

PROTECTING YOUR INTEREST THROUGH INTERIM RELIEF FROM TURKISH COURTS

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The relief sought in the principal action is frequently insufficient to effectively protect the rights or interests of the alleged innocent party. The time gap between the commencement of the proceedings and the enforcement of the award can prejudice one party, sometimes seriously and/or irreparably. This sort of damage can be exacerbated where one party seeks deliberately to take advantage of or create delays in the dispute resolution procedures - such as dissipation of assets.

To overcome these problems, the national legislatures, courts and arbitral tribunals have developed means for granting provisional measures. The effect of such measures is to distribute the risk for the duration of the main action between the parties, shifting it from the party applying for the interim measures to the other party.

Provisional measures take various forms, are understood and applied differently and may encompass different concepts in different legal systems. This article examines whether obtaining provisional measures from Turkish Courts, and according to Turkish law, can be a suitable or even an advantageous relief for the applicants.

Provisional Measures in Comparative Law

Arbitral tribunals and most national courts apply relatively straightforward standards to requests for provisional relief. These standards are designed to provide practical, effective results and aim to protect parties from serious hardships arising from the pendency and length of arbitral proceedings.

According to most national laws, the party requesting the interim measure must satisfy four conditions. First, the applicant must demonstrate on a *prima facie* basis that it has a good case in fact and law (*fumus boni juris*). Second, the arbitral tribunal/court must be satisfied on a *prima facie* basis that the applicant has a valid reason for granting the requested measure. This requires the courts/arbitral tribunals to examine whether the requesting party is likely to suffer irreparable harm, or at least harm not adequately reparable by an award of damages if the measure is not granted. Third, the applicant must show that its harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if it is granted (*periculum in mora*).

All elements of this test must be demonstrated with a reasonable degree of certainty, which implies a lower degree of certainty than required for establishing the facts of a case when an arbitral tribunal or court tries evidence.

In light of these three requirements, in practice, arbitral tribunals and courts usually reject the applications for orders requiring security for underlying monetary claims - unless diversion or dissipation of assets is proven. The arbitral tribunals and courts generally conclude that mere deterioration of the counterparty's financial situation cannot be a valid ground for granting security for claim applications *per se*. In their view, potential deterioration of the counterparty's financial situation is the risk that (should have been) envisaged when entering into a relevant contractual relationship. For security for claim applications to be successful, the applicant must be able to demonstrate that a party has begun to, or appears likely to, engage in conduct that goes beyond the ordinary course of business by attempting to dissipate assets, encumber the property, or grant preferential security to insiders, then provisional measures will ordinarily be appropriate. It goes without saying that this is a high burden to satisfy.

Provisional Orders Requiring Security for Underlying Monetary Claims under Turkish Law

In principle, requirements for provisional measures are almost identical to the requirements explained above. But what makes Turkish law different is that it regulates provisional orders requiring security for underlying monetary claims separately.

Article 257 of the Execution and Bankruptcy Law (“EBL”) distinguishes between matured and unmatured monetary claims.

With regards to the matured receivables, Article 257 EBL requires the applicant to demonstrate on a *prima facie* basis that (i) it has a good case both in fact and law (*fumus boni juris*) and its receivable is matured; and (ii) its receivable is not secured by any mortgage.

On the other hand, with regards to the unmatured receivables, in addition to the above two requirements, Article 257 EBL requires the applicant to show on a *prima facie* basis that (i) the counterparty has no particular residential/business place or (ii) the counterparty has begun to, or appears likely to, dissipate assets to evade liability.

The rationale for this distinction between matured and unmatured receivables is that Turkish law considers a debtor who is not paying its debt already matured debt in bad faith. Therefore, unlike the case of unmatured debts, it does not require the applicant to prove that the debtor has begun to or is likely to engage in dissipation of assets.

Evaluation

The authors believe that when compared, the requirements for provisional orders requiring security for underlying monetary claims appear to be more lightly regulated under Turkish law for the matured receivables. This is particularly because, under Turkish law, the applicant need not *prima facie* prove the risk of serious or

irreparable harm and a balance of hardships weighing in its favor. Rather it suffices for the applicant to demonstrate on the *prima facie* basis that its alleged receivable is already due. And this is not a high burden if the applicant has already shown that it has a good case both in fact and law (*fumus boni juris*) on a *prima facie* basis.

The preceding does not mean that the Turkish courts always grant applications for provisional orders requiring security for underlying monetary claims. Establishing *prima facie* merits of the case is generally a high hurdle under Turkish law. Nevertheless, the authors believe that the Turkish courts may sometimes be advantageous compared to other courts and arbitral tribunals, depending on the circumstances of each case. For example, the Turkish courts usually grant applications for provisional orders requiring security for underlying monetary claims of the award creditors if the arbitral process has already been completed.

It is important to note that the Turkish courts hear the provisional measure applications not only after but also before and during the arbitration - irrespective of the seat of arbitration¹. Therefore, it is advisable for the parties to consider applying for provisional orders requiring security for underlying monetary claims to Turkish courts where their counterparty has any asset, right or receivable in Turkey. Any potential favorable award may not only secure the client's receivables but may also contribute to the early settlement of the case. This is particularly the case where the enforcement of arbitral awards takes years (as in the case of Turkey).

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¹ 46586 numbered International Arbitration Law, Article 6(1)