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COURTS' REQUIREMENT FOR FINALIZATION CERTIFICATE IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In our domestic legislation, the enforcement of foreign arbitral awards is governed by Articles 60 to 62 of the International Private and Procedure Law (the "**IPPL**"). Additionally, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10 June 1958 (the "**New York Convention**"), to which Republic of Turkey is a contracting state, is directly applicable to the enforcement of foreign arbitral awards in Turkey, since international treaties that duly entered into force are deemed to have the force of law under Article 90/V of the Constitution.[1] Accordingly, these two sources govern the enforcement regime for foreign arbitral awards in disputes where enforcement is sought in Turkey. For the foreign arbitral awards that fall outside the scope of the New York Convention in terms of place, time or subject matter, the enforcement regime is governed by the provisions of the IPPL. As for the foreign arbitral awards rendered in contracting states and related to commercial matters, the provisions of the New York Convention apply. Moreover, according to Article VII/1 of the New York Convention, the provisions of the New York Convention shall not affect the validity of bilateral agreements entered into by the contracting states and the more favorable provisions of the country where the enforcement is sought. Accordingly, even in disputes falling within the scope of the New York Convention, the parties can resort to the more favorable provisions of the applicable bilateral treaties and local laws, if any. Having said this, the contemporary practice displays a tendency towards the application of the New York Convention's provisions due to the large number of contracting states party to the New York Convention[2] and the more flexible conditions provided by the New York Convention.

According to Article V/1-e of the New York Convention, one of the grounds for refusal of the enforcement of a foreign arbitral award is that the award has not yet become *binding* on the parties. In other words, in the absence of any other grounds for non-enforcement, a foreign

[1] For the Law on the Ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *see* the Official Gazette dated 21 May 1991 and numbered 20877.
[2] For the list of contracting states, *see* https://www.newyorkconvention.org/contracting-states (Last Access: 30 September 2024).

arbitral award is enforced if the party against whom enforcement is sought fails to prove that the award has not yet become binding on the parties. However, as the New York Convention does not define the term *binding*, the conditions under which an award is considered binding have been subject to different interpretations in the contracting states, resulting in extensive debates on this subject. Some courts have interpreted the concept of bindingness as the finalization of the award in the courts of the seat of arbitration, while others have adopted that the term bindingness refers to the exhaustion of available remedies against the award under the arbitration rules agreed upon by the parties.[3] In fact, according to the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 (the "**Geneva Convention**"), the predecessor of the New York Convention, to obtain an enforcement judgment, it was necessary to establish that foreign arbitral award had become final in the country where it was rendered. To establish the finality of the foreign arbitral award, the developing practice was for the party seeking enforcement to submit the award to the courts of the seat of arbitration, before submitting it to the enforcement courts in order to ensure that the award became final. This practice inevitably caused the issue of double *exequatur,* leading to increased costs for the parties involved, prolonged proceedings and prevention of or at least delays in the enforcement proceedings. All of these have led to scholarly criticisms.[4] In order to avoid the challenges caused by the requirement of finalization leading to high criticism, the drafters of the New York Convention replaced the requirement of finalization with the requirement of bindingness.[5] Likewise, Article IV of the New York Convention, which sets out the documents to be submitted by the party seeking enforcement, does not require the submission of any annotation or certificate establishing that the award is final or binding. Therefore, it appears that the drafters of the New York Convention made a conscious choice to avoid the challenges associated with double *exequatur*.

As for Article 60/1 of the IPPL, it provides that arbitral awards that have become final and enforceable or binding on the parties can be enforced. In connection with this provision, Article 61/1(b) of the IPPL refers to the original or duly certified copy of the award, which has become final and enforceable or binding on the parties, setting out the documents required to be submitted to the enforcement court. As indicated, for a foreign arbitral award to be enforced, it is sufficient for the award to be binding as per the IPPL, without meeting the finalization requirement. As a matter of fact, this interpretation is confirmed by Law No. 2675 on Private International Law and Procedural Law (repealed) ("**Law No. 2675**"). Under Article 43/1 of Law No. 2675, only final and enforceable arbitral awards were eligible for enforcement. Additionally, Article 44/1(b) required the submission of the original and certified copy of the arbitral award, which needed to be final and enforceable. However, with the entry into force of the IPPL, it has been explicitly stated that, as an alternative to finalized and enforceable awards, awards which are binding on the parties may also be sought to be enforced. Thus, contrary to the provisions of Law No. 2675, foreign

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[3] **Cemal Şanlı**, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları (*Drafting of International Commercial Contracts and Dispute Resolution*), Beta, Istanbul 2023, p. 456 and fn. 628.

[4] **Ziya Akıncı**, Milletlerarası Ticari Hakem Kararları ve Tenfizi (*International Commercial Arbitral Awards and Enforcement*), Dokuz Eylül Üniversitesi Hukuk Fakültesi Döner Sermaye İşletmesi Yayınları No. 44, Ankara 1994, pp. 138-140.

[5] **Gary B. Born**, International Arbitration: Law and Practice (e-book), Wolters Kluwer, the Netherlands 2021, pp. 368-369; **Albert Jan van den Berg**, in "The New York Convention of 1958: An Overview", Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Emmanuel Gaillard, Domenico Di Pietro), Cameron May, 2008, p. 61; United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-third Meeting, https://www.newyorkconvention.org/media/uploads/pdf/6/3/63_e-conf-26-sr23.pdf, (Last Access: 27 September 2024).

arbitral awards with binding effect can be enforced under the IPPL, even if such awards have not yet become final. Ultimately, the amendment introduced with the IPPL aligns our domestic legislation with the provisions of the New York Convention.

All in all, the regime governed by both the New York Convention and the IPPL provides that it is sufficient for foreign arbitral awards to be binding on the parties for them to be enforced in Turkey, and the finality requirement is not sought to be met. Moreover, neither the New York Convention nor the IPPL requires the submission of a document certifying the finality of the award when seeking enforcement. Having said this, Turkish courts recently have developed a misguided practice of granting a deadline for the claimant to submit the foreign arbitral award's finalization certificate.[6] This practice is not only incompatible with the New York Convention and the IPPL; but it is also impossible to request a finalization certificate from the courts of the seat of arbitration unlike in cases involving court judgments. Furthermore, the arbitration rules published by some arbitral institutions explicitly state that arbitral awards are binding.[7] Therefore, there is no legal basis for the courts to impose an obligation on the party seeking enforcement to submit the finalization certificate of the arbitral award.

The current court practice of requiring claimant parties to submit a finalization certificate for arbitral awards should be abandoned. In the meantime, for the parties and their counsel affected by this misguided practice, a solution may be to obtain a certificate from the courts of the seat of arbitration, certifying that no set-aside or appeal proceedings have been filed against the award sought to be enforced.[8]

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[6] **Ziya Akıncı**, "Usule İlişkin Sorunlar ve Yetki Aşımı (*Procedural Problems and Excess of Jurisdiction*)", Yabancı Mahkeme ve Hakem Kararlarının Tanınması ve Tenfizinde Güncel Gelişmeler içinde (Editör: Süheyla Balkar Bozkurt), On İki Levha Yayıncılık, İstanbul 2018, pp. 109-110; **Yavuz Kaplan**, "Yeni MÖHUK Tasarısının Tahkime İlişkin Hükümleri Hakkında Eleştirel Bir Yaklaşım ve Düzenleme Önerileri (*A Critical Approach to the Provisions related to Arbitration of the New Draft IPPL and Suggestions for Regulation*)", Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi, C. VII, No. 1-2, 2003, pp. 412, 416; **Cemal Şanlı**, *ibid*, p. 462.

[7] For example, *see,* Article 35 of the Rules of Arbitration of the International Chamber of Commerce; Article 26.8 of the Rules of Arbitration of the London Court of International Arbitration; Article 34.2 of the Rules of Arbitration of the Swiss Arbitration Centre.

[8] Judgment of the 43rd Civil Chamber of the Regional Court of Appeals of Istanbul dated 22.4.2021 and numbered E. 2020/291, K. 2021/528.