

Critical analysis of recent Turkish legislation regarding the registration of foreign divorce decisions

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Abstract

The Act on Private International Law and International Civil Procedure of 2007 is the main legislation regulating the recognition and enforcement of foreign judgments in Turkey. The recognition of divorce judgments delivered by foreign courts had also been subject to the Act until 2018 just as all other foreign judgments on civil and commercial matters. However, in 2018 the Turkish legislator enacted a special regime under the Civil Registry Services Act providing for the registration of foreign divorce decisions. The new legislation which is examined in this article will undoubtedly reduce the workload of the Turkish courts; hence it will contribute to the efficiency of litigation. However, as argued here, by also departing from the traditional requirements for the recognition and enforcement of foreign judgments in Turkey it is subject to criticism in many other ways.

1. Introduction

Until 2017, just as all foreign judgments, the recognition of foreign divorce judgments had been subject to the Turkish Act on Private International Law and International Civil Procedure of 2007 (hereinafter referred to as ‘TAPIL 2007’)¹ unless an international agreement on the recognition and enforcement of foreign judgments to which Turkey is a party would apply. However, in 2017, by the amendment of the Civil Registry Services Act (hereinafter referred to as ‘the Act’) a new regime for the registration of foreign decisions on divorce was introduced in Turkish Law. The new legislation aims to solve the problems of Turkish citizens living abroad as regards the recognition of divorce decisions they have obtained from the authorities of their countries of residence.²

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1 Turkish Official Gazette (OG), 12 December 2007, No. 26728. All provisions of Turkish legislation mentioned in this article are translated by the author.

2 For the *rationale* of the provision see <https://www.tbmm.gov.tr/sirasayi/donem26/yil01/ss484.pdf> (accessed 25 August 2018).

The new provision is now found in Article 27/A of the Act³ and is explained by the Regulation on the Registration of Decisions Given by Foreign Judicial and Administrative Authorities of 2018 (hereinafter referred to as ‘the Regulation’).⁴

The registration of foreign decisions on divorce based on the new legislation has only started since June 2018. Therefore although it would require some time to elaborate on the practical consequences of the said legislation, it is still possible to assess the changes brought about by it.

As will be discussed below, the new legislation does not only depart from the traditional principles of Turkish Law as regards the recognition of foreign judgments but also raises certain question marks regarding its implementation in practice. Thus, this article aims to critically assess the changes brought about by the new legislation as well as its potential shortcomings.

2. Requirements for the registration of foreign decisions

2.1 Substantive requirements

2.1.1 Decisions of foreign administrative or judicial authorities

Under Article 27/A of the Act, registration first and foremost requires a *decision* that has been delivered by foreign administrative or judicial authorities. This requirement includes both the necessity that the decision has been handed down by the *foreign* authorities⁵ and the possibility that such an authority could be either judicial or administrative in nature. The possibility of the foreign decision being *administrative* in nature is one of the important innovations of this provision and an exception to the provisions of TAPIL 2007, the latter only requiring

3 Art. 27/A reads as follows: ‘[d]ecisions on divorce, the invalidity, annulment or existence of marriage by foreign judicial or administrative authorities shall be registered in the civil registry if the parties apply together in person or through their representatives; the decision must have been given by the competent foreign judicial or administrative authorities pursuant to the law of that country and is procedurally final and it must not be manifestly contrary to Turkish public policy (*ordre public*) (para. 1). Registrations at the civil registry are made by the foreign representations in the countries where the decision has been handed down and by the Civil Registry Directorates within Turkey that are determined by the Ministry (para. 2). If a request for the registration of a decision is rejected because of the non-fulfilment of the requirements laid down under this provision, the recognition of that decision shall be subject to the Act on Private International Law and International Procedure dated 27/11/2007 and numbered 5718 (para. 3). The procedure and principles as regards the implementation of this provision shall be determined by a Regulation to be adopted by the Ministry (para. 4)’.

4 OG 7 February 2018, No. 30325.

5 Although the Act and the Regulation are silent on this issue, the Explanatory Note on the Registration of Decisions of Foreign Judicial or Administrative Authorities prepared by the Directorate General of Civil Registration and Citizenship Affairs of the Turkish Ministry of Interior (hereinafter referred to as ‘the Explanatory Note’) provides that the foreign authority should be an authority of a state which is recognised by Turkey. Such a requirement has to be criticised since the recognition of a state under public international law is by its nature a political act. Based on the same reason there exists no such requirement under TAPIL 2007 for the recognition and enforcement of foreign judgments. For the mentioned Explanatory Note see <https://www.nvi.gov.tr/PublishingImages/mevzuat/mevzuat/talimat-aciklayici-yazilar/YabanciUlkeAdliveidariMakamlarincaVerilenKararlarinTescili.pdf>, p. 10.

foreign judgments to be recognised and enforced in Turkey.⁶ Thus, the recognition of foreign administrative decisions was not possible under TAPIL 2007 even if they were delivered by the competent administrative authorities pursuant to the law of that foreign state. In this regard the recognition of divorce decisions delivered by the Municipality of Copenhagen,⁷ the Governorship of Copenhagen or the Governorship of *Hordaland* have previously been rejected by the Turkish Court of Cassation under TAPIL 2007.⁸ Therefore the enactment of Article 27/A made it possible to register the decisions of foreign municipalities, governorships, public notaries or diplomatic representatives.⁹

On the other hand, since the provision does not specifically deal with the registration of decisions by foreign religious authorities, such decisions should be considered to be outside the scope of the said provision. Nevertheless, once decisions by foreign religious authorities are approved by the competent administrative or judicial authorities of that foreign state, their registration in Turkey should also be possible.¹⁰ Besides, since Article 27/A requires a *decision*, it

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- 6 C. Şanlı/E. Esen/I. Ataman-Figanmeşe, *Milletlerarası Özel Hukuk* [Private Interantional Law], İstanbul: Vedat 2018, p. 609; A. Çelikel/B.B. Erdem, *Milletlerarası Özel Hukuk* [Private Interantional Law], İstanbul: Beta 2017, p. 763; B. Huysal, 'Nüfus Hizmetleri Kanunu Kapsamında Yabancı Boşanma Kararlarının Doğrudan Tescili' [Direct Registration of Foreign Divorce Decisions under the Civil Registry Services Act], *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* [Public and Private International Law Bulletin] (37/2) 2017, p. 475. However, it should be underlined that this is not the first legislation providing legal effect for foreign administrative decisions in Turkey. Other than certain international agreements to which Turkey is a party (e.g. the Convention on the Recognition of Decisions Relating to the Matrimonial Bond of 1967; the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children; the Hague Convention of 2007 on International Recovery of Child Support and Other Forms of Family Maintenance), Art. 30/II of the Civil Registry Services Act has also provided for the recognition of foreign administrative decisions on adoption.
- 7 Court of Cassation [*Yargıtay*] (Second Chamber) 13 April 1995, Registration No. 1995/3612, Decision No. 1995/4567: N. Ekşi, *Milletlerarası Özel Hukuk I Pratik Çalışma Kitabı* [Private Interantional Law I Case Studies], İstanbul: Beta 2014, pp. 124 et seq.; Şanlı/Esen/Ataman-Figanmeşe (2018), p. 514, fn. 343 (above note 6); N. Ekşi, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi* [Recognition and Enforcement of Foreign Judgments], İstanbul: Beta 2013, p. 534.
- 8 Court of Cassation [*Yargıtay*] (Second Chamber) 10 October 2008, Registration No. 13882/2008, Decision No. 13079/2008: Ekşi 2013, p. 535 (above note 7). Nevertheless, it is still possible to recognize a decision by foreign administrative or religious authorities under TAPIL 2007 if that decision has been approved by the judicial organs of that country. In this regard where *talaq* is pronounced according to the law of the foreign country and involves the subsequent consent of the woman, once it is approved by the courts of that country it can also be recognized in Turkey: Ekşi 2013, p. 537 (above note 7); V. Doğan, *Milletlerarası Özel Hukuk* [Private Interantional Law], Ankara: Savaş 2016, p. 108. See e.g. the decision of the *Kadıköy* Civil Court of First Instance where the court accepted that a *talaq* divorce before the Saudi Arabian qadi which was subsequently accepted by his spouse before the Jeddah Religious Court could be recognized in Turkey as the divorce could be qualified as an uncontested divorce: *Kadıköy* Civil Court of First Instance [*Kadıköy Asliye Hukuk Mahkemesi*] (Second Chamber) 7 February 1991, Registration No. 1990/853, Decision No. 1991/94: Ekşi 2013, p. 539 (above note 7).
- 9 Şanlı/Esen/Ataman-Figanmeşe 2018, p. 609 (above note 6).
- 10 U. Tütüncübaşı, 'Yabancı Kararların Türk Hukukunda Tanınması Konusunda 690 Sayılı Kanun Hükmünde Kararname İle Düzenlenen Yenilikler' [Amendments Brought By Degree Numbered 690 on the Recogni-

is clear that it shall not be applied in situations where the marriage ceases to exist automatically without a decision as a result of a conversion to another religion or life imprisonment.¹¹

The said provision of the Act also departs from the general system of TAPIL 2007 by requiring foreign judicial or administrative authorities *to be competent under the law of that country*. This examination as to the competence of the foreign authorities is not required under TAPIL 2007 which provides for competence with regard to two different aspects: First, that the judgment must not have dealt with matters falling within the exclusive jurisdiction of the Turkish courts¹² and, second, that the foreign court must not have exercised exorbitant jurisdiction (Article 54/I/b). The *rationale* for this requirement as well as the examination to be made regarding the competence of the foreign authorities is far from clear. However, it may be assumed that this requirement shall also be assessed by the Inquiry Examination Commission,¹³ just as all the other requirements for registration.

Last but not least, the foreign decision must be ‘procedurally’ final, which should be understood to mean that judicial remedies against that decision under the law of that foreign country should have been exhausted.¹⁴

2.1.2 Subject-matter of the decision

Article 27/A applies to foreign decisions on divorce as well as to the invalidity, annulment and existence of marriage, despite the fact that the heading of that provision is limited to ‘registration of divorce decisions delivered by foreign judicial and administrative authorities in the civil registry’. Thus the provision applies to decisions which break the marriage bond as well as declaratory judgments on the existence of a marriage. Where the foreign divorce decision includes provisions on subjects such as custody, maintenance, compensation or matrimonial property that requires enforcement, an application for registration shall only be examined with regard to the divorce itself (Article 9/V Regulation). In such a case, parts of the decision requiring enforcement shall be subject to TAPIL 2007 (Articles 50 et seq.).

2.1.3 Nationality of the parties

It should be stated that the provisions on the recognition and enforcement of judgments in TAPIL 2007 apply independently of the nationality of the parties. Thus, it is not required that

tion of Foreign Decisions in Turkish Law], *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi* [Journal of Dokuz Eylül University Faculty of Law] (19/2) 2017, p. 117.

11 Huysal 2017, p. 485 (above note 6).

12 As for divorce actions, the jurisdiction of the Turkish courts is not exclusive. Thus the mentioned requirement is not a basis for rejecting the recognition of a foreign divorce decision under TAPIL 2007.

13 Regarding the Inquiry Examination Commission see below section 3.

14 The requirement of the finality of the foreign judgments is also provided for under Art. 50 of TAPIL 2007 for recognition and enforcement. See e.g. on the finality of a foreign divorce judgment, Court of Cassation [Yargıtay] (Second Chamber) 16 March 2011, Registration No. 2010/15075, Decision No. 2011/4678: www.kazanci.com (accessed 25 February 2019).

any of the parties has Turkish nationality.¹⁵ The only limitation as to foreign nationals applying for the recognition or enforcement of a judgment before the Turkish courts is that they are required to provide security for costs under Article 48 of TAPIL 2007.¹⁶

In a similar vein, neither Article 27/A of the Act nor the Regulation provides for any requirement as to the nationality of the parties. The said legislation only provides for registration in a 'civil registry' and/or a 'family register', both of which are legally defined without giving any indication as to nationality.¹⁷ However, it can be indirectly inferred from certain provisions in the legislation that such registries are used to register the information as to Turkish nationals only.¹⁸ Also bearing in mind that Article 27/A of the Act was inserted to solve problems faced by *Turkish citizens* living abroad when seeking the recognition of divorce decisions, it can be concluded that the scope of application of the said provision is limited to the registry of divorce decisions as regards Turkish nationals. Thus at least one of the parties should have Turkish nationality.¹⁹

It should also be mentioned that the point in time to be taken into consideration when determining the nationality of the spouses is the date of the divorce rather than its registration. Without any indication in legislation, practice shows that applications by previous Turkish citizens are also accepted under the said provision if at least one of the spouses has Turkish nationality on the date of the divorce decision. In other words, where a Turkish national obtains a divorce decree from foreign authorities and subsequently loses his/her Turkish nationality,

15 Court of Cassation [*Yargıtay*] (Second Chamber) 27 March 2008, Registration No. 2007/20375, Decision No. 2008/4214; Court of Cassation [*Yargıtay*] (Second Chamber) 25 June 2008, Registration No. 2008/9629, Decision No. 2008/9345: Ekşi 2014, pp. 129 et seq. (above note 7).

16 According to Art. 48 of TAPIL 2007, '[f]oreign natural and legal persons who file a lawsuit, intervene in a lawsuit, or initiate the execution proceedings before a Turkish court are required to provide security whose amount shall be determined by the court to cover the expenses of the legal procedures and proceedings as well as the losses or damages of the other party (Art. 48/I). The court shall exempt the plaintiff, intervenor, or applicant for execution from providing security on a reciprocity basis (Art. 48/II)'. As regards the requirement of *cautio judicatum solvi* for foreigners in Turkish law see G. Bayraktaroğlu Özçelik, 'MÖHUK m. 48 uyarınca Yabancıların Türkiye'de Teminat Gösterme Yükümlülüğü' [The Obligation of Foreigners to Provide Security for Costs in Turkey under Article 48 of TAPIL], in: Feriha Bilge Tanrıbilir/Gülce Gümüşlü Tunçağıl (eds.), *10. Yılında MÖHUK Sempozyumu* [TAPIL's 10th Anniversary Symposium], Ankara: Adalet 2018, pp. 434-453.

17 According to the Act, a 'civil register' means 'all records comprised in the family register, a special register and their back-ups' (Art. 3/I(u)) and a 'family register' means 'the register where records relating to civil status events are kept in paper or electronic format' (Art. 3/I (e)).

18 See e.g. Art. 7/I(a) of the Act requiring a Turkish Republic identity number to be included in the family register, Art. 7/II of the Act and Art. 14/III of the Civil Services Act Regulation providing that 'Turkish nationals who are not registered in the family register in Turkey and reside in foreign countries shall be entered in the family register established in a civil registration office determined by the Ministry' and Art. 20/I of the Act and Art. 46/I of the Civil Services Act Regulation providing that '[p]ersons who have acquired Turkish nationality in accordance with the Law shall be registered in the family register in line with the issued forms upon the decision of the competent authorities or councils'.

19 The possibility of one spouse being a foreign national is also taken into consideration in the Explanatory Note which states that where one of the parties has foreign nationality and cannot speak Turkish, that party could make his/her application with the aid of a translator: Explanatory Note, p. 5.

his/her application is deemed to be equally admissible under the said provision. In this regard the registration is made in the previous family register that applies to that – previous Turkish – national.²⁰ Nevertheless, according to the opinion of the present author the requirement as to the nationality of the parties should have been clearly mentioned under Article 27/A of the Act itself.

In this regard it can be concluded that the recognition of foreign divorce judgments under TAPIL 2007 can now only be possible where both spouses have foreign nationality upon the date of divorce.

2.1.4 Public policy (*ordre public*)

Another requirement for the registration of foreign divorce decisions under the Act is that the decision should not be manifestly contrary to Turkish public policy, a requirement that also applies to the recognition and enforcement of judgments under TAPIL 2007. By requiring a *manifest* contradiction both pieces of legislation underline the exceptional character of the public policy requirement.

Under TAPIL 2007 the prohibition of *révision au fond* prevents the Turkish court where the recognition or enforcement of a judgment is requested to review the foreign judgment in substance.²¹ Thus, both the procedure followed and the facts that were taken into consideration by the foreign court are outside the review to be made by the Turkish court.²² A failure to apply the mandatory provisions of Turkish law or their application in a defective manner²³ or the application of a foreign law which is different in substance from Turkish law²⁴ is not a sole

20 Under Art. 14 of the Act, 'the [c]losure of a civil status record means that the record becomes non-maintainable due to events such as death, absence, the loss of Turkish nationality, marriage, divorce, adoption, rectification or the denial of filiation' (Art. 14/I). 'The record shall be reopened when the cause related to the closure of a record ceases to exist or when a new cause for the reopening of the record emerges. The personal status events that have occurred after the opening of the record shall be entered into the record of the person' (Art. 14/II).

21 Court of Cassation [*Yargıtay*] (Second Chamber) 4 November 2004, Registration No. E. 2004/10683, Decision No. 2004/13120, www.kazanci.com (accessed 25 January 2019). Therefore, the 1984 decision of the Second Chamber of the Court of Cassation, 15 May 1984 (Registration No. 1984/2674, Decision No. 1984/4577) rejecting the recognition of a foreign decision on an uncontested divorce when such divorces were not provided for in Turkish law was subject to criticism: A. Gürzumar, 'Türk Devletler Özel Hukuku Açısından Boşanma Davalarında Kamu Düzeninin Etkileri' [Effects of Public Policy in Divorce Cases in Turkish Private International Law], *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* [Public and Private International Law Bulletin] (14/1-2) 1994, pp. 39-40.

22 Court of Cassation [*Yargıtay*] (Second Chamber) 4 November 2004, Registration No. 2004/10683, Decision No. 2004/13120, www.kazanci.com (accessed 25 January 2019).

23 Court of Cassation [*Yargıtay*] (Second Chamber) 4 December 2008, Registration No. 2007/16684, Decision No. 2008/16665: Ekşi 2014, pp. 176 et seq. (above note 7); Court of Cassation [*Yargıtay*] (Second Chamber) 4 November 2004, Registration No. 2004/10683, Decision No. 2004/13120, www.kazanci.com (accessed 25 January 2018).

24 Court of Cassation [*Yargıtay*] (Second Chamber) 23 June 1983, Registration No. 1983/5550, Decision No. 1983/5697, www.kazanci.com (accessed 25 January 2018). See also e.g. Court of Cassation [*Yargıtay*] (Second Chamber) 18 June 2012, Registration No. 2011/19791, Decision No. 2012/16687, where the court

ground for not recognising that judgment. One can only speak of the intervention of Turkish public policy in very exceptional situations where the foreign decision is manifestly contrary to the fundamental principles of Turkish Constitution and Turkish law, fundamental rights and freedoms as guaranteed by international conventions as well as the moral values of Turkish society.

In the practice of TAPIL 2007, foreign decisions given as a result of unilateral divorces are found to be contrary to Turkish public policy when the decision was based solely on the will of one of the spouses without the other spouse being requested to recognise that decision.²⁵ Likewise where one of the spouses (the defendant) was not able to defend himself/herself due to undue notification, the claim for the recognition of the decision of the foreign court will be rejected by the Turkish court based on the public policy requirement.²⁶ The same result shall also be reached where there exists a prior judgment by the Turkish courts on the same action (i.e. involving the same parties, the same subject-matter and the same cause of action)²⁷ or when the foreign decision has been obtained by fraud.²⁸

Although the new legislation does not provide any clear provision on the prohibition of *révision au fond*, as a fundamental principle of Turkish law on the recognition and enforcement of foreign judgments, the public policy requirement under the new legislation should be implemented with this limitation. However, the most important scepticism regarding the new legislation is that it leaves the duty to examine the public policy requirement to the Inquiry Examination Commission which is an administrative authority composed of administrative staff.²⁹ Thus, it is doubtful whether the Commission will be able to make an adequate intimate examination by taking the principles of private international law into consideration. Besides,

found no infringement of Turkish public policy when the spouses had not been heard in person in an uncontested divorce action but were represented by their representatives according to the *lex fori*: www.kazanci.com (accessed 25 January 2019).

25 See e.g. Court of Cassation [*Yargıtay*] (Second Chamber) 26 October 2001, Registration No. 2001/13000, Decision No. 2001/14704, www.kazanci.com (accessed 5 November 2018).

26 See e.g. Court of Cassation [*Yargıtay*] (Second Chamber) 4 October 2005, Registration No. 2005/10735, Decision No. 2005/13428: www.legalbank.net (accessed 25 February 2019).

27 Court of Cassation [*Yargıtay*] (Eleventh Chamber) 24 February 2016, Registration No. 2015/14353, Decision No. 2016/1941: Şanlı/Esen/Ataman-Fıganmeşe 2018, p. 550, fn. 412 (above note 6). There are also examples where the Turkish courts use *res judicata* as a ground instead of public policy: Court of Cassation [*Yargıtay*] (Second Chamber) 2 December 2010, Registration No. 2010/5910, Decision No. 2010/20102 (Ekşi 2014, pp. 170 et seq., above note 7); Court of Cassation [*Yargıtay*] (Second Chamber) 4 July 2013, Registration No. 2013/13005, Decision No. 2013/18939; Court of Cassation [*Yargıtay*] (Second Chamber) 26 February 2007, Registration No. 2007/2219, Decision No. 2007/2792: Ekşi 2013, pp. 318 et seq. (above note 7).

28 *Erzincan* [Second] Civil Court of First Instance (Erzincan 2. Asliye Hukuk Mahkemesi) 27 September 2001, Registration No. 1999/100, Decision No. 2001/220.

29 Also see Huysal 2017, pp. 494 et seq. (above note 6); Tütüncübaşı 2017, p. 120 (above note 10). The Inquiry Examination Commission shall be established in the provincial directorates of civil registration and nationality as determined by the Ministry of Interior and shall be composed of one vice-governor, one provincial directorate of civil registration and nationality, two district directorates of civil registration and nationality and a government official having a legal format (Art. 8/I, II). The Commission can also be established abroad by the related Turkish Embassy or Consulate General of the country in question (Art. 8/III).

one can expect differing attitudes towards the meaning and scope of public policy intervention as well as changes in the established case law of the Turkish courts based on various compositions of the Commission. The fact that the decisions of the Commission are not published also raises questions as to their transparency.

2.1.5 Pending related actions or a previous decision by the Turkish courts

Although it is not mentioned in Article 27/A of the Act, this requirement is provided for under Article 9, paragraph 6 of the Regulation. According to the said provision, if there exists a pending action before the Turkish courts or an action has been previously rejected³⁰ by the Turkish courts and it relates to the decision given by the foreign judicial or administrative authorities, the application for the registration of that decision shall be rejected.

It should first be mentioned that TAPIL 2007 neither provides for the same or related action which is pending before the Turkish courts nor for a prior decision by the Turkish courts on the same action as being specific impediments to recognition and enforcement.³¹ Under TAPIL 2007, the *pendency* of the same or related action before the Turkish courts has no effect on recognition or enforcement, thus two actions – one on the substance of the dispute and the other on the recognition or enforcement of the foreign judgment – shall continue to be heard by the Turkish courts. In this possibility, depending on the action that has been dealt with earlier by a final decision, the other action shall be rejected on the ground of *res judicata*. On the other hand, where there has been a prior judgment by the Turkish courts on the same action, i.e. involving the same parties, the same subject-matter and the same cause of action, the claim to have the foreign judgment recognized or enforced may be rejected on the grounds of either public policy³² or *res judicata*.³³

From the point of view of the present author, this provision of the Act is subject to criticism based on two main reasons:

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- 30 The reason for providing for ‘a rejected action’ instead of *res judicata* might be Art. 55 of the Act which requires the Turkish courts to notify the local public registration offices of any changes to be registered at the civil registry within ten days starting from the date on which the judgment becomes final. Thus, if the Turkish courts have already accepted the claim and decided on the divorce this should have already been registered at the civil registry.
- 31 However, such requirements of recognition and/or enforcement may be found in certain international conventions to which Turkey is a party: See e.g. the Hague Convention of 1968 concerning the recognition and enforcement of decision relating to maintenance obligations towards children (Art. 2/I(4)); the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (Art. 5/III, IV); the European Convention of 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Art. 10/II(b)).
- 32 Court of Cassation [Yargıtay] (Eleventh Chamber) 24 February 2016, Registration No. 2015/14353, Decision No. 2016/1941: Şanlı/Esen/Ataman-Figanmeşe 2018, p. 550, fn. 412 (above note 6).
- 33 Court of Cassation [Yargıtay] (Second Chamber) 2 December 2010, Registration No. 2010/5910, Decision No. 2010/20102 (Ekşi 2014, pp. 170 et seq., above note 7); Court of Cassation [Yargıtay] (Second Chamber) 4 July 2013, Registration No. 2013/13005, Decision No. 2013/18939; Court of Cassation [Yargıtay] (Second Chamber) 26 February 2007, Registration No. 2007/2219, Decision No. 2007/2792: Ekşi 2013, pp. 318 et seq. (above note 7).

First, although the mentioned requirement is a condition for an application for registration, it is not specifically provided for under Article 27/A of the Act. In this regard, a condition for application is found in the Regulation, instead of the Act providing for such conditions.

Second, it raises doubts because of the fact that the provision does not require the decision and the action before or decided by the Turkish courts to be concerned with the 'same action' but provides for 'related actions'. In Turkish civil procedure, based on the idea that the pendency of the same action before different courts may lead to conflicting judgments as well as a waste of effort, time and resources both for the parties and for the courts, the second action is prevented by the plea of *lis pendens*. In a similar vein, where there exists a prior decision by the Turkish courts on the same action, the second action could be prevented by the plea of *res judicata*. However, both are subject to strict requirements, i.e. where the parties, the subject-matter and the cause of action are required to be identical.³⁴

On the contrary, the term 'related actions' does not coincide with the term 'same action'. In Continental European legal systems, to which Turkish Law also relates, because of the fact that the pleas of *lis pendens* and *res judicata* are subject to strict requirements, they cannot be pleaded in the case of 'related actions' where the parties and/or the cause of action and/or the subject-matter of the actions are not identical but the actions are only deemed to be closely connected because of the fact that the judgment to be given in one of them shall have a bearing on the other.³⁵ In such situations different procedural tools are used also to avoid the risk of irreconcilable judgments resulting from separate proceedings, such as the staying of one of the proceedings or the consolidation of actions.

On the other hand, if a 'related action' was used in the Regulation with this meaning, then this would require the rejection of any application for the registration of divorce decisions where there was a closely connected action, such as an action concerning maintenance, matrimonial property or custody pending before the Turkish courts or previously decided by them although the new legislation excludes the mentioned issues from its scope of application (Regulation Article 9/V). Therefore, this interpretation cannot be accepted. In this regard, in the opinion of the present author, the term 'related actions' is not used in its technical meaning in the Regulation. In fact, in practice the Inquiry Commissions compare the subject-matter of the actions by means of the information obtained from the National Judiciary Informatics System. Thus, if e.g. both actions are divorce actions then the application for the registration of the foreign divorce decision is to be rejected based on the fact that the action is still pending before or has already been decided by the Turkish Courts.

The term 'related action' in the said provision should be understood and applied as the 'same action' in order to comply with the principles of Turkish Civil Procedure until it is accordingly amended. However, if this interpretation is to be adopted, then for actions to be considered as

34 For detailed information regarding the plea of international *lis pendens* in Turkish law see G. Bayraktaroğlu Özçelik, *Milletlerarası Usul Hukukunda Paralel Davalar* [Parallel Proceedings in International Civil Procedure], Ankara: Yetkin 2016, pp. 273 et seq. ('Parallel Proceedings'); G. Bayraktaroğlu Özçelik, 'International Lis Pendens as a Contemporary Problem of Turkish International Civil Procedure', *Yearbook of Private International Law* (17) 2015/2016, pp. 217-231.

35 For a detailed analysis of related actions in international civil procedure see Bayraktaroğlu Özçelik 2016, Parallel Proceedings, pp. 336 et seq. (above note 34).

the same, the requirements for a same action (the same parties, the same subject-matter and the same cause of action) should also be satisfied in practice.

2.2 Procedural requirements

Article 27/A of the Act requires the application to be made by the parties or by their representatives concurrently, i.e. together. A 'concurrent application' does not require the parties to be present before the competent authority at the same time (Article 6 Regulation). However, if the parties make separate applications then the period between the two applications shall not exceed 90 days. In other words, the new legislation does not allow only one of the spouses to request the registration of the foreign divorce decision by the Turkish authorities. If only one of the spouses wishes to have the foreign decision recognised in Turkey, then this can only be possible by taking action before the Turkish courts under TAPIL 2007.

If one of the spouses dies before the application for registration is made, then the application shall be made by one of the heirs representing the legal interest of the deceased and the other spouse together and when both of the spouses die, then the application shall be made by one heir representing the legal interest of each spouse together³⁶ (Article 6/II Regulation). The provision should be welcomed in this regard since it gives the opportunity to the heirs who might have a legal interest in the registration of the divorce in the civil registry in the case that one of the spouses has died following the decision of the foreign authority on divorce. As explicitly provided for under Article 6/II of the Regulation unilateral divorces are exempted which also complies with the practice under TAPIL 2007 rejecting the recognition of *talaq* on public policy grounds when it is merely based on the will of one of the spouses without the request of the other spouse for the recognition of that decision.³⁷

Applications concerning registration shall be made to the foreign representations of the Turkish Republic in the country in which the decision has been handed down or to the provincial directorate of civil registration and nationality of the place of residence of one of the spouses in Turkey. If there is no place of residence in Turkey, the application can then be made to one of the provincial directorates of civil registration and nationality in the cities of Adana, Ankara, Antalya, Bursa, Diyarbakır, Erzurum, Gaziantep, İstanbul, İzmir, Kayseri, Konya, Kahramanmaraş, Samsun, Siirt, Sivas, Trabzon, Şanlıurfa or Van (Article 5/I Regulation).

The applicants shall submit certain documents along with an application form including the original decision approved in accordance with the procedure, the Turkish translation of the decision as approved by a notary public or Turkish foreign representations or by an Apostle of the competent authority of that country (Article 7/I(b) Regulation); where there is no statement on the decision confirming its finality then an original document or a written statement from the authorities of the state which officially confirms that the court decree is final under the law of that country and its Turkish translation as approved by a notary public or Turkish foreign representations or by an Apostle of the competent authority of that country (Article 7/I(c) Regulation); copies of identity cards or passports, and if one of the spouses has foreign nationality then the Turkish translation of the identity cards or passports as approved by a notary public

36 Explanatory Note, p. 4.

37 See e.g. Court of Cassation [*Yargıtay*] (Second Chamber) 26 October 2001, Registration No. 2001/13000, Decision No. 2001/14704, www.kazanci.com (accessed 5 November 2018).

(Article 7/I(ç) Regulation); if the application is made by a representative then the original or the approved copy of the notary drafted by the power of attorney (Article 7/I(d) Regulation) as well as the documents which show that there is a pending action before the Turkish courts or a final decision by the courts in a dispute relating to the decision of the foreign authorities which is subject to registration or documents to be obtained from the Turkish judicial organs showing that there is no pending action before the Turkish courts as such or that the recognition of that decision has not been previously rejected by the Turkish courts (Article 7/II Regulation).

3. Examination of the application

Applications are examined and decided by the Inquiry Examination Commissions which are to be established abroad in the foreign representations of the Turkish Republic and in Turkey in the provincial directorates of civil registration and nationality as decided by the Turkish Ministry of Interior (Article 9/IV, Article 8/I Regulation). They shall be composed of one vice-governor, one provincial directorate of civil registration and nationality, two district directorates of civil registration and nationality and a government official having a legal format (Article 8/I, II).

The power given to the commissions constitutes an exception to the general principle in Turkish International Civil Procedure which requires a decision of a Turkish court to give effect to foreign judgments in Turkey. Thus by the new provisions it has become possible to give effect to foreign divorce decisions in Turkey by means of decisions by Turkish administrative authorities.³⁸ As such the new legislation may help to improve the lengthy judicial proceedings before the Turkish courts for the recognition of foreign judgments and to give effect to foreign divorce decisions through a simple procedure rather than resorting to the judicial bodies.³⁹

3.1 Acceptance of the application and the effect of registration

Once the application has been allowed, registration shall be made in the family register by the Turkish representations in the country where the authority giving the decision is situated or by the provincial directorate of civil registration and nationality in Turkey as determined by the Ministry of Interior within 7 days (Article 27A/II Act; Article 10/I Regulation).

It is provided under Article 10/II of the Regulation that '[i]f the application as to the registration of the decisions given by the foreign judicial and administrative authorities are admitted by the Commission, the date of finality shall be accepted as the date of the decision on divorce and the validity, annulment or existence of marriage'. The meaning of this provision is far from clear. It is not possible to accept the date of the decision on divorce as the date of the finality of that decision since it should be the *lex fori* of the country of the judicial or administrative authority that is to decide on the date of the finality of the decision.⁴⁰ On the other hand, if the intention of the legislator was to provide a clear rule on the date of the acceptance of the *res judicata* effect of that decision in Turkey, then the provision should have been drafted similar to

³⁸ Çelikel/Erdem 2017, p. 763 (above note 6).

³⁹ See the rationale for Art. 27/A of the Act.

⁴⁰ See also Art. 7/I(c) Regulation requiring the submission of a document from the authorities of that state which officially confirms that the judgment is final under the law of that country.

Article 59 TAPIL 2007.⁴¹ In that case the provision could be redrafted as ‘[i]f the application as to the registration of the decision given by the foreign judicial and administrative authorities is admitted by the Commission, the decision shall have legal effect in Turkey from the date of the finality of that decision on divorce or the validity, annulment or existence of marriage’, also taking into account the fact that unlike Article 59 TAPIL 2007, decisions subject to registration under this provision may also be administrative in nature. In such a case the foreign decision on divorce shall not have legal effect in Turkey from the date of registration by the Turkish authorities but rather retrospectively from the date on which it becomes final under the law of the authority delivering that decision.

3.2 *Rejection of the application*

If the application does not fulfil the requirements provided under Article 27/A of the Act it shall be rejected (Article 27A/III). According to Article 27/A, paragraph III ‘where the application as to registration is rejected on the ground that the decision does not satisfy the requirements provided under this provision, its recognition shall be subject to the Act on Private International Law and International Civil Procedure dated 27.11.2007 and numbered 5718’.

One could assume that the foreign divorce decision may still have a possibility to be recognised in Turkey under TAPIL 2007 depending on the ground for rejection under the Act. Considering the grounds for rejection under the Act it is likely that the foreign judgment may be recognised in Turkey if the same action is already pending before the Turkish courts, since pendency is not provided as a ground for rejecting recognition or enforcement under TAPIL 2007. The same conclusion can be reached if registration has been rejected because the application has been made by one spouse only, since there is no such requirement of a concurrent application when taking an action for recognition under TAPIL 2007. The plaintiff may have the foreign decision recognised under TAPIL 2007 by also providing for the necessary documents requested if his/her prior application under the Act has been rejected based on incomplete documentation. In contrast, if the application has been rejected because of the existence of a prior judgment by the Turkish courts on the same action, then it is to be presumed that a subsequent claim for the recognition of the foreign decision shall also be rejected by the Turkish courts. As mentioned earlier, although *res judicata* is not provided for under TAPIL 2007 as a separate ground, it is considered to fall within the public policy exception in practice. On the other hand, regarding the consideration of the public policy requirement under the Act and under TAPIL 2007, the assessment of the administrative authorities and the courts might potentially be different, also because of the characteristics of the public policy exception. However, it should be mentioned that the administrative authorities applying this exception should take the case law of the Turkish courts into consideration.

However, Article 27/III of the Act is subject to criticism for a number of reasons:

The first question is whether the provision paves the way for recognising *administrative decisions* under TAPIL 2007; thus, as explained above, it is only possible to recognise or enforce *foreign judgments* under the latter. In the present author’s view, this question has to be answered

41 According to Art. 59 TAPIL-2007 ‘a foreign judgment serves as *res judicata* or as definitive evidence from the time that it becomes final’.

in the negative.⁴² Although it is possible to recognise the decisions of foreign administrative authorities on adoption under TAPIL 2007, this exception arises from the clear provision of the Act under Article 30. On the contrary, there is no such clarity under Article 27/A of the Act providing for the registration of decisions on divorce.

In this regard, Article 11 of the Regulation providing that '[i]f the application as to the registration of the decision given by foreign judicial and administrative authorities is rejected by the Commission, an action can be taken before the competent family courts for the recognition or enforcement of that decision under the Act numbered 2718' is equally subject to criticism. Thus, according to Article 142 of the Turkish Constitution '[t]he organisation, functions and jurisdiction of the courts, their functioning and trial procedures shall be regulated by law', 'law' as used in the provision thereby referring to acts to be adopted by the Turkish Parliament. According to the Act on the Establishment, Functions and Trial Procedures of the Family Courts, numbered 4787,⁴³ the family courts have jurisdiction to hear actions regarding the recognition and enforcement of foreign judgments under TAPIL 2007 when they relate to family disputes. Nevertheless, since it is not possible to recognise or enforce the decisions of foreign administrative authorities under TAPIL 2007, the family courts cannot be deemed to have jurisdiction to hear actions relating to the recognition or enforcement of foreign administrative decisions. In this regard, if the aim of the legislator was to give effect to foreign administrative decisions on divorce under TAPIL 2007, this should have been clearly provided for by an Act of the Turkish Parliament, instead of a regulation.

The second question arising from Article 27/A, paragraph III of the Act is whether the possibility of commencing an action before the Turkish courts under TAPIL 2007 as provided by this provision can be construed as a judicial remedy against decisions rejecting an application for registration. According to the opinion of the present author this question should be answered in the negative.⁴⁴ Decisions by the Turkish administrative authorities rejecting an application for registration are without doubt administrative in nature and therefore they should be subject to review by the administrative courts in accordance with Article 125/I of the Turkish Constitution requiring that 'recourse to judicial review shall be available against all actions and acts of administration'. Therefore it should be accepted that the aim of Article 27/A, paragraph III of the Act and Article 11 of the Regulation is merely limited to 'reminding' the parties of the possibility of resorting to the courts under TAPIL 2007 if their application for registration is rejected. There should still be the possibility of taking action before the administrative courts against the decision which has rejected the application. However, it has to be admitted that the vague terminology used in the said provisions as well as the careless drafting might result in varying interpretations in practice.

Lastly it should also be answered whether the parties are free to resort to the courts for the recognition or enforcement of the divorce decision under TAPIL 2007 without first applying

42 Also see Huysal 2017, p. 500 (above note 6); Tütüncübaşı 2017, p. 121 (above note 10); R. Erten, *Türklerin Kişi Hâllerine İlişkin Davalarda Türk Mahkemelerinin Milletlerarası Yetkisi (MÖHUK m. 41)* [International Jurisdiction of Turkish Courts in Actions Regarding the Personal Status of Turkish Nationals], Ankara: Yetkin 2017, p. 194.

43 OG 18 January 2003, No. 24997.

44 For a different view see E. Şensöz Malkoç, *Aile Hukukunda İlişkin Yabancı Kararların Tanınması* [Recognition of Foreign Family Decisions], İstanbul: On İki Levha 2017, p. 241.

for the registration of that decision under the Act. One opinion argues that there will be no legal interest in commencing an action before applying for registration since the plaintiff can only have a legal interest in commencing an action if he/she has not acquired his/her right by resorting to non-judicial mechanisms.⁴⁵ According to this view, Article 27/A, paragraph III of the Act should be accepted as a special preliminary objection, thus if the parties commence an action before the courts for recognition prior to requesting registration, the action should be rejected on procedural grounds.⁴⁶ According to the present author Article 27/A, paragraph III is not aimed at such a result. In fact although Article 27/A of the Act requires a concurrent application by the parties, under TAPIL 2007 there is no such requirement concerning the recognition and enforcement of foreign judgments. Therefore by merely relying on Article 27/A, paragraph III it is not always possible to say that there is no legal interest in commencing an action under TAPIL 2007.

4. Conclusion

Up to 2018 the number of actions before the Turkish courts as regards the recognition of foreign divorce judgments had reached 10,000 to 15,000 annually.⁴⁷ Considering the workload of the Turkish courts the new regime on giving effect to foreign decisions might improve the efficiency of the Turkish judiciary by lessening both the number of actions and the financial burden arising therefrom.⁴⁸

The new legislation introduces certain important exceptions to the system of the recognition and enforcement of foreign judgments in Turkey. First and foremost, it makes it possible to give effect to decisions of foreign administrative authorities which was previously only possible regarding decisions on adoption by the Turkish legislator. Secondly, it is now possible to give effect to a foreign decision by means of a decision by a Turkish administrative body and therefore it is no longer necessary for there to be a decision by a Turkish court. In this regard it is possible to register decisions by foreign administrative or judicial bodies following an examination to be made by the Turkish administrative authorities. In this respect the new legislation introduces a far easier system when compared with the traditional system for recognition and enforcement under TAPIL 2007 which requires an action to be commenced before the Turkish courts. Nevertheless, both Article 27/A of the Act and the Regulation are far from perfect. There are deficiencies in the drafting of the wording which from time to time is lacking in technical legal terminology as well as certain disputable issues – such as the public policy exception – being included. In practice such issues as well as those mentioned throughout this work may be problematic in the months ahead.

45 Huysal 2017, p. 501 (above note 6).

46 Huysal 2017, p. 501 (above note 6).

47 See <https://www.ytb.gov.tr/haberler/2017-yili-yurtdisindaki-vatandaslarimiza-hizmet-yili-oldu> (accessed 31 October 2018).

48 See <https://www.ytb.gov.tr/haberler/2017-yili-yurtdisindaki-vatandaslarimiza-hizmet-yili-oldu> (accessed 31 October 2018).