

In Quest of Collection: Assignment of Arbitral Awards under Turkish Law

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Congratulations! You prevailed in arbitration. All of your blood, sweat, and tears paid off. But keep in mind as you savor victory that, unfortunately, the time for real celebration hasn't yet arrived. Why? Because the losing party likely has no intention of voluntarily honoring the award and, therefore, the adventure isn't over. A second and uphill battle waits for you: *Enforcement*.

Enforcement proceedings are likely to be lengthy, possibly contentious, and certainly costly. On the other hand, you may be in quest for a quick cashflow for your business or you may not have sufficient funds, human resources or even energy to allocate for enforcement proceedings. In such a case, the question which usually pops up is: *Would it be possible to assign the benefits of the arbitral award to a third party in return for a payment?* Answers to this question usually come with several reservations varying depending on jurisdiction in which assignment and enforcement are sought^[1]. What follows is a discussion of the matter under Turkish Law.

1. Validity and Effects of Assignment

Turkish law does not specifically regulate assignment of arbitral awards. We therefore turn for guidance to general principles of Turkish law governing the assignment of receivables codified in the Turkish Code of Obligations (the "**TCO**").

Article 183 of the TCO allows a creditor, pursuant to a written assignment agreement satisfying the requirements of TCO Article 184, to assign receivables to a third party without debtor's consent.

Article 189 of the TCO provides that upon assignment all rights pertaining to assigned receivable, including the right to sue, are transferred to assignee together with any secondary rights. Accordingly, under a valid assignment agreement, assignee as a matter of law stands in the shoes of assignor.

The assignment may be performed before the receivable is made subject to a lawsuit or after a lawsuit has been initiated. Accordingly, the assignee will have right (*i.e.* standing to sue) to initiate a lawsuit against the debtor.

Further, pursuant to Article 125 of the Code of Civil Procedure (the "**CCP**"), where a claim is assigned prior to judgement the assignee replaces the claimant and the lawsuit will proceed without interruption.

2. Assignee's Standing to Sue for Enforcement of Arbitral Award

As to recognition and enforcement of arbitral awards, in principle, the claimant can only be one of the parties to the arbitration award^[2]. Otherwise, the recognition and enforcement lawsuit initiated by the third parties shall be dismissed on procedural grounds due to lack of standing to sue which is a mandatory procedural condition under Article 114 of the CCP.

An exception to this principle is deemed to be the event of succession. It is accepted by the Turkish authorities that successors of the parties to the arbitration award should have right to initiate or continue recognition and enforcement proceedings against the counterparty. Accordingly, any party which have succeeded to rights under the

arbitration award as a result of an assignment should have right to file a lawsuit for recognition and enforcement of the award in Turkey.

While it is reasonable to argue that a valid arbitral award assignment agreement confers upon the assignee standing to sue, absent specific statutory grounds to that effect, counterparties may have colorable arguments to disrupt the recognition and enforcement proceedings before the Turkish courts. Notably, it would not be surprising that the counterparty challenges standing to sue of the assignee in the proceedings and enforceability of the award by invoking that the assignee was not a party to the arbitration agreement.

Nevertheless, recent Turkish court decisions^[3] recognize a valid assignee's standing to enforce an assigned arbitral award.

3. Potential Drawbacks of Assignment of Arbitral Awards

Neither statute nor judicial precedent specifically prohibit the assignment of arbitral awards. But such a possibility does not necessarily guarantee a successful enforcement. Further, any failure in the enforcement may backfire on not only the assignee but also the assignor.

The most challenging issue for an assignee is the fact that it did not participate in the arbitral proceedings; in particular, the arbitral hearings. Naturally, an award assignee having not been a party to the underlying arbitration will rely on the support of the assignor to overcome a challenge implicating the underlying proceedings. In principle, following the assignment, the assignor shall deliver to the assignee all documents, including bills of debt, necessary for the documentation and assertion of the claim as per Article 190 of the TCO. Accordingly, an assignor should deliver to the assignee the complete arbitration file as well as any necessary documents for a successful enforcement. However, depending on the grounds of the challenge, documents alone may be insufficient. Especially, in the event that the respondents' arguments go to the core of factual details of arbitral proceedings, any explanation made by the assignee may fall factually short. Therefore, that assignment agreements usually require assignor's full support and cooperation in all proceedings.

Where assignor's external support is insufficient to enable assignee to overcome the respondent's arguments, the assignor can intervene^[4] upon assignee's request or or by filing an intervention motion on the grounds that a ruling unfavorable to assignee will negatively impact assignor by ripening claims of assignee against it. Accordingly, it is advisable to include in assignment agreements a release sufficient to prevent recourse to the assignor where same provided all reasonable support and cooperation - provided that such a release does not contravene applicable law.

Third-party claims, particularly from assignor's creditors, challenging the assignment on grounds of collusion between assignor and assignee are not unknown in Turkish courts. Accordingly, assignment agreements should always be the product of arm's length negotiations, and proof of an actual assignment should be readily presentable in court

Conclusion

Winning your case does not necessarily result in a quick collection of the awarded amounts. As the arbitration award creditor, you are faced with a choice: initiate enforcement proceedings which are likely to be challenging, or assign the award to a third party, in exchange for immediate payment of an agreed amount less than the original award and likely in line with what you would have been realized on your own after litigation costs, who will seek enforcement on its own time at its own expense.

Such a transaction is not prohibited under Turkish law, but concerns and limits usually derive from the issues encountered in practice. Therefore, a careful drafting of the assignment agreement in accordance with potential challenges which may occur in the future is of utmost importance; and a particular attention should be paid to, inter alia, ongoing cooperation between assignor and assignee, limits to and conditions of recourse right, and arm's length principle.

[1] In common law jurisdictions, maintenance or champerty arguments are often discussed in relation with assignment of benefits of arbitral awards (See, decision of the High Court of the Hong Kong Special Administrative Region Court of First Instance in FG Hemisphere Associates LLC vs Democratic Republic of Congo, Miscellaneous Proceedings No. 928 of 2008); as well as standing to sue of the assignee. (See, decision of Ruling of Prymorskyi District Court of Odessa City dated 20 March 2013 in Euler Hermes v PJSC Odessa Fat and Oil Plant)

[2] Turkish Court of Cassation ("CoC"), 11th Civil Chamber, 18.05.1999, No. 2159/4122; CoC, General Assembly of the Civil Chambers, 23.02.2000, No. 11/121-139

[3] 13th Civil Chamber of the Istanbul Regional Court of Appeals, File No: 2020/33, Decision No: 2020/908, 21.09.2020; 43rd Civil Chamber of the Istanbul Regional Court of Appeals, File No: 2020/291, Decision No: 2021/528, 22.04.2021; Istanbul 8th Commercial Court of First Instance, File No. 2018/44, Decision No. 2018/944, 11.10.2018; Istanbul 17th Commercial Court of First Instance, File No. 2019/23, Decision No. 2019/406, 09.10.2019

[4] Under Article 61, *et seq.* of the CCP, a party, considering a subsequent recourse action to be filed by or against a third party in case of an unfavorable result in the case, may request the court to notify the proceedings to that third party.

Even if there is no notification, a third party may request leave from the court to intervene in the ongoing proceedings as an intervening party if the decision to be rendered may affect its rights and/or lead to a recourse action. An intervening party can choose the party whom he/she will side. The intervening party is bound by all actions performed, claims, defenses and evidence submitted by that party.

At the end of the proceedings, the court shall render its decision for the main parties of the case. Accordingly, the effect of the intervention shall occur between the intervening party and the related party in the case of a recourse action wherein the intervening party cannot challenge the decision rendered in the main case.

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