

Exceeding the Boundaries in Law: Enforcement of “Finalized Payment Order” in International Debt Collection

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Abstract

The definition of the concept of "enforceable decision" has gone beyond narrow interpretation of court judgement. Many bilateral and/or multilateral treaties and international regulations provide a legal basis for the enforcement of legal documents which are not given by the judicial organs in the members but have legal certainty in the European Union, as well as worldwide. As we have experienced in the recent years during the conduct of our legal profession, the payment orders which are finalized in Turkey can be enforced in many different jurisdictions in accordance with the established practices, mutual and/or multilateral legal assistance agreements and international regulations.

Keywords: Enforcement of payment orders; International debt collection; Execution proceedings; Debt enforcement and bankruptcy law

Introduction

In Turkish law, enforcement which refers to the procedures for executing a foreign judgment in another country is regulated in Article 50 of the Law on Private International Law and Procedural Law (“PILPL”).

According to this Article, enforcement decision given by the competent Turkish court is required for executing the civil judgements of foreign courts which have been finalized pursuant to the laws of the relevant foreign state in Turkey.

The conditions of enforcement in Turkish law are regulated in Article 54. The competent court shall render enforcement of a foreign judgment subject to following the 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,

As have been underlined in the above paragraph b, the condition that the judgment shall be given by the state court refers to the existence of a judgment given by the judicial organ of a foreign state. Although in Article 50 and 54 of the PILPL, the term “court” is used, in practice, we see that this term is interpreted broadly in accordance with the purpose.

As an example, there is no doubt about the enforcement of arbitral awards, and it is also possible to execute the notary deeds approved by

the Turkish Consulates as have been with the judgements.

In this regard, when evaluating the expression "judicial organ", it will be necessary to accept that it would be a narrow interpretation and from a formalist point of view to argue that this “organ” solely consists of the “court”.

Within the scope of this article, however, we will tackle the question of whether it is possible that a foreign judicial organ can render enforcement of a payment order which is finalized in accordance with the execution proceedings initiated in Turkey.

In the face of the globalization of commercial relations and the prevalence of individuals residing and/or acquiring assets in different jurisdictions, the necessity to collect claims across the borders is gradually increasing, the term "judicial body", as a condition of enforcement, requires a broader interpretation in line with this change.

The European Union has issued significant regulations on the enforcement of those legal documents which are not given by the judicial organs in the member states, but have legal certainty. The scope of these regulations has been further expanded with many multilateral treaties signed in relation to this issue across the world.

It is possible to argue that if the authority giving the judgment is engaged in judicial activity functionally the enforcement of a judgment would be possible, even if this authority cannot be characterized organically as a court [1].

This has been in line with the aim regarding the institutionalization in international law, as well as its nature which further pushes for development of the right to a fair trial and the right to legal remedies.

Within this framework, in this article, we will discuss the regulations in the field of international law in relation to this subject, and argue in full confidence that “ it is possible to enforce a finalized payment order,

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just as court judgements", as our professional conduct in recent years has proved that this has been the case.

Can the payment order be defined as a judicial decision in turkish law?

Debt Enforcement and Bankruptcy Law is a branch of law that deals with the fulfillment of debts arising from private law relations and which are not voluntarily fulfilled by the debtor by use of force of the state. As a result, the authorized agency of the state seizes and liquidates the debtor's assets and pays the sales price to the creditor.

In the event that the debtor does not voluntarily perform his obligations, the procedure of taking the right of the creditor from the debtor by the state force and delivering it to the creditor is called compulsory execution. In a nutshell, through the procedure of compulsory execution, it has interfered with the debtor's assets through the executive agencies determined by the State. If the obligation is a thing to be received is a thing and if it is present in the debtor's assets, it is taken and given to the creditor (i.e. specific performance). If specific performance is not possible, the sales price or, if the obligation is an amount of money to be paid, the relevant amount is taken from debtor and given to the creditor.

In other words, compulsory execution is the fulfilment of an obligation that is not fulfilled voluntarily by force of the state. The branch of law which regulates how the creditor will obtain his right is called enforcement and bankruptcy law or compulsory execution law.

Execution offices are the agencies in charge of enforcement and execution affairs. Whichever way of proceedings is chosen by the debtor, the first resort is the execution office. Execution proceedings cannot be initiated without making an application to the execution office. The execution office is authorized to take all necessary actions for the collection of the creditor's claims or the execution of a court decision. In this regard, the enforcement office sends a payment order or an enforcement order upon the creditor's request. If the requirements of these orders are not fulfilled and the enforcement proceedings are "finalized", the execution office will seize the debtor's properties, sell them and pay the creditor's debt with the money obtained upon the demand of the creditor. On the other hand, if subject is something other than money. the execution office will confiscate this by force.

The compulsory execution is the use of force against the debtor's assets, and when necessary, against the debtor himself, , in order to fulfil his legal obligations that have been definite within the scope of private law or can be accepted as formally definite as a result of an official warning, in accordance with a legal procedure [2].

In Turkish law, execution- bankruptcy officers are civil servants who use their compulsory execution powers. In order to ensure the fulfilment of its compulsory execution duty, the enforcement and bankruptcy office uses an authority derived from public law to carry out transactions regarding the initiation or course of the proceedings. This authority used by the enforcement and bankruptcy office arises directly from the law has two types: (i.) the authority to fulfil the order of the law, or (ii.) the discretionary authority recognized by the law. In this respect, the decisions of the enforcement and bankruptcy office can affect the personal rights of the debtor without the need for a judicial decision [3].

The prohibition of seeking rights in person and ensuring legal stability require the procuring an enforceable document for debts which are not fulfilled voluntarily and the obligation to making an application to the state for the enforcement of the rights defined herein, as well

as the granting the creditor the right of enforcement and execution. This right arises from the demand for legal remedies or the provision of justice, which is a public right (Article 36 of the Constitution) and renders its implementation possible [4].

The execution office carries out the procedures either on the basis of the requests-claims and statements of the parties or builds and concludes by itself [5]. Forced execution is carried out with transactions that manifest the will of the executive agency in this regard. In line with this, the execution officers usually carries out the compulsory execution by making a decision and, if necessary, by transferring the legal consequences of this to the material world [6].

In brief, in Turkish law, the execution office is the main agency that carries out private law execution activities on behalf of the state as a rule. Execution and bankruptcy officers are independent and do not act on the orders of a superior entity while performing the execution proceedings. There is no subordinate-superior relationship between courts and execution offices. Execution offices are "judicial institutions" affiliated to the Ministry of Justice, similar to courts, within the Turkish legal system. Similarly, those in charge of the execution offices are "judicial officers" and the transactions carried out there are "judicial proceedings".

A "payment order" is a "judicial decision" which gives the creditor the power to execute the debtor's assets without the need for any further notice following its finalization.

However, in many countries, the authority to seize and sell the debtor's assets ("execution power") can be obtained as a court judgment first and is then handed over to the officers for execution.

This situation is not related to the issue of whether the nature of the execution power is a "judicial decision", but only to the judicial structures and organizations of these countries. In a similar vein, as stated, payment order is the Turkish equivalent of the "execution power" which can be given by the courts in foreign countries.

While enforcing a payment order which is finalized in Turkey in a foreign country, the organic structure and legal nature of the payment order should be evaluated within the framework of Turkish law and the Turkish judicial organization.

Also in the legal doctrine, when enforcement of a decision is requested, it is accepted that the issue will be tackled according to the law of the relevant state, and that the decision-making body should take its authority from the state, enforcement is requested is a court decision [7].

In addition, the decisions made by foreign administrative authorities can be enforced in accordance with international agreements or special provisions [8].

When we look at the international regulations in relation to this topic, firstly, we come across the European Union Council's Regulation on the "Recognition and Enforcement of Decisions on Commercial and Civil Matters" dated 22 December 2000 and numbered Besides, EN 44/2001. The definition of "judgment" in the aforementioned regulation is made as follows:

"Article 32 For the purposes of this Regulation, judgment. means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."

Hence, it is possible to see that the documents that can be enforced

are not limited to "court decisions". Similarly, it is possible to match the "payment order" with the concept of "order" in the definition, and argue that the certificates regarding the finalization received within the scope of the execution file are also a "judicial document", as their content includes and refers to definite debt, and hence they can be enforced. .

In addition, many Mutual Legal Assistance Agreements to which Turkey is a party which contains regulations regarding enforcement do not limit the enforceable decisions to "court decisions", and enforcement of "judicial decisions" is accepted and regulated under these agreements. Therefore, when the enforcement process is initiated in a foreign country in relation to any dispute, it is important to first read the international agreements concluded between that country and Turkey, and to evaluate the opportunities provided by them.

On the other hand, this situation has not been regulated only by agreements to which Turkey is a party, but also by many materials that appear in international law.

For example, regulations under the Lugano Convention have been similar to the regulation in the abovementioned European Union legislation. Within the scope of Lugano Convention, the enforcement proceedings and payment orders can be easily enforced across the countries that signed the Convention.

For example, the court orders that payment orders ("writ of summons") originating from Poland shall be enforced within the framework of the Lugano Convention in an enforcement process between Poland and Switzerland [9].

The creditor's right of objection, the consequences of finalization of the payment order within the context of finalization requirement for enforcement

One of the conditions required for the enforcement of a foreign court decision is that the enforceable decision must be "finalized" according to the law of the state in which it was issued.

Whether the decision given by the foreign court is final or not will be determined according to the law of the foreign state.

In the law of proceedings, the enforcement office issues a payment order and sends it to the debtor upon the request of the creditor.

The Executive Director examines whether the execution request complies with the law and makes a decision on issuing the payment order. With the payment order, the debtor is informed that he has to pay the debt or if he has an objection, he has to notify it and if he does not do this, the compulsory execution will continue and his properties will be seized. It is clearly stated in the notification that the debtor can present his objection and be given a period of time depending on the type of proceeding.

If the debtor presents any objection after receiving the relevant notification, the proceeding is ceased temporarily, and the creditor must commence an action for the annulment or cancellation of the objection. If the debtor does not submit an objection, the proceeding is finalized and it can proceed with the attachment proceedings.

As have seen, the debtor is given the right to object before the payment order becomes final in Turkish law. This is an important condition for enforcement.

Also, in order to be able to talk about a finalized decision in international practices regarding this matter, it is required that the decision be finalized against the other party in the face of the fact that the other party has been given the opportunity to defend himself.

The component that is taken as a basis in practice, especially in the European Union countries, is whether the decision complies with the conditions in Article 27/2 of the Brussels Convention. As can be understood from the text of the article, a decision cannot be enforced unless the other party is given a reasonable time to defend himself and the right to appeal is given and this remedy is exhausted.

"A judgment shall not be recognized: Where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence."

Similarly, in the judgment "Hengst Import BV v Anna Maria Campese", the Community Court ruled that the payment order has characterized as a final decision in accordance with the Articles 633-653 of the Italian Code of Civil Procedure [10]. The dispute in question concerned the right to claim arising from the non-payment of the invoices arising from the shoe sales.

Mrs. Campese, residing in Italy, sent a payment order for the collection of unpaid shoe invoices against Hengst Import BV, which has an office in the Netherlands. Since the defendant did not pay or return the shoes within the 20-day objection period, the proceedings were finalized. Thereupon, based on this payment order decision, the plaintiff requested its enforcement pursuant to the provisions of the 1968 Brussels Convention,

Whilst the Community Court analyzed the legal nature of the payment order in the Italian Code of Civil Procedure, it has ruled that it is a decision that can be enforced in accordance with the Article 27/2 of the Brussels Convention on the grounds that an enforcement decision cannot be made before the objection period expires and judicial action cannot be initiated unless the defendant is duly notified.

In the final judgment, the Community Court has ruled that this decision issued pursuant to Book IV Articles 633-656 of the Italian Code of Civil Procedure is subject to enforcement within the scope of the Article 27/2 of the Brussels Convention.

Conclusion

Although court judgements and arbitral awards come to mind first when enforcement is mentioned, today, the definition of the concept of "enforceable decision" has gone beyond narrow interpretations within the framework of different legal regulations, bilateral and/or multilateral agreements and/or international regulations in different countries. In fact, what we have actually experienced in the last 3 years is that enforcement of payment orders finalized in Turkey has been possible in many different jurisdictions, although Turkey is not bound by the abovementioned EU legislation, based on established practices, mutual and/or multilateral legal assistance agreements and international regulations. Many countries with different legal systems, such as Belgium, Croatia, Albania, Luxembourg, Switzerland, Bulgaria, the Netherlands, the United Kingdom, and Canada accept the enforcement capacity of payment orders on different legal grounds. This acceptance enables the creditor, who has difficulty in collecting his receivables at home, to get successful results in a short time across borders. As a result, collection can be attained over the assets that were once considered inaccessible in significant amounts. The primary method to achieve successful results hereby is to carefully read and evaluate the bilateral and/or multilateral agreements between Turkey and the country where the enforcement process will be initiated, and/or the regulations applied by the foreign state.

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Conflict of Interest

None

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