judgment requested to be recognised or enforced.

In *Hoffmann v. Krieg*, a German court ordered the defendant to pay alimony to Krieg in 1979. In 1980, the parties divorced in the Netherlands. However, despite the divorce, Krieg requested the enforcement of the alimony payment judgment from the Dutch court. The problem in this dispute was whether the alimony payment had to be paid or not as the parties were regarded as married under the German law¹¹³. In its judgment the ECJ ruled;

- Judgment, recognized per the Brussels Convention Article 26 must have the same effect both in the State addressed and in State of origin;
- If the execution of a judgment is not possible in the addressed State for a reason which is not under the scope of the Brussels Convention, enforcement of that decision shall not be possible;

¹¹⁰ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

¹¹¹ Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 1 59/45

¹¹² Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 1 59/45

¹¹³ Case C-145/86 *Hoffmann v. Krieg* [1988] ECR 645

- In this dispute, the decision concerning the alimony payment is not compatible with the divorce judgment in the sense of Brussels Convention Article 27/3.

bb. Incompatibility with a Judgment Given in another State in Which Recognition is Sought

According to Article 45/1(d) of the Regulation, the recognition of a judgment which is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed¹¹⁴. Four criteria must coexist in order Article 45/1/(d) to be applied;

- (a) The judgment of the Member or the third State court must be given earlier.
- (b) The judgment of the third State court must fulfil the conditions necessary for recognition. The law of the addressed court shall decide whether the judgment is recognizable or not¹¹⁵. It does not matter whether the judgment is recognizable in accordance with the addressed court's law or per an international agreement. Compliance with one of them is sufficient¹¹⁶.
- (c) The judgment of the third State court must be incompatible the judgment requested to be recognized
- (d) The parties and cause of action of the dispute must be the same

E.g., A tort case has been filed between the same parties both in the United States and Germany. First, the American court ruled that the plaintiff was faulty. In the latter decision, the German court ruled that the plaintiff was not erroneous. The recognition request of the German court's judgment in England will be denied on the basis of Article 45/1(d) of the Brussels I Regulation.

¹¹⁴ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

¹¹⁵ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 309

¹¹⁶ Peter Byrne, *The EEC convention on jurisdiction and the enforcement of judgments* (1990) 114

cc. Special Jurisdiction

As a rule, the court which the application of recognition and enforcement was submitted cannot review the jurisdiction of the court of origin¹¹⁷. However, the Regulation has foreseen exceptions to this rule; Accordingly, the jurisdiction of the court of origin shall be reviewed in matters that fall under the exclusive jurisdiction of the Member State courts and in matters concerning insurance, consumer contracts and individual contracts of employment where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant. In case of violation of special jurisdiction in matters discussed, the recognition and enforcement shall be refused.

The court where the request of recognition and enforcement is submitted shall examine whether there is a violation of jurisdiction or not *ex officio*¹¹⁸.

Lastly, the court to which the application was submitted is bound by the findings of fact on which the court of origin based its jurisdiction¹¹⁹. Therefore, the addressed court cannot examine the findings of fact of the court of origin.

dd. Judgments Given in Civil Matters by Criminal Courts

According to Article 64 of the Regulation:

‘without prejudice to any more favorable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seized of the matter may order appearance in person; in case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defense need not be recognized or enforced in the other Member States’¹²⁰.

¹¹⁷ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

¹¹⁸ Dominik Lasok and Philip Stone, *Conflict of Laws in the European Community* (Abingdon: Professional Books Ltd 1986) 296

¹¹⁹ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

¹²⁰ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/18

In brief, the recognition and enforcement of a judgment given by a criminal court in civil action (in the absence of the defendant who has been ordered to appear) may be refused. Purpose of this barrier is to give the person who finds it inconvenient to appear in a criminal trial in person (and who cannot defend his civil rights therein) the possibility to stop recognition and enforcement.

In *Krombach v. Bamberski*¹²¹, French Bamberski whose daughter was killed by the German Krombach demanded non-pecuniary compensation in the criminal case heard in a French court. Krombach, who was not present at the hearing in person, was represented by an advocate, however; the court ordered Krombach to pay non-pecuniary compensation per the French Criminal Procedure Law without hearing his advocate. When Bamberski wanted to enforce this judgment in Germany, the German court asked whether the enforcement of the judgment should be denied. The court referred to Article 2 of the Protocol annexed to the Brussels Convention which has special provisions concerning the right to present a defense. Accordingly, the recognition and enforcement of a judgment given in civil action in criminal courts in the absence of the defendant for an offense which was not intentionally committed need not be recognized or enforced. Contrary to Article, the crime, in this case, was intentionally committed therefore the Article could not be applied. The German court asked whether this Article would prevent the public policy intervention to enforcement or not. The ECJ in its judgment stated that, right to present a defense was a crucial element of the right to a fair trial which is guaranteed by the European Convention on Human Rights. Therefore, the purpose of the Brussels Convention was not superior to the right to a fair trial. Thus, the enforcement of the French court's judgment had to be refused on the grounds of public policy.

ee. Appeal Against the Refusal of Recognition and Enforcement Decision

Refusal of recognition and enforcement decision may be appealed against by either party per Article 49 of the Regulation¹²². According to Article 46/2 of the Regulation, the appeal has to be lodged with the court which the Member State concerned has communicated to the Commission¹²³. Article 49 has not stipulated an appeal procedure therefore, the substantive law of the Member State court where the appeal is lodged shall be applied to the procedure.

¹²¹ Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-01935

¹²² Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

¹²³ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

According to Article 50¹²⁴, the decision given on the appeal may only be challenged by an appeal to be lodged with the court communicated by the Member State concerned pursuant to Article 75/(c). Therefore, the Member State are free to determine whether the decision given on the appeal is final or not.

Finally, According to Article 51/1¹²⁵, ‘The court to which an application for refusal of enforcement is submitted or the court which hears an appeal lodged under Article 49 or Article 50 may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. In the latter case, the court may specify the time within which such an appeal is to be lodged.’

Chapter 3

Private International Law of Republic of Turkey

1. The Turkish Code on Private International and Civil Procedural Law

A. General

In Turkish Private International Law, recognition is a mechanism securing the legal existence of a foreign court judgment and the rights provided thereof, the use of judgment as conclusive evidence or *res judicata* and the taking of administrative action in accordance with such judgments¹²⁶.

Without recognition, a foreign court judgment cannot be considered as conclusive evidence. The need to ‘recognize’ a foreign court judgment indicated that there is no obligation of Turkey to recognize a foreign court judgment. This is the natural result of the sovereign rights. The recognition of foreign court judgments is subject to the determination by the competent court that it satisfies the requirements for enforcement except the reciprocity criteria¹²⁷. The authority in this regard is the Turkish Law as the *lex fori*.

¹²⁴ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

¹²⁵ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/16

¹²⁶ Burcu Yüksel and Beaumont Paul, *Turkish and EU Private International Law -A Comparison-* (2014) 57

¹²⁷ Burcu Yüksel and Beaumont Paul, *Turkish and EU Private International Law -A Comparison-* (2014) 57

On the other hand, enforcement is the procedure securing the executive forces of the foreign court judgments in Turkey¹²⁸. Recognition of a foreign court judgment does not *per se* give that judgment the capacity to be enforced and executed directly in Turkey. A decision of *exequatur* is required by the competent Turkish court is required for a judgment to introduce its executive forces in Turkey¹²⁹.

Turkish Code on Private International and Procedural Law No 5718 of 2017 (hereinafter referred to as the PIL) governs jurisdiction, recognition and enforcement of foreign court judgments in civil and commercial matters. Recognition and enforcement of any court judgment in civil and commercial matter that is not under the scope of an international treaty shall be subject to the PIL. One of the most crucial characteristics of the PIL is that the *revision au fond* is not accepted. It should be noted that this prohibition is not openly stipulated in the PIL, but its acceptance is clearly established in the case law and doctrine¹³⁰. Thus, when deciding on recognition and enforcement, the judge shall only take into account whether the conditions stipulated by the PIL are met or not.

B. Recognition and Enforcement of Foreign Court Judgments Under the PIL

Article 50-59 of the PIL, set out the prerequisites and conditions to be fulfilled for foreign court judgments to be recognized and enforced. The conditions stipulated for enforcement also applies to the recognition exempt the reciprocity principle. It should be noted that despite a court judgment, the parties are allowed to file a lawsuit before a Turkish court without requesting the recognition and enforcement¹³¹

a. Prerequisites for Recognition and Enforcement

According to Article 50 of the PIL¹³²,

‘(1) Enforcement of court judgments given in civil matters by foreign courts and having become final per the law of the source state shall be

¹²⁸ Ergin Nomer, *Devletler Hususi Hukuku* (21 edn, Beta 2015) 500

¹²⁹ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 58

¹³⁰ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 58

¹³¹ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 71

¹³² Act No. 5718 on Private International and Procedural Law, Article 50

subject to the enforcement decision given by the competent Turkish court

(2) An enforcement decision may also be requested concerning personal rights included in the judgments of criminal courts.’

aa. Legal Interest

First of all, having legal interest in enforcement and recognition is the first pre-condition to be satisfied; anyone who has legal interest in enforcement and recognition of a judgment can request so¹³³.

E.g., The recognition of a divorce decision can be requested by the heirs of the deceased

Legal interest shall be determined by the judge within the context of each cases characteristics. In its judgment the Turkish Court of Cassation ruled that where a right can be obtained in another way and equally safe without the need for a court decision, it is considered that there is no legal interest in filing a request concerning that right¹³⁴.

bb. Court Judgment

The second prerequisite is that the foreign judgment has to be rendered by a ‘‘court’’. It is sufficient to fulfill this condition if the judgment is given by the source State’s competent judiciary body. Additionally, written records and documents issued by foreign courts cannot be subject to *exequatur* judgment. However, under the Turkish Civil Procedural Law, these records possess the power and effect of official instruments¹³⁵.

E.g., A judgment in a civil matter by a foreign administrative body cannot be subject to recognition and enforcement decision.

Whether the decision for which the recognition and enforcement is requested is a court judgment or not shall be determined in accordance with the law of the source State. If the law of the source State does not consider the judgment as a ‘‘court’’ judgment, then, the request of

¹³³ Act No. 5718 on Private International and Procedural Law, Article 52 clause 1

¹³⁴ Judgment of the Court of Cassation, 2nd chamber, 30.11.2011, E. 2011/2-593 K. 2011/726

¹³⁵ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 71

recognition and enforcement shall be refused on the grounds that pre-conditions are not met. However, in some countries, some disputes in civil matters are settled outside the courts.

E.g., divorce.

In some countries, divorce is bound to the will of the spouses whereas in other countries, divorce decisions can be rendered by administrative bodies. Can these decisions which do not constitute a court decision, be subject to recognition and enforcement?

For these decisions to be subject to recognition and enforcement, the addressed Turkish court must examine whether this decision has been reviewed by a judiciary organ or not in source State. If these decisions are audited, reviewed and approved by the competent judicial bodies, then, they can be subject to recognition and enforcement under the PIL. The audit and approval process allow the PIL to regard these decisions a ‘‘court decision’’ in a sense. If a divorce is settled by the wills of the spouses and this settlement is audited, reviewed and approved by the competent judicial body of the source State, then, its recognition and enforcement can be requested in Turkey¹³⁶.

Moreover, whether the decision is given in an internationally recognized State or not does affect the recognizability and enforceability of a foreign court judgment as long as it is given under independent sovereignty. Therefore, a judgment given by a non-recognized State court will be considered as a ‘‘court’’ judgment and be eligible for recognition and enforcement in Turkey¹³⁷.

The recognition and enforcement of judgments rendered by international courts are not subject to PIL. They are treated depending on whether Turkey is a Contracting State. If the founding treaty of these international courts stipulate special provisions, then, the recognition and enforcement of the judgments given by these courts shall be carried out per the provisions of the treaty. On the other hand, it is not possible to recognize and enforce judgments given by international courts that are founded by treaties that Turkey is not a party. Article 50 of the PIL clearly states that the judgment has to be given by a ‘‘court’’. The problem here is that a ‘‘court’’ is an entity in which the State exercises its judicial power which is a sovereignty right. The judicial power is either exercised by a State’s court or by an international court in which the State waives some extent of its judicial power through an international agreement. Therefore, the judgments of international courts

¹³⁶ Aysel Çelikel and Ergin Nomer, *Devletler Hususi Hukuku* (9 edn, Beta 2008) 237

¹³⁷ Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 106

which are founded by international agreements that are not binding Turkey cannot be subject to recognition and enforcement ¹³⁸.

cc. Civil Matters

According to Article 50 of the PIL, the foreign court judgment must be given in a civil action. First of all, it is essential to determine whether a judgment is in a civil matter or not. In the Turkish Legal System, the Public Law and Private Law are distinct. As a result, matters that some countries may regard as a matter of Private Law may be subject to Public Law in Turkey or vice versa. Therefore, the Turkish Law determines whether a judgment is in a civil action or not¹³⁹. Accordingly, the judgment is not required to be given by a civil court; it is sufficient that the judgment is given in a civil action.

As a rule, judgments given by the administrative or criminal courts of a foreign state cannot be recognized or enforced. However, Article 50 clause 2 of the PIL has foreseen an exemption;

‘An enforcement decision may also be requested concerning personal rights included in the judgments of criminal courts’

Therefore, the PIL shall apply to recognition and enforcement requests concerning personal rights included in the judgments of criminal courts.

dd. Final Judgments

Another prerequisite stipulated by the PIL is that the judgment concerned must be ‘final’ under the law of the source state¹⁴⁰. Therefore, decisions such as ‘Interim relief’ cannot be recognized or enforced in Turkey. Final judgment alludes to the formal and substantive effect of final judgment. The formal effect of final judgments indicates that a judgment cannot be nullify and the judgment has become final after all legal remedies being exhausted. The substantive effect of a final judgment means that the contents of the judgment have a binding effect¹⁴¹. There is no consensus on whether the formal effect or substantive effect should be taken as a basis. In practice, judgments that have become fi-

¹³⁸ Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 108

¹³⁹ Bilgin Tiryakioğlu, *Yabancı Boşanma Kararlarının Türkiye’de Tanınması ve Tenfizi* (AÜHF Döner Sermaye Yayınları 1996) 34

¹⁴⁰ Nuray Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* (Beta 2013) 129

¹⁴¹ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 71

nal after all legal remedies being exhausted are recognized and enforced¹⁴².

b. Main Requirements for Recognition and Enforcement

After having fulfilled the prerequisites discussed above, the main requirements outlined by the PIL must be satisfied. The main requirements envisaged for enforcement also applies to the recognition exempt the reciprocity principle. According to Article 54 of the PIL, the addressed competent Turkish court is obliged to examine the satisfaction of the requirements for enforcement *ex officio*. Therefore, the main requirements for enforcement shall be assessed first.

aa. The Reciprocity Principle

The first main requirement for enforcement stipulated under Article 54 is the reciprocity¹⁴³. The reciprocity can be secured through conventional, statutory or actual means between Turkey and the respective country. It should be noted that if conventional or statutory reciprocity is not reflected in the actual practice, in other words, if the judgments given by Turkish courts are not enforced in the concerned state despite the conventional or statutory reciprocity, then, in this case, the reciprocity condition must be deemed not fulfilled¹⁴⁴. On the other hand, if the conventional or statutory reciprocity is not reflected in the actual practice as an official enforcement request is yet to be made in Turkey, or the enforcement of a judgment given by a Turkish court is refused on justified grounds, it shall be deemed that the reciprocity condition is met¹⁴⁵. The determination of reciprocity condition presents practical imparities for the national courts¹⁴⁶. In practice, the Ministry of Justice of Turkey publishes a circular each year in January which shows the countries where the reciprocity is fulfilled. If the concerned judgment is rendered by one of the countries listed in the circular, then, the judge shall deem that the requirement is met. However, if the concerned

¹⁴² Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 110

¹⁴³ Act No. 5718 on Private International and Procedural Law, Article 54 paragraph 1 clause a

¹⁴⁴ Ergin Nomer, *Devletler Hususi Hukuku* (21 edn, Beta 2015) 500

¹⁴⁵ Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 112

¹⁴⁶ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 64

judgment is given by a country not listed in the circular, then, the judge is obliged to determine the fulfillment of the condition. In this respect, the judge may ask the parties¹⁴⁷.

bb. Exclusive Jurisdiction of the Turkish Courts

The Turkish legislator preferred to determine whether a dispute had been in the exclusive jurisdiction of the Turkish courts rather than determining whether the court of origin has jurisdiction or not. Accordingly, the enforcement of judgments in matters falling under the exclusive jurisdiction of the Turkish courts shall be refused¹⁴⁸. Under the Turkish Law, some matters in public policy falls under the exclusive jurisdiction of the Turkish courts¹⁴⁹. Of course, every jurisdiction rule concerning public policy of Turkey is not exclusive. Whether the jurisdiction rule is exclusive or not shall be determined from the expression of the rule and the purpose of its imposition¹⁵⁰.

E.g., According to Article 12 of the Turkish Civil Procedure Code, disputes arising out of right *in rem* in immovable property falls under the exclusive jurisdiction of the Turkish courts.

According to Article 47 paragraph 2, 'the jurisdiction of courts referred in articles 44, 45, 46 cannot be removed by an agreement'. Besides the matters that fall under the public policy of Turkey, disputes arising out of employment, consumer and insurance contracts have been kept under the exclusive jurisdiction of the Turkish courts to in order to protect the more vulnerable party¹⁵¹.

In doctrine, it is argued that the exclusive jurisdiction of the Turkish courts on these three matters is limited¹⁵². Therefore, the refusal of recognition and enforcement on the grounds of limited exclusive jurisdiction may only be the case when the foreign court judgment is contrary to the purpose of this rule. In other words, if the foreign court judgment is given in favor of the weaker party, then, the request for recognition and enforcement may not be refused.

¹⁴⁷ Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 113

¹⁴⁸ Act No. 5718 on Private International and Procedural Law, Article 54 paragraph 1 clause b

¹⁴⁹ Ergin Nomer, *Devletler Hususi Hukuku* (21 edn, Beta 2015) 513

¹⁵⁰ Emre Cumalıoğlu, 'Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi Bakımından Turk Mahkemelerinin Münhasır Yetkisi' [2008] 3(2) Erciyes Üniversitesi Hukuk Fakültesi Dergisi<<https://emrecumalioglu.files.wordpress.com/2016/02/emre-cumalc4b1oc49flu-mc3bcnhasc4b1r-yetki.pdf>> accessed 15 January 2019

¹⁵¹ Cemal Şanlı and others, *Milletlerarası Özel Hukuk* (6 edn, Vedat Kitapçılık 2018) 495

¹⁵² Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 116

On the other hand, if the judgment is to the detriment of the weaker party, the request may be refused on the basis of the limited exclusive jurisdiction¹⁵³. However, it should be noted that one problem may arise with this practice as it requires the court to review the merits of the judgment which is a direct breach of *revision au fond* prohibition.

cc. Exorbitant Jurisdiction

Article 54 paragraph 1 clause b of the PIL provides that the recognition and enforcement of foreign court judgments are refused if the concerned court's jurisdiction is based on an exorbitant jurisdiction and the defendant objects¹⁵⁴. In principle, the recognition and enforcement court does not discuss and review the jurisdictional rules of the court that rendered the judgment. However, the Turkish legislator wanted to prevent the enforcement of decisions given by the courts which do not have a real connection with the dispute and the parties.

The exorbitant jurisdiction is also violating the natural judge principle¹⁵⁵. The natural judge principle is one of the elements of the right to a fair trial which is a fundamental principle of the Turkish public policy and legal system. The right to a fair trial requires the employment of jurisdiction rules based on objective and legal measures. As in the case of individual states of law, only fair and reasonable jurisdiction rules can provide an objective legal relationship between the case and the parties.

Finally, as it is stated above, the judge is not obliged to review the jurisdiction of the court of origin. Provided that the defendant contests the request, then, the court shall examine whether the court of origin had a real connection with the dispute and the parties or not. If the court comes to the conclusion that the jurisdiction of the court of origin was indeed exorbitant, then, the recognition and enforcement shall be refused¹⁵⁶.

dd. Public Policy

According to Article 54 paragraph 1 clause c of the PIL, 'the court decree must not be openly contrary to public policy'¹⁵⁷. If the foreign court judgment constitutes an open contradiction to fundamental and

¹⁵³ Cemal Şanlı and others, *Milletlerarası Özel Hukuk* (6 edn, Vedat Kitapçılık 2018) 495

¹⁵⁴ Act No. 5718 on Private International and Procedural Law, Article 54 paragraph 1 clause b

¹⁵⁵ Ergin Nomer, *Devletler Hususi Hukuku* (21 edn, Beta 2015) 518

¹⁵⁶ Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 117

¹⁵⁷ Act No. 5718 on Private International and Procedural Law, Article 54 paragraph 1 clause c

inalienable moral, ethical and legal rules of the Turkish public policy, its recognition and enforcement shall be refused through an intervention of the public policy¹⁵⁸. It is not possible to determine in advance the kind of foreign court judgments that could possibly or definitely infringe the Turkish public policy. Therefore, in each case, the judge must make an evaluation by interpreting the public policy in accordance with time and place. It should be noted that the constituent element of this intervention is the open contradiction. The discretion on the assessment of the violation conferred upon the judge is limited pertaining to open contradiction.

E.g., A divorce concluded through talaq¹⁵⁹ will not be recognized in Turkey as it openly contradicts the public policy.

The concept of public policy intervention in the recognition and enforcement is weaker than the public policy concept in the conflict of laws. It is argued that the recognition and enforcement of judgments which have an attenuated effect and reasonably less disruptive should not be refused, and the law should respect the rights conferred therein. In this context, it is possible to talk about *l'effet atténué de l'ordre public*.¹⁶⁰

In addition, the concept of public policy intervention finds its underlying rationale in the legal effects of the concerned judgment. In other words, the recognition and enforcement of a foreign court judgment cannot be refused on the grounds that the substantive law which constitutes its basis is infringing the public policy¹⁶¹. Therefore, the competent addressed court solely assesses the possible infringements that could occur in the recognition or enforcement of the concerned judgment regardless of the underlying rationale of the judgment¹⁶².

Public policy intervention under the Turkish Private International Law pertains to both substantive and procedural law. Therefore, in addition to fundamental and inalienable moral, ethical and legal rules stipulated by the substantive law, it is expected from the judgment to be in compliance with the fundamental procedural rules such as right to a fair trial¹⁶³.

¹⁵⁸ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 66

¹⁵⁹ A method of divorce envisaged by the Sharia Law which consists of a unilateral declaration of will of a party

¹⁶⁰ Ergin Nomer, *Devletler Hususi Hukuku* (21 edn, Beta 2015) 522

¹⁶¹ Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 119

¹⁶² Ergin Nomer, *Devletler Hususi Hukuku* (21 edn, Beta 2015) 518

¹⁶³ Ergin Nomer, *Devletler Hususi Hukuku* (21 edn, Beta 2015) 521

ee. Right of Defense

The final requirement for the recognition and enforcement is that the respective procedures relating to right of defense of the party against whom enforcement is sought must not be breached. This requirement finds its underlying rational in Article 54 paragraph 1 clause d of the PIL¹⁶⁴ 'It is accepted that the right of defense is violated if the person against whom enforcement is sought is not duly summoned to the court which rendered the judgment or not represented before that court or if a default judgment is given contrary to the procedures'¹⁶⁵.

The recognition and enforcement of a judgment shall be refused on the grounds of breach of right of defense provided that the defendant puts forth an objection in this regard. Thus, the court is not obliged and shall not review the judgment for possible breach of right of defense¹⁶⁶.

Since the subject matter falls under the procedural law and in principle, it is accepted that *lex fori* applies to the procedural matters in private international law, the law of the court of origin shall be taken into account when determining whether the right of defense was infringed or not.

However, Turkish public policy may intervene if the competent court determines that an unalienable element of right of defense in the context of Turkish public policy is infringed. In this case, the request may be refused on the grounds of public policy violation even if it complies with the law of the court of origin.

E.g., A notice by publication may be considered as a violation of right of defense and may trigger the Turkish public policy intervention¹⁶⁷.

C. Jurisdiction and Venue

Article 51 of the PIL outlines the rules concerning the jurisdiction and venue for the recognition and enforcement. Accordingly;

‘(1) The court of first instance shall have jurisdiction regarding judgments of enforcement.

¹⁶⁴ Act No. 5718 on Private International and Procedural Law, Article 54 paragraph 1 clause d

¹⁶⁵ Burcu Yüksel and Paul Beaumont, *Turkish and EU Private International Law -A Comparison-* (2014) 66

¹⁶⁶ Vahit Doğan, *Milletlerarası Özel Hukuk* (3 edn, Savaş Yayınevi 2015) 122

¹⁶⁷ Judgment of the Court of Cassation, 2nd chamber, 25.06.2009, E. 2009/8144 K.2009/12603

(2) These judgments may be requested from the court of domicile in Turkey of the person against whom enforcement is sought, if there is no such domicile, before the court of her/his habitual residence, and if she/he has no domicile or habitual residence in Turkey, before either one of the Ankara, İstanbul or İzmir courts.¹⁶⁸

Matters that fall under the Family Law shall be under the jurisdiction of the competent family court. The request shall be reviewed in accordance with the simple trial procedure provisions¹⁶⁹. The court may decide for full or partial recognition or enforcement or may refuse the request¹⁷⁰. Finally, the judgments which are full or partially recognized or enforced shall have the same effect of court judgments given by the Turkish courts¹⁷¹.

D. Appeal

The judgment on refuse or acceptance of the recognition and enforcement may be appealed in accordance with the general provisions of the Turkish Civil Procedure Law¹⁷². Due to a recent change in the Turkish Civil Procedure Law, the remedies for decisions given before 20.07.2016 are appeal and rectification.

On the other hand, court decisions given concerning the acceptance or refusal of recognition and enforcement given after 20.07.2016 will firstly be appealed before the provincial court of appeals and then, it may be appealed before the supreme court of appeals. The appeal directly suspends the execution.

E. Conclusion

Albeit being similar, the rules of the European Union's Brussels I Regulation and The Turkish Code on Private International Law and International Civil Procedure on the recognition and enforcement of foreign court judgments proved to have significant differences. This thesis aimed to analyze the key procedural differences between the two regulations as well as giving an insight to the codification process of the European Union in the context of Private International Law.

In the first part of the thesis, the Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters has been reviewed in terms of its historical background, its purpose, its position in the Community Law, its implementation and scope.

¹⁶⁸ Act No. 5718 on Private International and Procedural Law, Article 54 paragraph 1-2

¹⁶⁹ Act No. 5718 on Private International and Procedural Law, Article 55 paragraph 1

¹⁷⁰ Act No. 5718 on Private International and Procedural Law, Article 56 paragraph 1

¹⁷¹ Act No. 5718 on Private International and Procedural Law, Article 57 paragraph 1

¹⁷² Act No. 5718 on Private International and Procedural Law, Article 57 paragraph 2

The recognition and enforcement of foreign court judgments in civil and commercial matters were initially achieved with the Brussels Convention. With the removal of customs and quota restrictions between the European Community and the European Free Trade Association (EFTA) states in the early 1970s, the economic relationship between two communities has greatly improved. As a result, in addition to the Brussels Convention, the Lugano Convention was adopted in 1988. Therefore, the thesis has briefly analyzed the key aspects of the Lugano Convention after the Brussels Convention.

In the second part of the thesis, the procedure of recognition and enforcement of foreign court judgments in civil and commercial matters under the Brussels I Regulation has been in-depth assessed. The thesis has continued with the Turkish Private International Law on the recognition and enforcement of the foreign court judgments in civil and commercial matters.

Finally, recognition is the consideration of a foreign court judgment as conclusive evidence or *res judicata* under the Brussels I Regulation and the Turkish Code on Private International Law. The enforcement of a foreign court judgment is the introduction of the foreign court judgment's executive powers. The first difference shows itself in the procedure applied. Recognition or enforcement of a foreign court judgment is not subject to any special procedure under the Brussels I Regulation. Contrarily, under the Turkish Code on Private International and Civil Procedural Law, the recognition of a foreign court judgment depends on a determination decree given by the competent court that it has satisfied the requirements stipulated by the code. Likewise, to introduce the executive powers of a foreign court judgment, an *exequatur* decision must be given by the competent Turkish court.

Another significant difference shows itself in the attribution of the foreign court judgment. The Turkish Code on Private International and Civil Procedural Law has required a foreign court judgment to be final under the law of the court of origin in order to be eligible for recognition and enforcement whereas under the Brussels I Regulation, it is sufficient for a judgment to be enforceable under the law of the court of origin. Thus, judgments such as an interim relief may be subject to recognition and enforcement in the European Union.

A small yet important difference is also in the procedure of appealing; under the Turkish Code on Private International and Civil Procedural Law, an appeal against the decisions concerning refusal or acceptance of the recognition and enforcement decision directly suspends the execution. On the other hand, under the Brussels I Regulation, it is at the discretion of the court addressed to suspend the proceedings.

Again, both under the Brussels I Regulation and the Turkish Code on Private International and Civil Procedural Law, the jurisdiction rules

stipulated concerning contracts arising out of employment, consumer and insurance cannot be replaced by agreement of the parties. However, the implementation of this rule is not absolute under the Brussels I Regulation.

Lastly, one of the most problematic difference is the requirement of reciprocity under the Turkish Code on Private International and Civil Procedural Law. The reciprocity principle requires the court judgments rendered by Turkish courts to be enforced in the country origin of the judgment concerned for enforcement in Turkey. This requirement is merely political and does not have a legal purpose. In fact, it is extremely difficult for the Turkish judges to determine whether the condition has been fulfilled or not.

The final verdict of the thesis is that Turkey, prefers to employ its own domestic rules on matters on a wide scale whereas the European Union is trying to simplify the free movement of judgment within the Union, therefore possesses a softer recognition and enforcement procedure. It should also be noted that European Union Member States share a wide array of customs, traditions, common sense and religion. Therefore, it is natural that the recognition and enforcement of judgments given by a Member State is recognized or enforced without any special requirement in another Member State. This is not the case on Turkey's behalf. Turkey lies between the Europe and Asia and interacts with nations who very different set of rules, traditions and customs. Thus, it strictly reviews the recognition and enforcement requests in the context of its public policy.

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Summary

The establishment of modern states and the concept of sovereignty required the employment of rules to govern the judicial judgments rendered by foreign states. Accordingly, the international community has adopted the procedure of recognition and enforcement in which the foreign court judgments would be allowed to have extraterritorial legal effect under certain conditions.

The first codification process in Europe had begun with the Brussels Convention in 1968. It was a set of rules where recognition and enforcement of foreign court judgments in civil and commercial matters of the European Communities was regulated. The increasing interaction between the European Communities and the EFTA States has proved it necessary to expand the scope of the Convention and consequently led the Lugano Convention to be adopted in 1988. In the framework of the original Convention, the Brussels I Regulation of 2001 was enacted in-

roducing further changes to meet the requirements of growing EU. Finally, the Brussels I Regulation was superseded by the Recast Brussels I Regulation in 2015 as more ‘‘liberal’’ regulation was needed.

The recognition of a foreign court judgment is the mechanism of securing the legal existence of the concerned judgment and the rights provided thereof, the use of judgment as conclusive evidence or *res judicata* and the taking of administrative action in accordance with such judgments. On the other hand, enforcement is the procedure securing the executive forces of foreign court judgments.

Under the Brussels I Regulation, the court judgments given in a Member State is recognized or enforced in another Member State without any special procedure required substantially reducing the cost and time loss of the procedure.

On the other hand, the recognition and enforcement of court judgments in Turkey are conditioned to fulfil some requirements such as the principle of reciprocity.

The thesis has focused on the historical development of the concept of recognition and enforcement of the foreign court judgments in Europe and the key differences between the European Union’s current legislation and the Turkish Code on Private International and Procedural Law.

Zusammenfassung

Die Errichtung von den modernen Staaten und das Konzept der Souveränität erforderten die Anwendung von Regeln zur Regelung der Gerichtsurteile ausländischer Staaten. Dementsprechend hat die internationale Gemeinschaft ein Anerkennungs- und Vollstreckungsverfahren eingeführt, bei dem ausländischen Gerichtsurteile unter bestimmten Bedingungen außergerichtliche Rechtswirksamkeit haben dürften.

Der erste Kodifizierungsprozess in Europa hatte im Jahr 1968 mit dem Brüsseler Übereinkommen begonnen. Es war eine Reihe von Regeln, nach denen die Anerkennung und Vollstreckung ausländischer Gerichtsurteile in Zivil- und Handelssachen der Europäischen Gemeinschaften geregelt wurde.

Die zunehmende Interaktion zwischen den Europäischen Gemeinschaften und den EFTA-Staaten hat sich als notwendig erwiesen, den Geltungsbereich des Übereinkommens auszuweiten, und führte dazu, dass das Lugano-Übereinkommen im Jahr 1988 angenommen wurde. Im Rahmen des ursprünglichen Übereinkommens wurde die Brüssel-I-Verordnung von 2001 erlassen Einführung weiterer Änderungen zur Erfüllung der Anforderungen der wachsenden EU. Schließlich wurde die Brüssel-I-Verordnung im Jahr 2015 durch die Neufassung der Brüssel-I-Verordnung ersetzt, da eine „liberalere“ Verordnung erforderlich war.

Die Anerkennung eines Urteils eines ausländischen Gerichts ist der Mechanismus zur Sicherstellung der rechtlichen Existenz des betreffenden Urteils und der ihm eingeräumten Rechte, die Verwendung eines Urteils als schlüssige Beweismittel oder Rechtskraft und das Ergreifen von Verwaltungsverfahren im Einklang mit diesen Urteilen. Auf der anderen Seite ist die Vollstreckung des Verfahrens, dass die Exekutivgewalt ausländischer Gerichtsurteile absichert.

Nach der Brüssel-I-Verordnung werden die in einem Mitgliedstaat ergangenen Gerichtsurteile in einem anderen Mitgliedstaat anerkannt oder vollstreckt, ohne dass ein besonderes Verfahren erforderlich ist, das den Kosten- und Zeitverlust des Verfahrens erheblich verringert. Außerdem ist die Anerkennung und Vollstreckung von Gerichtsurteilen in der Türkei an bestimmte Voraussetzungen wie den Grundsatz der Gegenseitigkeit gebunden.

Die Dissertation konzentrierte sich auf die historische Entwicklung des Konzepts der Anerkennung und Vollstreckung ausländischer Gerichtsurteile in Europa und auf die wichtigsten Unterschiede zwischen den geltenden Rechtsvorschriften der Europäischen Union und dem türkischen Gesetz über internationales Privat- und Verfahrensrecht.