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In a House of Mirrors: Reflections of Public Policy When Enforcing Foreign Judgments in Turkey

Today, it is almost impossible to find a concept that is unable to depict a clear perspective, but plays a crucial role during interaction of different jurisdictions other than the public policy. Strikingly, while a consented definition on international and even local platforms is ever absent, importance of public policy can be observed in myriad areas of law.

However, one could identify some of the eloquent attempts to describe public policy. For instance, latter is often denoted as values, principles and responsibilities within social, moral, commercial themes that a State attaches its protective power.¹ Moreover, violation of public policy signifies the consequences to which the core values of fairness, justice and public morals of a society would strongly object.² In another inclusive remark, public policy consists of rules that has gained legitimacy over the time throughout collective subconscious of a nation by safeguarding fundamental interests of it.³

¹ Emmanuel Gaillard & Domenico di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* (London: Cameron May, 2008), p. 797

² A. Briggs, *Conflict of Laws* (Oxford, Oxford University Press, 2002), 44–5.

³ Yılmaz Altuğ, *Amme İntizamı ve Tesirleri*, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, Cilt: XXVII, Sayı: 3, Doç Dr. Cem Sar'a Armağandan Aynı Baskı, p.365

Having explained that, in this brief summary, selected dimensions of public policy pursuant to Turkish International Private and Procedural Law ('IPPL') and practices of the Supreme Court ('Yargıtay') will be brought under the spotlight.

According to Article 54 of the IPPL⁴, among other conditions, the competent court shall rule on the enforcement provided that the decree of the foreign court is not *plainly* contrary to Turkish public policy. While inspecting the foreign judgment, an extensive discretion is conferred on the judge.

The ex-officio duty of the competent court to determine conditions for enforcement cannot be extended as constituting a substantial review of the foreign judgment. Article 54 orders the judge to only take 'conclusion section' of the foreign judgment into account and bars him from examining and verifying methodology of the foreign court's application of its own legislation.

At this junction, the question as to whether or not a foreign judgment which lacks a reasoning section plainly violates Turkish public policy has occupied the agenda of the numerous chambers of the Supreme Court for more than a decade. In its groundbreaking decision⁵ of 2012, General Assembly for the Unification of Judgments of Yargıtay has concluded the debate.

⁴ Article 54

(1) The competent court shall render enforcement subject to the following conditions:

- a) Existence of an agreement, on a reciprocal basis between the Republic of Turkey and the state where the court decision is given or a de facto practice or a provision of law enabling the authorization of the execution of final decisions given by a Turkish court in that state,
- b) The judgment must have been given on matters not falling within the exclusive jurisdiction of the Turkish courts or, in condition of being contested by the defendant, the judgment must not have been given by a state court which has accepted himself competent even if there is not a real relation between the court and the subject or the parties of the lawsuit,
- c) The court decree shall not openly be contrary to public order,
- d) The person against whom enforcement is requested was not duly summoned pursuant to the laws of that foreign state or to the court that has given the judgment, or was not represented before that court, or the court decree was not pronounced in his/her absence or by a default judgment in a manner contrary to these laws, and the person has not objected to the exequatur based on the foregoing grounds before the Turkish court,

⁵ Decision of the General Assembly for the Unification of Judgments of Yargıtay, dated 10.02.2012, numbered E. 2010/1, K.2012/1

Relevant and illuminating parts of the decision follows:

“Public policy, by its nature, is a changing concept, which adapts itself to time, place and the subject matter. Despite explanations provided by scholars and court decisions, it does not have a definition even within long-established jurisdictions. Nevertheless, this legal concept, whose scope is a burdensome task to determine, may be described as the rules which protect fundamental values and structure of the society... The area that public policy intervenes is vast and can be expanded by interpretation... Indeed, the consequences of recognizing and enforcing foreign judgments in Turkey must be evaluated by determining their compliance with the Turkish public policy as oppose to evaluating substantive law and its application procedure by the foreign court... It is evident that reasoning is in strong relation with public policy. Reasoning of a court decision not only rationalizes the judgment in democratic constitutional states, but also scrutinizes efficiency of the judge with its sense of reality. Reasoning is binding... Reasoning must be inclusive and reflect a pluralist outlook... Approaches of Private International Law and Civil Procedure Law are different from each other... One of the conditions that is required for enforcement of the foreign court decisions is related with the Turkish public policy. Pursuant to Article 54.c of the Law No:5718, in order for a foreign court decision to be enforced, it must not carry a provision that violates Turkish public policy. Here, violation of Turkish public policy is possible only if the conclusion section or one of its provisions plainly breaches Turkish public policy. Therefore, reasoning of a foreign judgment does not have any power to affect the enforcement procedure... To comply with Turkish public policy, the presence of a reasoning, in the context of the Turkish Procedural Law is not necessary in a foreign judgment... Therefore, a foreign judgment cannot be considered in plain violation with Turkish public policy only because it does not bear its reasoning.’

Despite the reform-minded and progressive approach depicted above, it must be mentioned that practice of the Supreme Court still consists of certain restrictions and conservative manner. For instance, particular matters of family law, including guardianship and adoption, severance pay, along with change of name conflicts are by default considered in strict relation with the Turkish public policy.

Ultimately, public policy is an immeasurably important actor in private international law which has a big potential to determine outcome of the enforcement procedure in a jurisdiction and ability to possess disguise itself under different areas of

law. For more information on precedents of Turkish courts regarding public policy, please do not hesitate to contact us.