

# Role of Local Courts in International Arbitration: Preliminary Injunctions

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**R**ecent arbitration figures of the International Chamber of Commerce (“ICC”) International Court of Arbitration indicate that, slowly but surely, Turkey is to become an arbitration country. The number of Turkish parties in the ICC arbitration during 1998-2009 had a concrete increase. **Whilst the total number of Turkish parties in the ICC ar-**

law country with its convenient location and considerably cheap accommodation opportunities, Turkey is no different to big brothers such as Geneva, Zurich, Vienna, London, etc. in terms of being an arbitration friendly country.

The welcoming approach of Turkish courts towards arbitration is also an undeniable factor in the growing tendency. The assistance of national courts has always been a popular topic of debate in international arbitration but in the big pool of various themes, this article intends to give brief information on obtaining preliminary injunctions from Turkish courts during or before arbitration. Talking of arbitration in Turkey, noting the difference between domestic arbitration conducted according to the Turkish Code of Civil Procedure and international arbitration subject to the provisions of the Turkish International Arbitration Law is important. Within this framework, this article is concerned with granting of preliminary injunction by local courts in *international arbitration*.

## Why obtain an injunction?

From the perspective of international arbitration, preliminary injunctions are granted for a variety of reasons such as to *prevent irreparable harm, preservation of evidence, to facilitate the enforcement of the award and production of evidence*. However the Turkish approach to the need of the preliminary injunction is limited in comparison to the general international attitude.

In general terms, Turkish courts can be requested to grant preliminary injunctions to prevent

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bitration was 8 in 1998, the number increased to 36 in 2008 and to 62 in 2009. Triggered by the adoption of the Turkish International Arbitration Law, based on the UNCITRAL Arbitration Rules, known as the Model Law, the arbitral breeze is likely to pick up pace in the future. Being a civil

irreparable harm or significant loss that may arise until an award is given by the arbitral tribunal.

Obtaining a preliminary injunction is of paramount importance especially when the other party may impose sanctions in case the requested disputed amount is rejected to be paid. Evidently the party requesting an injunction should convince the court of the existence of the irreparable harm or significant loss which is in fact quite perceptual rather than being objective.

#### How to do it?

In principle, the International Arbitration Law is applied if there is a foreign element and the place of arbitration is Turkey. However, preliminary injunctions may be requested from Turkish courts where necessary, even when the place of arbitration is not Turkey.

Both the national court and an arbitral tribunal may grant a preliminary injunction before or during the arbitration. For domestic arbitration, it seems that the parties will no longer have this option, since the new Code of Civil Procedure which shall be enforceable as of 1 October 2011 provides that the parties may apply to the courts to obtaining a preliminary injunction if the arbitral tribunal will fail to take the relevant action in due time or effectively. Other circumstances when parties can request a preliminary injunction from the courts are if permission is granted by arbitral tribunal and relevant agreement of the parties in writing.

The courts' intervention to the arbitration is possible when and only if permitted by law but in Turkish practice, this intervention should not be contrary to the arbitration agreement between the parties.

According to Article 10/A of the International Arbitration Law, if a party obtains a preliminary injunction before a local court prior to the arbitration, the arbitration should be initiated within 30 days. Otherwise, the preliminary injunction will automatically become ineffective. This period is different from and longer than the 10 days period provided in the Turkish Code of Civil Procedure. It suits the complex structure of the international arbitrations.

In case a party seeks a preliminary injunction in Turkey, he should do it before the competent courts at the venue of domicile or habitual residence or workplace of the respondent and if the respondent does not have a domicile, habitual residence of workplace in Turkey, Istanbul Civil Court of First Instance.

If a preliminary injunction is granted for a limited period of time or until the fulfilment of certain conditions, it automatically becomes ineffective when the determined time expires or the conditions are fulfilled. If the preliminary injunction was granted before initiating arbitration, the arbitration should be initiated within 30 days. Otherwise the preliminary injunction becomes ineffective.

#### What should be in it?

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Having said the above, in practice it may take longer than expected for an arbitral award to become enforceable. Especially for arbitrations governed by the International Arbitration Law, the parties may apply to Turkish courts for the annulment of the arbitral award.

Therefore, when requesting a preliminary injunction pursuant to International Arbitration Law, it should be made clear that the injunction is requested under this relevant law. The request should also explicitly list the items for which a preliminary injunction is requested and should also be mentioned in the relief sought because the courts base their decisions on the relief sought.

#### What about the practice?

In international practice, all of the important international arbitration rules allow the parties to seek judicial recourse for purposes similar to those available in Turkish law. The ICC Arbitration Rules have long recognized the right of the parties to apply to the courts for preliminary injunctions. It is no different with the LCIA Rules which accepts that *the power of the Arbitral Tribunal shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal, and in exceptional cases, thereafter.* The 1961 European Convention on International Commercial Arbitration also favors having the parties apply to the courts for provisional measures.