

Recognition and Enforcement of Arbitral Awards in Turkey

Introduction

The recognition and enforcement of arbitral awards is of utmost importance in the arbitral process as most of the international awards ultimately need to be recognized and enforced in jurisdictions other than the seat in order for the winning party to satisfy its award. Unless parties can have solid reason to believe that they will be able to enforce the award at the end of the arbitral proceedings, an award in their favour will be no more than a pyrrhic victory, and would make the arbitral process largely futile.

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Foreign adjudications including foreign arbitral awards become binding and enforceable within Turkey only upon approval granted by a Turkish court, in accordance with a certain procedure to be followed. The distinction between “recognition” and “enforcement” is that recognition is an undertaking by a state to respect the bindingness of foreign arbitral awards. Such awards may be relied upon by way of defense or set-off in any legal proceedings concerning the subject-matter of the award commenced in the courts of the state concerned, whereas enforcement is an undertaking by a state to enforce the performance of certain obligations covered in foreign arbitral awards, in accordance with its local procedural rules.

Recognition and enforcement procedure of foreign arbitral awards is mainly regulated under International Private and Procedural Code (“IPPC”) No. 5718 and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)

which was ratified by Turkey on 02.07.1992 and came into force on 30.09.1992.

Purpose and Scope

The New York Convention aims to make recognition and enforcement procedure much more feasible and easier in signatory countries. As stated in the preamble of the IPPC, significant changes were made in the relevant articles to simplify this procedure.

Foreign arbitral awards granted in other states become binding and enforceable in Turkey upon the relevant procedure determined under either the New York Convention or the IPPC are followed.

The New York Convention is applied to arbitral awards (i) which are granted in the territory of another contracting state of the New York Convention and (ii) arising out of legal relationships that are considered as commercial under Turkish Law.

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Foreign arbitral awards granted by any of the states that is not a contracting state of the New York Convention are subject to the recognition and enforcement procedure determined under the IPPC. Besides, foreign arbitral awards which are not granted in the territory of another contracting state of the New York Convention or which are not considered as commercial under Turkish Law, are subject to the recognition and enforcement procedure envisaged under the IPPC.

Arbitral awards granted in respect of the provisions of Turkish International Arbitration Code ("TCPC") are accepted as domestic arbitral awards; and thus are binding and enforceable without recognition and enforcement procedure. However, in case Turkey is determined as the place of arbitration and there is an element of foreignness but parties choose not to apply TCPC, the arbitral award is subject to recognition and enforcement procedure determined under either the New York Convention or the IPPC.

The New York Convention and the IPPC do not make a distinction between recognition and enforcement in the procedure to be applied. Therefore, both recognition and enforcement procedure

are subject to same provisions in respect of the New York Convention and the IPPC.

Recognition and Enforcement Procedure Under the New York Convention

As stated in detail above, the New York Convention was ratified and came into force with certain reservations made by Turkey. In case the foreign arbitral award falls within the scope of the New York Convention, Turkish courts shall apply the provisions of the New York Convention with regards to recognition and enforcement.

Any arbitral award is deemed foreign arbitral award within the scope of the New York Convention in case a foreign arbitral award (i) which is granted in another contracting state and (ii) not regarded as a domestic award in the state where its recognition and enforcement are sought.

Procedural rules regarding recognition and enforcement within the scope of New York Convention are subject to national laws of contracting states. Therefore, within the process of recognition and enforcement of a foreign arbitral award of which recognition and enforcement is requested in Turkey, procedural rules to be applied shall be those having been determined under Turkish laws.

The New York Convention sets forth the conditions for the recognition and enforcement of foreign arbitral awards. The party requesting the recognition and enforcement shall submit the following documents with a petition:

- ❖ The duly authenticated original award or duly certified copy thereof, and
- ❖ The original agreement related to arbitration or duly certified copy thereof.

These documents shall be submitted in the official language of the state in which the recognition and enforcement is requested. In other words, the party requesting the recognition and enforcement of the award, shall submit the translated copies of these documents and these copies shall be certified by an official or a sworn translator or by a diplomatic or consular agent and notarized.

Application for the recognition and enforcement of a foreign arbitral award shall be made to the competent authority of the contracting state. In Turkey, application shall be made to Turkish commercial court of first instance. Parties may determine mutually the location of the competent court in writing. Otherwise, the court of first instance at the domicile of the party in Turkey against whom the award is rendered or in the absence of domicile of this party, the habitual residence of this party and in the absence of habitual residence, the court at the location of the property that may be subject to the enforcement shall have the jurisdiction and shall be the competent court.

Grounds for Refusal Under the New York Convention

The recognition and enforcement of a foreign award may be refused upon the request of the party against whom the award is invoked, in case she/he proves the existence of the situations listed below before the Turkish court:

- Parties of the arbitration agreement are legally incapable of concluding such an agreement, or the arbitration agreement or clause are not valid under the law applicable to the parties, or
- The party against whom the arbitral award is invoked was not given a proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his/her case, or
- The arbitral award deals with a different subject not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters exceeding the scope of the submission to arbitration; however, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, the part of the award pertaining to the matters submitted to arbitration may be recognized and enforced; or
- The composition of the arbitral tribunal or the arbitral procedure was not conducted in accordance with the arbitration agreement or clause determined by the parties,

or, failing such agreement was contrary to the law of the country where the arbitration took place; or

- The award has not become binding on the parties yet or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

In case the party against whom the award is invoked does not object to the recognition and enforcement request lodged by the other party or cannot prove the existence of the above situations, the application for the recognition and enforcement shall not be refused.

The New York Convention also determines the grounds for refusal of the recognition and enforcement of an arbitral award by the competent court in case it is ascertained that:

- The arbitration cannot be implemented as a method of dispute resolution, pursuant to the relevant laws of that country, for the subject matter of the relevant arbitration award; or
- The recognition or enforcement of the award would be contrary to the public policy of that country.

Recognition and Enforcement Procedure Under the IPPC

The aim of the IPPC is to regulate the applicable law for private transactions and relations which contain foreign element, the international jurisdiction of the Turkish courts, and the recognition and enforcement of foreign adjudications.

The recognition and enforcement of foreign arbitral awards shall be subject to the provisions of IPPC in case a foreign arbitral award is granted in a state that is not a contracting state of the New York Convention. Additionally, it is stated under the IPPC that only final and conclusive foreign arbitral awards can be subject to the recognition and enforcement procedure.

The party seeking recognition and enforcement of an arbitral award shall commence an action before the Turkish commercial court of first instance with a petition. Required documents which shall be

attached to the petition are almost same with the documents determined under the New York Convention. The required documents are:

- ❖ The original or duly certified copy of the arbitration agreement or arbitration clause, and
- ❖ The original or duly certified copy of the final and executable or binding arbitral award.

These documents shall be submitted in the official language, and the translated copies of the documents, which must be certified and notarized, shall be provided.

Grounds for Refusal Under the IPPC

The grounds for refusal determined under the IPPC are very similar to that of the New York Convention. In case the party against whom the arbitral award is invoked proves the existence of the following situations, the competent court shall refuse the request for the recognition and enforcement of foreign arbitral award:

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- a. An arbitration agreement is not concluded or an arbitration clause is not incorporated into the main agreement,
- b. The arbitral award is contrary to general ethics or public policy,
- c. In respect of relevant Turkish laws, it is not possible to solve the dispute through arbitration,
- d. One of the parties has not been duly represented before the arbitral tribunal and afterwards has not accepted the conducted proceedings explicitly,
- e. The party against whom the enforcement is requested has not been duly informed related to the appointment of arbitrator or arbitral tribunal or has been deprived of the right to make a claim and defense,
- f. The arbitration agreement or arbitration clause is invalid in respect of the applicable law mutually agreed by the parties; or, in the absence of this, in respect of the law prevalent in the country where the award is granted,

- g. The appointment of arbitrators or the procedures conducted by arbitrator or arbitral tribunal violates the arbitration agreement of the parties; or, in the absence of an arbitration agreement, the law prevalent in the country where the award is granted,
- h. The foreign arbitral award is rendered pertaining to an issue which is not regulated under arbitration agreement or arbitration clause, or it exceeds the scope of arbitration agreement or arbitration clause,
- i. The arbitral award is not finalized, or is unenforceable or non-binding in respect of the provisions of the applicable law or the law of the place of arbitration; or the applicable procedure or the arbitral award has been annulled by the competent authority of the place of arbitration.

The burden of proof for the situations mentioned in the paragraphs (d), (e), (f), (g), (h) and (i) lies on the party against whom the enforcement is requested.

The Examination of the Recognition and Enforcement Request

Upon the request for the recognition and enforcement is received, the competent court may make a limited examination on whether the conditions of the recognition and enforcement stipulated under the New York Convention or the IPPC are met or not. In other words, the competent court is not entitled to review the merits of the dispute or render a decision over the foreign arbitral award granted by an arbitral tribunal.

Turkish courts may order partial enforcement of foreign arbitral awards. Foreign arbitral awards which are recognized and enforced by the competent courts are enforced same as the awards given by Turkish Courts. Parties may appeal the court decision given upon the request for the recognition and enforcement. Appealing the court decision automatically suspends the enforcement of the decision.

The recognition and enforcement of arbitral awards is rendered through simplified proceedings which take a relatively shorter period compared to normal court proceedings. However, the

completion of recognition and enforcement proceedings together with the appeals process still take 2-3 years on average.

Conclusion

Having been signatory to the New York Convention for almost three decades, Turkey embraces the international policy favouring the enforcement of foreign arbitral awards.

In practice, as the judicial review on the merits of the dispute is not permitted, the violation of public policy is regarded as the gateway to setting aside arbitral awards. As is the case for most of the world, public policy is one of the most elusive concepts in Turkish law given the lack of definition in the legislation and contradictory precedents. However, thanks to the arbitration-friendly approach adopted by the Supreme Court of Appeals, Turkish courts are inclined to interpret the concept of public policy more narrowly in international arbitration than in domestic arbitration, thereby the recognition and enforcement of arbitral awards are rarely rejected on the grounds of violation of public policy.

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