REVIEW AND ANALYSIS OF INTERIM MEASURES AVAILABLE TO FOREIGN ARBITRATIONS IN TURKEY

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I. Introduction

Arbitration is often portrayed as an alternative to litigation; hence, the expression alternative dispute resolution. However, to make such conclusion would be to overlook the interaction between arbitration and litigation. Without judicial assistance, arbitral proceedings can come to a halt. Particularly in certain cases judicial assistance "gives teeth" to arbitration. There may be instances where counsel in arbitration would need to seek court assistance - by way of an interim measure - to ensure that the client's interests are fully protected. Consequently, counsel would be well placed to have an awareness of the legal rules applicable to the granting of interim measures before or during the arbitral proceedings. Given that in most cases arbitration embodies international character, an awareness of certain key jurisdictions' legal rules regarding the obtainment of interim measures before or during the arbitral proceedings is crucial. This is exactly what this paper seeks to achieve, by providing a review of interim measures available under Turkish arbitration law with respect to foreign arbitral proceedings, *viz*., arbitrations seated abroad. An analysis of such rules will also be made to assess whether better protection of rights through interim measures is possible.

To accomplish this aim, the paper has been divided into five parts: (i) general remarks; (ii) types of relief available and applicable test; (iii) procedure; (iv) appeals and objections; (v) enforcing arbitral tribunal's interim relief; and (vi) ancillary issues. A conclusive remark will then be made, summarizing the paper and suggesting the way forward. It is hoped that, having read this paper, the reader will have a solid understanding of the general principles applicable to obtaining interim relief in aid of arbitral proceedings and the effectiveness of such principles.

II. General remarks

Legislative framework. Turkey has a dual-legislative system for arbitration: The provisions of Chapter 11 of the Code of Civil Procedure ("**CCP**")[1] regulate domestic arbitrations[2] without foreign element, whereas the

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[1] Code of Civil Procedure, Law No. 6100 (Part 11) of 12 January 2011.

[2] Arbitrations seated in Turkey are considered domestic arbitrations. There were conflicting views between scholars as to whether arbitrations seated in Turkey were automatically

provisions of the IAL regulate domestic arbitrations with foreign element.[3] The IAL also applies where the parties so agree, or where the arbitral tribunal determines that the arbitral proceedings should be conducted in accordance with the provisions of the IAL.[4]

Foreign element. According to the IAL, foreign element exists where: (i) the domicile, permanent residence or place of business of the parties are in different states; (ii) the domicile, permanent residence or place of business of the parties are in a state other than the place (seat) of arbitration stated in the arbitration agreement or the place of arbitration determined in accordance with the arbitration agreement, or in a state other than where substantial portion of the underlying agreement is to be performed, or where the subject-matter of the dispute is closely connected; (iii) at least one of the companies' shareholders, who is a party to the principal agreement underlying the arbitration agreement, has brought foreign capital to Turkey under the foreign capital encouragement regulations, or where it is necessary to enter into a loan or security agreement to provide foreign capital from abroad for the implementation of the agreement; or (iv) the principal agreement or legal relationship underlying the arbitration agreement causes the movement of capital or goods from one country to another.[5]

Interim measures in general. It should be noted that provisions of the IAL relating to jurisdictional objections ('arbitration objections') before Turkish courts (*mahkemede tahkim itirazı ve anlaşması*) (Article 5) and interim

considered domestic arbitrations. Some scholars expressed doubts as to the applicability of the principle of territoriality, relying on various appellate decisions. However, with the enactment of the International Arbitration Law, Law No. 4686 of 21 June 2001 ("**IAL**"), it is now accepted that the principle of territoriality is the determining factor when seeking to decide whether an arbitration is domestic or foreign. Consequently, where an arbitration is seated in Turkey, it is a domestic arbitration, not a foreign one, as confirmed by recent Court of Appeal decisions. In one of its decisions, the Court of Appeal - though relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("**New York Convention**") - ruled that where an arbitral award is rendered in a foreign state, the award should be deemed a foreign arbitral award: "Even though there are different opinions in doctrine regarding the determination of whether or not an arbitral award is domestic, termed as 'law under which it is rendered' and 'territoriality,' since Article I of the New York Convention expresses that 'this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal,' the said Convention clearly accepts the 'territoriality' principle. *It should be accepted that arbitral awards that are rendered outside Turkey are 'foreign arbitral awards*'." (emphasis added) (Court of Appeal General Legal Assembly, Date: 8 February 2012, File No.: 2011/13-568, Decision No.: 2012/47 (<www.kazanci.com>, October 2015)) [Note: translated by the author (this note applies to all other translations contained herein, unless otherwise stated)]. The same principle applies with respect to arbitrations subject to the CCP. For a more detailed analysis see: M. Aygül & D. Gültutan, 'Arbitration Procedure', in *Arbitration in Turkey*, edited by A. Yeşilırmak & İ.G. Esin (Alphen aan den Rijn: Kluwer Law International, 2015), 92-93.

[3] Article 1(2), IAL.

[4] Article 1(2), IAL.

[5] Article 2, IAL. It is widely accepted by scholars that the term foreign element should be very broadly interpreted and that it encapsulates many scenarios and possibilities. See C. Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (Drafting International Commercial Agreements and Dispute Resolution Mechanisms), (Istanbul: Beta Publishing, 2005), 239.

injunctions and interim attachments (*ihtiyati tedbir ve ihtiyati haciz*) (Article 6) apply regardless of the place of the arbitration.[6] Consequently, a request for court assistance with respect to domestic (containing foreign element) and foreign arbitral proceedings would need to be made pursuant to Article 6 of the IAL. Where the IAL is silent on a given issue, particularly regarding the applicable procedure, provisions of the CCP (for interim injunctions) and the Execution and Bankruptcy Law ("**EBL**")[7] (for interim attachments) become applicable. For domestic arbitrations without foreign element, the provisions of the CCP and the EBL apply.

Note that very minor differences exist with respect to interim measures for domestic (regardless of presence of foreign element) and foreign arbitrations.[8] Therefore, they are all, metaphorically speaking, in the same boat.

Interim measures prior to the commencement of proceedings. The IAL permits applications to Turkish courts for interim injunctions or interim

[6] Article 1(3), IAL.

[7] Execution and Bankruptcy Law, Law No. 2004 of 9 June 1932.

[8] Regarding such differences, for instance, the CCP is more restrictive in terms of permitting parties to seek interim relief from state courts where an arbitral tribunal has already been constituted. Whereas the IAL permits parties to apply to state courts for interim relief following the constitution of the arbitral tribunal (Article 6(1)), the CCP permits such application only where it can be shown that the arbitral tribunal or a third party instructed by the parties cannot act in a timely and effective manner (Article 414(3)). Absent such circumstances, a request for interim relief may be made to state courts only with the arbitral tribunal's consent or through parties' written agreement.

attachments [9] before commencement of the arbitral proceedings. [10] Accordingly, one need not wait for commencement of arbitral proceedings or commence arbitral proceedings to request interim relief. This provision therefore allows for urgent measures to be taken, i.e., an order for the preservation of evidence so that the arbitral award rendered achieves a fair result and is one that can be enforced in the practical sense. The same is true of arbitrations governed by the CCP. [11] However, where interim relief is granted before the commencement of the arbitral proceedings, the arbitral proceedings must be commenced within 30 days or the interim measure will cease to have effect.[12]

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[9] The differences between interim injunctions and interim attachments were explained by the Court of Appeal General Legal Assembly as follows: "*Interim injunctions and interim attachments, concerning interim measures of legal protection, are two different concepts. Interim measures of legal protection is a more general and higher concept, whereas interim injunctions and interim attachments are sub-divisions of interim measures of legal protection… In order to request interim attachment orders, there must be a monetary debt; in other words, the party requesting interim attachment must be the creditor of the debt that is the subject matter of the request… [A]s a rule, as a condition to being able to request interim attachment, the due date of the receivable must have arrived. Another condition for being able to request interim attachment for debts whose due date has arrived is that the receivable must not have been secured by way of a pledge.* A receivable secured by way of a pledge does not require an interim attachment since it has its security. … If the above-mentioned conditions exist, the creditor of a receivable whose due date has arrived is entitled to request interim attachment, without the requirement of any further condition. … *Interim injunctions, on the other hand, are regulated in Article 389 et seq [of the CCP]. It is possible for the subject matter of the claim to be made subject to changes in forms undesired during the period between the commencement date of lawsuit and the final judgment. By virtue of such changes, the execution of the judgment rendered at the conclusion of the claim may not be possible or may become extremely difficult. To prevent such danger from materializing, the interim injunction concept has been accepted…* Article 389 [of the CCP] stipulates the conditions required for interim injunctions. It provides that the conditions for the granting of interim injunctions would be deemed satisfied where it can be established that due to a change in the current state of affairs, there is a serious risk that obtaining an entitlement will become substantially more difficult or completely impossible, or that inconvenience or serious loss or damage will be sustained due to the delay. The court could grant the form of injunction which would address such inconvenience or loss, following the necessary examination… For interim injunctions, the essential factor is that there must be an entitlement that can be made subject to interim injunction and a reason requiring interim injunction must be present. These constitute fundamental conditions for interim injunctions… The granting or dismissal of interim injunction requests has been left to the judge's discretion, in accordance with certain general principles laid down; however, the interim injunction must be on a matter concerning the subject matter of dispute… *Interim attachments are available for lawsuits (or execution proceedings) concerning monetary receivables (and security), whereas interim injunctions, as a rule, are available for lawsuits concerning matters that are not monetary (i.e., rights and personal and real property). With respect to interim injunctions, precautionary measures are taken for disputed issues that concern the claim (i.e., personal or real property); with respect to interim attachments, on the other hand, prompt payment of the creditor's monetary receivable is secured before the entitlement to request final attachment arises for the creditor.*" (emphasis added) (Court of Appeal General Legal Assembly, Date: 20 December 2013, File No.: 2013/21-1791, Decision No.: 2013/1676 (<www.kazanci.com>, October 2015)).

[10] Article 6(1), IAL.

[11] Article 414(4), CCP. However, note that where an interim measure has been granted prior to the commencement of the arbitral proceedings, the period within which the arbitral proceedings must be commenced under the CCP is two weeks according to Article 426(2), CCP.

[12] Article 10(A)(2), IAL.

Although such liberal attitude towards the granting of interim measures prior to commencement of the arbitral proceedings should be commended, the time period within which arbitral proceedings must be commenced, *viz*., 30 days (or two weeks for CCP governed arbitrations) as of the date the interim measure is granted, can be extremely short in certain cases, i.e., in complex disputes requiring technical knowledge. Speaking from experience, particularly in such complex cases requiring technical knowledge, couple of months' preparation - if not more - is needed to properly determine the nature and causes of the dispute and the strategy to be followed in arbitration. Forcing a party to commence arbitration proceedings within a matter of weeks pressurizes such party to make certain sacrifices as to choice and such would inevitably weaken its case. It can also have adverse consequences on the proper conduct of arbitration proceedings, causing parties to seek time extensions to close the gap. By way of an example, it is common knowledge in international arbitration that you nominate/appoint an arbitrator that adopts a line of reasoning that will most probably be in your interests. For instance, certain arbitrators apply black-letter law whereas others may be more inclined to adopt a more equity-based interpretation of the law, contract and facts, commonly referred to as the "fairness test".[13] One would undoubtedly prefer to appoint an arbitrator once it has analyzed its case in depth and determined its points of strength and weakness. It is in such cases that the 30-day requirement would most probably work against the party who seeks interim relief from Turkish courts. Although requiring the party seeking interim relief to commence arbitration proceedings within a set period of time aims to protect a legitimate interest, *viz*., cost effective and speedy resolution of the dispute, such time period should not be set in stone and should be flexible, capable of being flexed where circumstances so require. In short, it is considered that it may perhaps be more appropriate for the relevant provision to read as follows, or on the same lines: "within 30 days, or within such time the court deems reasonable". Such provision will allow judges to undertake a balancing exercise, assessing the facts of the dispute and the likely consequences of the interim relief granted, considering its duration, and make an order that best protects parties' interests. The wording may provide for a maximum period within which an action must be commenced to ensure that the court does not abuse its discretion.

III. Types of relief available and applicable test

In general. As noted above, the types of relief available for arbitrations under the IAL and CCP are interim injunctions and interim attachments.[14]

[13] For more see, İ.G. Esin, Some Questions About M&A Disputes, in *Global Wisdom on Business Transactions, International Law and Dispute Resolution* (Munich: Verlag C.H. Beck, 2015), 631, pp. 637-639.

[14] Article 6, IAL; Articles 414 and 426(2), CCP. Note that the CCP expressly identifies evidence determination as a form of relief available to parties (Article 414(1)).

The test applicable is not contained in the IAL; the IAL only identifies the relief available. Consequently, considering that the reverse interpretation[15] of Article 17(1) of the IAL dictates that where a matter is not regulated by the IAL the provisions of the CCP should become applicable, particularly by national courts with respect to requests for interim measures[16], one must turn to the CCP and related legislation to ascertain the applicable test. Further, and in any event, since the CCP constitutes the *lex fori* with respect to applications made to Turkish courts, the CCP would be applicable.[17]

Interim injunctions. The test applied by Turkish courts when considering a request for interim injunction[18] is contained in the CCP. Article 389(1) provides as follows:

> *In order for the court to grant an interim injunction regarding the dispute matter, the court must be concerned that, due to a change in the current state of affairs, there is a serious risk that* ***obtaining***

[15] The 'reverse interpretation' concept (*mefhum-u muhalif; argumentum a contrario*) is a device used when interpreting legislations. It dictates that where a legislative provision is unclear and requires interpretation, its 'opposite meaning' should also be considered. For instance, where a provision stipulates that a person is entitled to take certain actions only if circumstances listed are present, the opposite meaning of such provision – its reverse interpretation – would dictate that, absent such circumstances, actions specified cannot be taken. Note that the reverse interpretation concept is not the sole interpretation mechanism used and may not always be adhered to, particularly where use of a different mechanism appears more appropriate in a given scenario. For more on rules relating to the reverse interpretation concept see, M.K. Oğuzman & N. Barlas, *Medeni Hukuk* (Civil Law) (Istanbul: Vedat Publishing, 2015), 65-66.

[16] Note that Article 6(4) of the IAL, which stipulates that the parties' right to make requests pursuant to the CCP and the EBL are reserved, relate to requests made pursuant to such laws. Where a request is made pursuant to the IAL, reliance should, it is submitted, be on Article 17(1). The IAL is the only law that explicitly permits applications to Turkish courts for interim measures with respect to foreign seated arbitrations; the applicability of other laws require satisfaction of additional jurisdictional requirements contained therein. Thus, where an application is made pursuant to Article 6 of the IAL, the route to the applicable procedure (that contained in the CCP, the EBL and other applicable laws) should be through Article 17(1), not Article 6(4). See also, Z. Akıncı, *Milletlerarası Tahkim* (International Arbitration), (Istanbul: Vedat Publishing, 2013), 134 fn. 240, where the author notes that "The conditions required for granting of interim injunctions and interim attachments have been listed in Article 257 of [EBL] and Article 389 of [CCP]", but deals with Article 6(4) in a separate paragraph without forming any link between Article 6(3) - regarding applications to court for assistance on implementation of orders granted by arbitrators - and Article 6(4). Further, for a general explanation on this issue see, M. Aygül & D. Gültutan, 'Arbitration Procedure', in *Arbitration in Turkey*, edited by A. Yeşilırmak & İ.G. Esin (Alphen aan den Rijn: Kluwer Law International, 2015), 82. See also, B. Yeşilova, *Milletlerarası Ticari Tahkimde Nihai Karardan Önce Mahkemelerin Yardımı ve Denetimi* (Court Assistance and Review Prior to Final Award in International Commercial Arbitrations) (Izmir: Güncel Publishing, 2008), 708-709, where the author notes the lack of detailed set of rules in the IAL regarding the nature of the court assistance regime.

[17] See, Court of Appeal General Assembly on Unification of Case-Law, Date: 10 February 2012, File No.: 2010/1, Decision No.: 2012/1 (<www.kazanci.com>, October 2015), where the Court noted that "As a rule, courts apply their own procedural provisions ("Lex Fori" principle)."

[18] Note that interim injunctions may be sought from civil courts only with respect to disputes falling within the jurisdiction of such civil courts: Court of Appeal, 4th Civil Division, Date: 18 January 1968, File No.: 11400, Decision No.: 688, *in* B. Kuru, *Hukuk Muhakemeleri Usulü Cilt: IV* (Civil Procedure Volume: IV) (Istanbul: Demir Demir Publishing, 2001), 4293.

> ***an entitlement will become substantially more difficult or completely impossible***, ***or*** *that* ***inconvenience or serious loss or damage will be sustained due to delay***. (emphasis added)

As the above quoted provision stipulates, an interim injunction will be available to a claimant in circumstances where it can be shown that, in the event the claimant succeeds in its claim, there is a likelihood that the defendant will transfer its assets, or any other thing that is the subject matter of the claim, to a third party, so that a judgment obtained against it cannot be enforced. In other words, it must be shown that there is a real risk of the defendant dissipating his assets, or a right or a thing that is the subject matter of the dispute.[19] An interim injunction will be granted by the court to secure the subject matter, provided that the court is satisfied that such risk exists.

Alternatively, an interim injunction may be granted where it is contrary to a party's interests or substantial damage will be sustained if the court remains inactive until its judgment relating to the merits. For instance, where perishable goods are concerned and the parties are in disagreement as to their quality and the buyer refuses to take delivery, a request for an interim injunction can be made for the court to order sale of the goods and for proceeds to be held in trust until the claim is concluded.[20]

There are no restrictions as regards form of interim injunctions that can be granted by courts.[21] For instance, regarding a dispute arising from breach of

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[19] For instance, regarding a dispute where the applicant sought an interim injunction restricting the transfer and assignment of rights involving vehicles and real property, on the ground that the defendant was dissipating his assets, the Court of Appeal ruled as follows: "In the compensation lawsuit commenced by the claimant, it has been alleged that the defendants dissipated their assets and that the collection of the compensation to be awarded at the conclusion of the trial will become more difficult. On this basis, a request was made for an interim injunction to be granted restricting the vehicles and real property registered in the name of the defendants. The legal provision referred to above provides that if it is determined that the obtaining of a right becomes substantially difficult, an interim injunction may be granted. In such a case, the court should have first determined whether or not the defendants dissipated their assets and, then, the result of such determination should have led to a decision whereby an interim injunction would be granted with respect to personal and real property belonging to the defendants in an amount sufficient to cover the debt and secure the collection of potential receivables ruled upon at the end of the trial. However, it was incorrect to dismiss the request on the reasons stated." Court of Appeal, 6th Civil Division, Date: 23 January 2013, File No.: 2012/18775, Decision No.: 2013/757 (<www.kazanci.com>, October 2015).

[20] For a general discussion see: B. Kuru, *Hukuk Muhakemeleri Usulü Cilt: IV* (Civil Procedure Volume: IV) (Istanbul: Demir Demir Publishing, 2001), 4290.

[21] The Court of Appeal noted in a recent decision that "with respect to its purpose, interim injunction is a route resorted to for the prevention of transfer of real or personal property that is the subject matter of the dispute, their preservation until final judgment or prevention of a danger or loss." (Court of Appeal, 21st Civil Division, Date: 27 October 2014, File No.: 2014/21038, Decision No.: 2014/21387 (<www.kazanci.com>, October 2015)). In another decision, the Court of Appeal noted as follows: "As regards their subject, interim attachments are available only for rights and receivables concerning real and personal property, whereas interim injunctions' subject matter is much broader. Indeed, excluding matters that are the subject of interim attachments, all obligations concerning acts which are to be undertaken or refrained from being undertaken, the delivery of certain property or the payment of a sum of money or its non-payment, are subjects of interim injunctions." (Court of Appeal, 21st Civil

share transfer/purchase restrictions contained in share purchase agreements and/or shareholders agreements, a request may be made for an injunction prohibiting such transfer or acquisition, limiting use of such shares by persons acquiring or transfer of shares subject to dispute to an escrow, for delivery to the rightful owner following conclusion of the dispute. The applicant can therefore mold its request in conjunction with the aim sought to be achieved so that vital rights may be preserved.

The applicant must, however, state in its request the form of interim injunction requested.[22] It should be noted that the form identified by the applicant does not restrict the court. The court is permitted to assess the facts of the case and determine the most appropriate protective measure, having regard to the party's request.[23] Parties and courts are therefore entitled to be as imaginative as required to find the most appropriate and effective form of interim injunction to achieve the desired result.[24] In practice, certain forms of interim injunctions are more often granted than others. Interim injunctions are usually granted by courts in the form of either orders for the delivery of goods to a trustee (*yediemin*) or orders prohibiting the sale of real property to prevent its sale or transfer to third parties.

It should be noted that an interim injunction cannot be granted that ultimately determines the substance of the dispute; the court can only grant interim injunctions that aim to protect a right or prevent damage from arising on a temporary basis, i.e., until the merits of the case are fully examined and determined upon.[25]

Division, Date: 17 October 2012, File No.: 2012/18942, Decision No.: 2012/17672 (<www.kazanci.com>, October 2015)). See also, Court of Appeal, 21st Civil Division, Date: 6 March 2013, File No.: 2013/3708, Decision No.: 2013/4084 (<www.kazanci.com>, October 2015).

[22] Article 390(3), CCP.

[23] Article 391(1), CCP.

[24] Forms of interim injunctions foreseen in the CCP are as follows: (i) preservation of a right or asset that is the subject matter of the interim injunction, or its delivery to a trustee (*yediemin*); or (ii) any form of protective measure that eliminates the prejudice or that prevents a loss or damage from arising, such as an order to do something or to refrain from doing something (Article 391(1)).

[25] In a notable case, the Court of Appeal ruled as follows: "The claimant, alleged that the defendant [E.G.O. General Directorate] administration refused to enter into a subscription agreement and expressed that it would not connect electricity and natural gas to flat number seven, which was joined to its building, and the boiler room, for which a residence permit was obtained without the transformer participation share being paid, and that it applied to the court for an interim injunction for the connection of electricity and natural gas, for a determination that the defendant was not entitled to request payment of a sum as transformer participation share and for an order preventing the occurrence of the dispute… As is known, the nature of interim injunctions and the circumstances in which an interim injunction orders can be made have been listed in Article 101 et seq. [of the previous Code of Civil Procedure, Law No. 1086 (Part 8) of 18 June 1927]. The court, however, granted an interim injunction in the claimant's favor, without identifying the legal provision or the grounds on which the decision was based, and ordered that a subscription agreement, which concerns private law and which can only be executed with the parties' free will, be executed, that the claimant be registered as a subscriber and that, as a natural consequence, for electricity connection to be made. Although the court did not identify the legal provision on which the interim injunction was based, it is understood that such provision is Article 103 [of the previous Code of Civil Procedure, Law No. 1086 (Part 8) of 18 June 1927]. However, the facts of the case before us

Interim attachments. In relation to interim attachments, the test is contained in the EBL. Article 257(1) provides that the creditor of a monetary debt may request interim attachment over personal or real property in the debtor's or a third party's possession, provided that the debt has not been secured by way of a pledge and the debt has become due.

A request for an interim attachment may be made in cases where the debt has not become due only where the debtor does not have a specific place of domicile or where the debtor is preparing to conceal or smuggle his assets or is preparing to or does smuggle such assets so as to rid himself of his obligations, or breaches the creditor's rights by undertaking fraudulent activities with such purpose (Article 257(2)).

Note that the Court of Appeal recently held that there is no legal obstacle to being able to request interim attachment after a foreign arbitral award is rendered, but before its enforcement in Turkey.[26] The award in that case was one which had been delivered by a tribunal constituted in Moscow, Russia. The Court noted that the fact that the foreign arbitral award had not become

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show that the circumstances foreseen in Article 103 are not present (circumstances where delay is dangerous or will cause substantial damage). *The concepts of dangerousness and damage are subjective and their meaning may vary from person to person; it is a matter that falls within the particular judges' discretion. However, in the concrete case there is neither danger nor damage that is likely to arise in the immediate future. In fact, in doctrinal and judicial opinions it is generally accepted that an interim injunction cannot be granted by a court which resolves the substance of the dispute and the claim.*" (emphasis added) (Court of Appeal, 4th Civil Division, Date: 16 June 1975, File No.: 1975/3743, Decision No.: 1975/7667 (<www.kazanci.com>, October 2015)). See also, Court of Appeal, 15th Civil Division, Date: 6 July 2012, File No.: 2012/4060, Decision No.: 2012/5172 (<www.kazanci.com>, October 2015). For more see, B. Kuru, *Hukuk Muhakemeleri Usulü Cilt: IV* (Civil Procedure Volume: IV) (Istanbul: Demir Demir Publishing, 2001), 4312-4314.

[26] Court of Appeal, 6th Civil Division, Date: 14 April 2014, File No.: 2014/3906, Decision No.: 2014/4941 (<www.kazanci.com>, October 2015). The Court opined as follows: "Although the arbitral award cannot be 'enforced' without the enforcement decision finalizing, such is not a legal obstacle to a request for interim attachment in reliance upon the arbitral award. Whether factors that complete interim attachments have materialized is another phase and cannot be made the reasoning of the decision. In fact, Article 257 [of the EBL] provides, in addition to providing that interim attachments may be requested for monetary debts that are due and that have not been secured by way of a pledge, that it can also be requested for debts that have not become due, the conditions for which have been listed. The purpose of an enforcement decision is to ensure the execution of decisions delivered in foreign countries that relate to civil law disputes and which have finalized according to the laws of such countries. Therefore, it is not a requirement that enforcement conditions foreseen for foreign decisions exist for an interim attachment order, as a conservatory/precautionary measure, to be granted over receivables identified by foreign court decisions or foreign arbitral awards. This is because an interim attachment order freezes the debtor's assets and rights for a temporary period of time. … *Further, since [according to Article 6 of the IAL] it is possible for an interim attachment to be ordered before or during the arbitral proceedings, the granting of interim attachment after the conclusion of the arbitral proceedings should also be possible.* Consequently, the written conditions laid out in Article 257 [of the EBL] should have been considered and the Claimant's interim attachment request evaluated on such basis. The dismissal of the request on the grounds set out by the first instance court was inaccurate. The decision must, for this reason, be overruled." (emphasis added). See also, 19th Civil Division, Date: 30 December 2004, File No.: 2004/9775, Decision No.: 2004/13391 (<www.kazanci.com>, October 2015).

"enforceable" is distinct from the issue of whether an interim attachment can be granted for a monetary debt established by an arbitral award. The court also noted that since an interim attachment can be granted before or during the arbitral proceedings, it would be illogical to conclude that such cannot be granted once the arbitral proceedings have concluded.

IV. Procedure

A. *Ex parte* and *inter partes* applications

An application for both interim injunctions[27] and interim attachments[28] can be granted without the counterparty being heard. Upon request, the court may determine the application without notifying the counterparty. The court enjoys absolute discretion with regards to interim attachments. In relation to interim injunctions, the judge is permitted to grant an interim injunction without providing the counterparty the right to be heard only where the applicant's rights require immediate protection.[29]

Where the court decides to notify the counterparty before determining whether or not to grant the application, the court will notify the counterparty and consider arguments raised by such party. The notification will be made in accordance with the Law on Notifications.[30] Pursuant to the Law on Notifications, the notification is to be made to the last known place of the addressee.[31] For legal persons this will be the address published in the trade registry, i.e., its headquarters. However, it should be noted that where the notification relates to a dispute arising from the commercial affairs of a company, the notification must be made to its authorized representative.[32] Where a party is represented by an attorney or legal representative, the notification is to be made to the legal representative.[33]

B. Court with general jurisdiction

[27] Article 390(2), CCP.
[28] Article 258(2), EBL.
[29] "The granting or dismissal of interim injunction requests has been left to the judge's discretion in accordance with certain general principles laid down; however, the interim injunction must concern the subject matter of the dispute." (Court of Appeal General Legal Assembly, Date: 20 December 2013, File No.: 2013/21-1791, Decision No.: 2013/1676 (<www.kazanci.com>, October 2015)). For boundaries on the exercise of the discretion see, Court of Appeal, 15th Civil Division, Date: 6 July 2012, File No.: 2012/4060, Decision No.: 2012/5172 (<www.kazanci.com>, October 2015): "Although the legislature has granted a wide discretion to the judge who is to rule upon the interim injunction request, the judge must, in each case, carefully examine whether the conditions required for interim injunctions are present and state the legal reasoning and concrete circumstance in reliance on which the interim injunction is granted. If conditions for interim injunction are not present and have not been proven to the extent foreseen by law, the request for interim injunction must be dismissed."
[30] Law on Notifications, Law No. 7201 of 11 February 1959 ("**Law on Notifications**").
[31] Article 10(1), Law on Notifications.
[32] Article 12, Law on Notifications.
[33] Article 11(1), Law on Notifications.

In relation to an application for interim attachment pursuant to the EBL, the general court with jurisdiction is the court located at the defendant's domicile.[34] The position is the same as regards applications for interim injunctions.[35]

An application can be made to a court that does not have jurisdiction, in which case the court will refer the application to the court with jurisdiction only if a jurisdictional objection is raised by the defendant (*yetki itirazı*). The objection must be raised before or with the statement of answer, the court with jurisdiction being expressed therein.[36] Failure to do so will result in the acceptance of the initial court as the court with jurisdiction.[37]

C. Evidential issues

When making an application for an interim attachment, the applicant (creditor) must submit evidence establishing the debt and the reasons for requesting attachment.[38] With regards to applications for interim injunctions, the applicant must submit proof that, in relation to the merits of the case, he is "approximately" justified in his claim.[39] All evidence to this end would need to be submitted. The Court of Appeal confirmed that the "approximate proof" rule must be adhered to when determining interim injunction requests.[40]

It should be noted that such vague standard leads to difficulties in practice when assessing the likelihood of the interim relief being granted. It is unclear whether the word 'approximate' equates to the generally known standard of 'balance of probabilities'[41], to a degree higher than that (i.e., around 75%) or,

[34] Articles 50(1) and 258(1), EBL; Article 6, CCP.
[35] Articles 6 and 390(1), CCP.
[36] Article 19(2), CCP.
[37] Article 19(4), CCP.
[38] Article 258(1), EBL.
[39] Article 390(3), CCP.
[40] "The party requesting injunction must primarily state the interim injunction reason relied upon in its request and the form of injunction requested, and *establish that it is approximately justified as to the merits of the claim, together with legal evidence* (Article 390(3), [the CCP]). *As to the standard of proof, the "approximate proof" rule applies. The judge, in applying the approximate proof rule, must consider - even if a low likelihood - the possibility that the allegation may not be true, when accepting the high likelihood of the allegation being correct.* It is for this reason that when granting interim injunction a security is obtained from the party requesting, considering the likelihood that it may be unjustified in its request." (emphasis added) (Court of Appeal, 15th Civil Division, Date: 6 July 2012, File No.: 2012/4060, Decision No.: 2012/5172 (<www.kazanci.com>, October 2015)).
[41] See, for an explanation as to its meaning under English law, *Rhesa Shipping Co. S.A. v Edmunds; Rhesa Shipping Co. S.A. v Fenton Insurance Co. Ltd.* [1985] 1 W.L.R. 948 (HoL), at p. 956 *per* Lord Brandon of Oakbrook (with whom all other Law Lords concurred): "...the legal concept of proof of a case on a balance of probabilities must be applied with common sense. *It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not.* If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden." (emphasis added).

although extremely unlikely, standard of beyond reasonable doubt[42], the standard generally applicable in criminal trials. Although the third is unlikely to be the case, there is uncertainty as to whether the approximate proof rule will be deemed to have been satisfied where the applicant establishes that it is more likely than not that it is justified in its claim on the merits. Judicial decisions fail to clarify this matter. Although such vagueness can work in the interests of justice in certain cases by granting the court room for maneuver, it produces uncertainty and unpredictability. It is submitted that a general direction, providing room for exceptions, as to the meaning of the approximate proof rule would serve the interests of all parties and, particularly, of the courts; clear guidance will enable parties to properly assess the likelihood of succeeding in a request for interim relief and such will necessarily weed out requests that will most likely be rejected.[43]

D. Security requirement

In general. In support of an application for an interim attachment, the applicant must provide written security to cover the trial costs and the loss or damage that may be incurred by the debtor or a third party as a result of the unjustified attachment[44], unless an exception applies[45]. Unless otherwise agreed by parties, the amount and form of security to be provided will be determined by the judge at his/her sole discretion.[46]

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[42] In fact, in a recent decision the Court of Appeal upheld a lower court's (Ankara 6th Commercial Court of First Instance) decision where the lower court had ruled out the applicability of the beyond reasonable doubt standard (*mutlak ispat*) with respect to interim attachments (Court of Appeal, 11th Civil Division, Date: 26 February 2014, File No.: 2013/16354, Decision No.: 2014/3605, *in* M. Tan Dehmen, Yabancıların Teminat Yükümlülüğüne İlişkin Olarak 2014 Yılında Verilen Bazı Yargıtay Kararları/Selected Decisions Made in 2014 by the Court of Cassation Regarding Cautio Judicatum Solvi, *Uluslararası Ticaret ve Tahkim Hukuku Dergisi* (Journal of International Trade and Arbitration Law) (2015) Volume 4, Issue: 2, 317-319).

[43] For instance, B. Kuru, *İcra ve İflas Hukuku: El Kitabı* (Handbook on Execution and Bankruptcy Law) (Ankara: Adalet Publishing, 2013), 1057 expresses that the court must form a 'complete opinion', (*tam bir kanaat*) when examining the debtor's objection to the granting of interim attachment. *Kuru* does not explain what he means by the term complete opinion, thus, again, leaving the matter open for interpretation. Further see, S. Taşpınar, Fiili Karinelerin İspat Yükünün Dağılımındaki Rolü (Role of Actual Presumptions in Distribution of Burden of Proof), *Ankara Üniversitesi Hukuk Fakültesi Dergisi* (Ankara University Law Faculty Journal) (1996) Volume 45, Issue: 1-4, 533-572, 549, where the author expresses the opinion that "Under Turkish law, theories relating to the burden of proof rules have not been developed; problems in concrete cases have been sought to be resolved through various standards."

[44] Article 259(1), EBL; Article 87, CCP.

[45] For instance, Article 259(2) provides that security will not be required where a receivable has been secured by judgment. The court enjoys discretion with respect to receivables secured by documents that possess same character as court decisions (*ilam mahiyetinde vesika*) (Article 259(3)). The following are examples of documents that possess same character as court decisions: settlements and acceptances made before the court (Article 38, EBL); documents unconditionally acknowledging monetary debt, prepared by notary publics (Article 38, EBL); attorney facilitated settlements (Article 35(A), Law on Attorneyship, Law No. 1136 of 19 March 1969). For more see, B. Kuru, *İcra ve İflas Hukuku: El Kitabı* (Handbook on Execution and Bankruptcy Law) (Ankara: Adalet Publishing, 2013), 895-900.

[46] Article 87(1), CCP.

However, in certain cases the court should be able to disregard party agreement, especially where circumstances justify such departure. Such is in the court's inherent jurisdiction; adoption of the contrary may lead to absurd results, which could not be reconcilable with the legislature's intention.[47] As noted above, written security aims to cover loss or damage that may be incurred by the debtor or a third party as a result of the unjustified attachment. Strict compliance with the rule on party agreement would contravene notions of fairness and justice, and may jeopardize the third party's possible claim for compensation. Further, the fact that Article 87(2) of the CCP provides the court the right to amend or dispense with the security provided, in cases of change of circumstances, further supports such contention. For instance, a loss that was not anticipated or foreseen at the time of contracting may arise or the form of security agreed upon when contracting may become obsolete. In such cases, and in other similar cases where it can be legitimately argued that the conclusion reached solely from initial party agreement cannot be what the parties could have realistically intended, the court should exercise its inherent jurisdiction and determine the form and amount of security to be provided, to ensure that the relevant party's interests are fully protected.[48]

In practice, judges usually require a security in an amount corresponding to 10% to 15% of the amount in dispute.[49] As rightfully asserted by some scholars, the categorical application of a fixed ratio of the amount in dispute to the amount of security to be provided is unjustifiable.[50] In concurrence with such views, it is suggested that the court should, in each concrete case before it, asses the compensation that may be requested by the defendant in the event the claim fails, taking into account the applicable court costs and attorney fees, and determine the security accordingly. After all, security serves as the defendant's protection in case the applicant fails in its claim and the defendant suffers loss or damage as a result.

Where a fixed amount is ruled upon, without an analysis of the loss or damage that may arise, such may place undue hardship on a party or, in certain cases, on both parties. For instance, it may be the case that the form of interim relief

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[47] See, M.K. Oğuzman & N. Barlas, *Medeni Hukuk* (Civil Law) (Istanbul: Vedat Publishing, 2015), 71 (and references contained therein): "However, one should not be satisfied with the meaning extracted following the adoption of a literal interpretation. A literal interpretation that does not accord with the spirit of the legislation cannot be accepted. In such cases, the meaning to be afforded to a text that is most appropriate in accordance with the spirit of the legislation should be taken into account."

[48] *Contra* see, C. Şanlı, *Milletlerarası Özel Hukuk* (International Private Law), (Istanbul, Vedat Publishing, 2013), 404-405. Şanlı notes that where the parties have agreed on the form of security to be provided, the court must respect party agreement and order the form of security agreed upon. However, it is considered that the statement above was made to merely state the general rule, not ruling out exceptional circumstances justifying departure from the general rule.

[49] See, Court of Appeal, 8th Civil Division, Date: 13 May 2013, File No.: 2013/6173, Decision No.: 2013/6983 (<www.kazanci.com>, October 2015), where the lower court [Edremit (Balıkesir) 2nd Court of First Instance (as Family Court)] had set the security at 15 % of the amount in dispute. See also, Court of Appeal, 7th Civil Division, Date: 10 June 2013, File No.: 2013/4259, Decision No.: 2013/10741 (<www.kazanci.com>, October 2015).

[50] See, C. Şanlı, *Milletlerarası Özel Hukuk* (International Private Law), (Istanbul, Vedat Publishing, 2013), 405.

requested will most likely not give rise to any monetary loss or damage to the defendant. It will be unjust to require, in such cases, the applicant to deposit security amounting to 10% - 15% of the amount in dispute for an interim measure to be granted, particularly where the amount in dispute is particularly high. Equally, the loss or damage that may arise may exceed 10% - 15% of the amount in dispute and adherence to such categorical application may put the defendant's interests at risk. The courts should therefore consider the circumstances of the case and reach an amount which in its judgment best preserves the interests of both parties.

The above-stated rules are equally applicable to the provision of security with regards applications for interim injunctions.[51] However, the court may dispense with the need to obtain security as regards interim injunctions where the request is based on an official document or definite evidence, or where the nature and circumstances of the case so require. The court must, however, provide express reasons for its decision.[52] The security will be returned within one month following finalization of the judgment regarding the underlying claim or within one month following the claimant's failure to commence its compensation claim once the interim injunction ceases to have effect.[53]

Encashment of security. Where the court determines that the applicant was unjustified in seeking an interim attachment or interim injunction, and loss or damage has been incurred by the debtor or a third party, the security will be converted into cash by the court upon the relevant party's request (i.e., the debtor or third party), and the loss or damage sustained will be cured through the proceeds of the security.[54] However, for this to occur, the aggrieved party (i.e., the debtor or third party) must commence a claim for compensation before the security is returned to the applicant (within a period to be provided by the court) – or within the two year time limitation[55], but in such case the security may no longer be with the court[56] - and establish the chain of causation between the unjust request and the loss or damage sustained.[57]

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[51] Article 392(1) and Article 87(1), CCP. See, Court of Appeal, 15th Civil Division, Date: 6 July 2012, File No.: 2012/4060, Decision No.: 2012/5172 (<www.kazanci.com>, October 2015), for its underlying reasoning: "The judge, in applying the approximate proof rule, must consider - even if a low likelihood - the possibility that the allegation may not be true, when accepting the high likelihood of the allegation being correct. *It is for this reason that when granting interim injunction a security is obtained from the party requesting, considering the likelihood that it may be unjustified in its request.*" (emphasis added). Note that Article 399(1) of the CCP expressly provides that, where it is understood that the party in whose favor the interim injunction was granted was unjustified in its request at the time of its application, or the interim injunction automatically ceases to exist or is lifted following objection, such party is obliged to compensate the loss sustained due to the unjustified request for interim injunction. Such compensation claim becomes time barred following the expiry of one year as of the date the decision finalizes or the interim injunction ceases to exist (399(3), CCP).

[52] Article 392(1), CCP.

[53] Article 392(2), CCP.

[54] See, B. Kuru, *İcra ve İflas Hukuku: El Kitabı* (Handbook on Execution and Bankruptcy Law) (Ankara: Adalet Publishing, 2013), 1077.

[55] *Ibid*, 1079.

[56] *Ibid*, 1080.

[57] *Ibid*, 1077.

Foreign claimant security. It should be noted that the Private International and Procedural Law [58] requires a foreign natural or legal person who commences a claim, joins a claim or commences execution proceedings, to deposit a security to cover trial and execution costs and the counterparty's potential loss and damage. [59] The form and amount of security is to be determined by the court.[60] However, the foreign applicant is exempted from depositing a security where reciprocity is found to exist.[61]

It is unclear whether the security foreseen under the PIPL regime is required concurrently with security pursuant to the EBL/CCP regime. There is no express legislative rule drawing the boundary between the two regimes. Considering the aim sought to be achieved by the security requirements contained in the PIPL and the EBL/CCP regimes, payment of security under both the EBL/CCP regime and the PIPL regime should not be demanded; payment of one - preferably under the PIPL regime only[62] - should relieve the applicant of the second form of security.[63] In essence, both regimes cover

[58] Private International and Procedural Law, Law No. 5718 of 27 November 2007 ("**PIPL**").
[59] Article 48(1). Whether the requirement to pay security has been complied with is a matter that must be considered by the court at all stages of the proceedings on its own initiative: see, Court of Appeal, 8th Civil Division, Date: 20 January 2014, File No.: 2013/12941, Decision No.: 2014/652; Court of Appeal, 23rd Civil Division, Date: 3 March 2014, File No.: 2013/8650, Decision No.: 2014/1526; Court of Appeal, 11th Civil Division, Date: 29 April 2014, File No.: 2013/130, Decision No.: 2014/7948; and Court of Appeal, 12th Civil Division, Date: 29 May 2014, File No.: 2014/12188, Decision No.: 2014/15555, *in* M. Tan Dehmen, Yabancıların Teminat Yükümlülüğüne İlişkin Olarak 2014 Yılında Verilen Bazı Yargıtay Kararları/Selected Decisions Made in 2014 by the Court of Cassation Regarding Cautio Judicatum Solvi, *Uluslararası Ticaret ve Tahkim Hukuku Dergisi* (Journal of International Trade and Arbitration Law) (2015) Volume 4, Issue: 2, 315.
[60] Note that security deposited must be in foreign currency: Court of Appeal, 12th Civil Division, Date: 7 December 2009, File No.: 2009/26499, Decision No.: 2009/23957, *in* B. Kuru, *İcra ve İflas Hukuku: El Kitabı* (Handbook on Execution and Bankruptcy Law) (Ankara: Adalet Publishing, 2013), 171. However, in a more recent decision the Court of Appeal upheld the lower court's decision, thereby dismissing the appeal, where the lower court had not requested the payment of security in foreign currency (Court of Appeal, 11th Civil Division, Date: 26 February 2014, File No.: 2013/16354, Decision No.: 2014/3605, *in* M. Tan Dehmen, Yabancıların Teminat Yükümlülüğüne İlişkin Olarak 2014 Yılında Verilen Bazı Yargıtay Kararları/Selected Decisions Made in 2014 by the Court of Cassation Regarding Cautio Judicatum Solvi, *Uluslararası Ticaret ve Tahkim Hukuku Dergisi* (Journal of International Trade and Arbitration Law) (2015) Volume 4, Issue: 2, 317-319). The position seems to be unclear as to whether the security provided should or should not be in foreign currency. Legislative clarification is therefore required on the matter.
[61] Article 48(2).
[62] See, B. Özden, Türk Hukukunda Cautio Judicatum Solvi Kuralı (The Cautio Judicatum Solvi Principle Under Turkish Law), *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* (International Law and International Private Law Bulletin) (1989) Volume 9, Issue: 1, 27-36, 35, where the author acknowledges that "The purpose of the security provision foreseen in the [former PIPL] is to secure the defendant's loss and damage, and trial costs, whereas Article 97 [of the previous Code of Civil Procedure, Law No. 1086 (Part 8) of 18 June 1927] only aims to secure defendant's loss and damage".
[63] See, Court of Appeal, 8th Civil Division, Date: 13 May 2013, File No.: 2013/6173, Decision No.: 2013/6983 (<www.kazanci.com>, October 2015), supporting - although impliedly - such conclusion. *Contra* see, B. Kuru, *İcra ve İflas Hukuku: El Kitabı* (Handbook on Execution and Bankruptcy Law) (Ankara: Adalet Publishing, 2013), 1045 fn. 48; and B. Özden, Türk Hukukunda Cautio Judicatum Solvi Kuralı (The Cautio Judicatum Solvi Principle Under Turkish Law), *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* (International Law and International Private Law Bulletin) (1989) Volume 9, Issue: 1, 27-36,

potential loss and damage that may be suffered by the defendant (or a third party, in case of interim attachments)[64] and trial and execution costs. In other words, to require the payment of both securities at the same time - that is, when a claim is filed with the request for interim measure and when the measure sought is granted - would be to double-secure the potential loss or damage a defendant may sustain due to an unjustified and frivolous claim. However, in certain cases, where implementation of one regime appears insufficient to cover the defendant's possible losses (i.e., where the security deposited under the PIPL regime when the claim is commenced does not sufficiently cover a third party's possible losses, as regulated under Article 259 of the EBL), an adjustment exercise may be necessary to ensure that exclusion of one regime does not disadvantage the defendant. In any event, a legislative amendment is needed to clarify such uncertainty.

E. Duration

It is simply not possible to state the time period within which such applications are heard and determined; it is dependent on the specific nature and circumstances of each given case. The urgency of the matter and the particular court's caseload are highly relevant factors. The following statistics may prove sufficient to demonstrate the extent of Turkish courts' heavy case-load: According to the Ministry of Justice's statistics, for civil courts of general jurisdiction alone, 2,024,456 cases were commenced in 2014, in addition to 1,165,621 cases transferred from the previous year. Together with cases overruled by the Court of Appeal and therefore remitted to the trial court, cases received by civil courts of general jurisdiction in 2014 total 3,293,090. The average period for such disputes being determined across Turkey is 207 days (a minimum of 91 and maximum of 586 days).[65]

Furthermore, whether the counterparty is notified and provided a right to be heard at a hearing is also a crucial factor as to the duration within which the interim measure sought is obtained. The judge may dispense with the need to hold a hearing and grant the application based solely on an examination of documents, which will significantly speed up the process.

In practice, in ordinary cases involving no exceptional circumstances, an interim injunction/attachment is usually obtained within three to 10 working

28, 30, where the author notes that the proposal to join the two provisions in two laws [former versions], thereby creating a one-regime security requirement, was dismissed by the commission drafting the [former] PIPL, reasoning that both provisions deal with different concerns. Although the author approves such dismissal, he does not explain why the PIPL regime with a wider coverage should not suffice to cover circumstances anticipated by the EBL/CCP regime.

[64] See, Court of Appeal, 3rd Civil Division, Date: 28 January 2014, File No.: 2013/20645, Decision No.: 2014/1092 (<www.kazanci.com>, October 2015), where the Court noted as follows: "according to Article 259 of [EBL], in the event the receivable is not based upon a court decision or a document that possess same character as court decisions, the creditor is obliged to provide the security foreseen in Article 96 [of the previous Code of Civil Procedure, Law No. 1086 (Part 8) of 18 June 1927 (Article 87 of CCP)] (for losses that may be suffered by the debtor or a third party in case his execution request proves to be unjustly made)".

[65] See, (<http://www.adlisicil.adalet.gov.tr/istatistik_2014/133.pdf>, October 2015)

days. As noted above, this period may be longer or shorter depending on the facts of the case. Given that with regards to interim attachments the judge enjoys complete freedom as to whether to hear the counterparty, the application may be determined within a shorter period compared to interim injunction applications.

F. Effectiveness

Once an interim measure is granted by the court, it will continue to have effect until one of the two following circumstances occur: (i) the arbitral award becomes enforceable (*icra edilebilirlik*)[66]; or (ii) the claim is dismissed by the arbitral tribunal.[67] Upon occurrence of either circumstance, the interim relief automatically ceases to exist.

V. Appeals and Objections

Appeals. In the event an application is made for an interim attachment and the application is dismissed, the applicant is entitled to appeal the decision. The appeal will be afforded priority and the decision of the appellate court is final and conclusive.[68] With respect to interim injunctions, the applicant is

[66] Note that under Turkish law the term *icra edilebilirlik* has a separate legal meaning. In legal terms, it refers to a party's ability to request enforcement of a decision/award from Turkish execution offices. For instance, foreign court judgments and foreign arbitral awards (and domestic awards regulated by the IAL (Articles 15(A)(4) and 15(B)(2))) are not "enforceable" until the period foreseen for appeal/set aside actions has expired or the party concerned waives its right to appeal/commence set aside proceedings. Upon expiration of the applicable period, an application must be made to the lower court to obtain an annotation on the decision/award stating that the decision has become "enforceable" (*icra edilebilirlik şerhi*), after which a request may be made to the execution offices for forced recovery of the amount due, in the event the debtor fails to satisfy the decision/award. In a decision regarding the enforceability of domestic arbitral awards, the Court of Appeal expressed as follows: "Provisions regarding arbitration are contained in Article 516 to 536 [of the previous Code of Civil Procedure, Law No. 1086 (Part 8) of 18 June 1927]. These provisions relate to domestic voluntary arbitrations. Awards concerning domestic voluntary arbitrations are not directly enforceable [*doğrudan icra kabiliyeti*]; they gain the force of enforceability when, following their finalization, according to Article 536 of the same law, they are approved by the court president or member, or if an appeal has been lodged with respect to it, when the Court of Appeal approves the lower court decision and the court places its annotation of enforceability." (Court of Appeal General Legal Assembly, Date: 25 January 2006, File No.: 2005/15-728, Decision No.: 2006/1 (<www.kazanci.com>, October 2015)). In this respect, see also Court of Appeal, 8th Civil Division, Date: 4 June 2013, File No.: 2013/4847, Decision No.: 2013/8387 (<www.kazanci.com>, October 2015), demonstrating that although binding when issued, foreign court judgments are not enforceable in Turkey until an enforcement decision has been rendered by a Turkish court (the same rule applies to foreign arbitral awards); and Court of Appeal, 8th Civil Division, Date: 21 March 2014, File No.: 2014/4434, Decision No.: 2014/4886 (<www.kazanci.com>, October 2015): "Subject to certain exceptions, [court] decisions that are capable of being enforced [*icra kabiliyeti olan kararlar*] are decisions that are final in content and form… *Not all court decisions are final and enforceable at the same time; certain decisions, by their nature, only constitute final decisions but are not enforceable [icra kabiliyeti taşıması]*." (emphasis added). Consequently, the interim relief will remain in existence until an enforcement decision is rendered - regarding the final foreign arbitral award - by Turkish courts.

[67] Article 6(5), IAL.

[68] Article 258(3), EBL. See, Court of Appeal General Assembly on the Unification of Case-Law, Date: 21 February 2014, File No.: 2013/1, Decision No.: 2014/1 (<www.kazanci.com>, October 2015).

permitted to appeal upon refusal of the application.[69] Again, such an appeal will be afforded priority and the decision of the appellate court is final and conclusive.

Objections. Where the application is accepted without the debtor being heard, the debtor has the right to object to the reasons for attachment, the court's jurisdiction or the security provided within seven days of being notified or implementation of the attachment.[70] A third party, whose interests are being violated, also possesses the right to object to the reasons for attachment or the security provided within seven days of notification.[71] The decision delivered upon an objection to the interim attachment may be appealed.[72] The appeal will be afforded priority and the decision of the appellate court is final and conclusive. Appeal will not suspend execution of the interim attachment.

With respect to interim injunctions, the counterparty is entitled to object to the conditions of the interim injunction, the court's jurisdiction or the security provided within one week as of implementation of the interim injunction, if the counterparty was present during its implementation, or, if the counterparty was not so present, within one week as of being notified of the record relating to its implementation.[73] Third parties whose interests are clearly violated by the implementation of the interim injunction are also permitted to object to the conditions for interim injunction and security provided, which must be made within one week of becoming aware of the interim injunction.[74] The decision delivered upon objection can be appealed.[75] Appeal will be afforded priority and the decision of the appellate court is final and conclusive. Appeal will not suspend execution of the interim injunction.

Decisions must contain reasoning. Decisions rendered by courts regarding interim measures will have to contain reasoning. In a case where the judge dismissed a request for interim injunction without reasons for its dismissal, the Court of Appeal overruled the trial judge's decision, holding that, when granting or refusing an interim injunction request, the court is obliged to state its legal reasoning in the judgment.[76] The appellate court opined that Article 141(3) of the Turkish Constitution requires all court judgments to contain reasoning.[77] Consequently, a decision granting or dismissing a request for interim relief must contain reasoning.

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[69] Article 391(3), CCP.
[70] Article 265(1), EBL.
[71] Article 265(2), EBL.
[72] Article 265(5), EBL.
[73] Article 394(2), CCP.
[74] Article 394(3), CCP.
[75] Article 394(5), CCP.
[76] See Court of Appeal, 15th Civil Division, Date: 6 July 2012, File No.: 2012/4060, Decision No.: 2012/5172 (<www.kazanci.com>, October 2015).
[77] In another decision, the Court of Appeal reasoned that since Article 391(3) of the CCP permits an appeal to be brought against a decision dismissing a request for interim injunction, the Court of Appeal can review such appeal only if the decision contains reasoning. The Court noted that appellate review is only possible if such review is made on the basis of a reasoned lower court decision. According to the court, a decision without reasoning violates the rule of law (as contained in Article 2 of the Turkish Constitution), the right to be heard (as contained in Article 27 of the CCP) and the right to a fair trial (as contained in Article 6 of the European Convention on Human Rights). On this basis, the lower court's decision was

VI. Enforcing Arbitral Tribunal's Interim Relief

In addition to permitting requests for interim relief in aid of foreign arbitral proceedings, the IAL also permits a party to seek assistance with respect to the enforcement of interim relief granted by arbitral tribunals.[78] Consequently, where a party fails to comply with the arbitral tribunal's order regarding interim relief, the counterparty does not need to wait for the final award to be rendered to bring the matter before Turkish courts. Such party may seek Turkish court's assistance in ensuring that the arbitral tribunal's order is implemented.

It is unclear from Article 6(3) of the IAL whether the request for assistance will be a request for implementation of the interim relief granted by the arbitral tribunal or a request for an interim relief on terms deemed appropriate by the court to be granted.[79] Literally translated, the provision provides as follows: "Where a party fails to comply with the arbitral tribunal's order regarding an interim injunction or interim attachment, the other party may request the competent court's *assistance for an interim injunction or interim attachment order to be made*" (emphasis added).

On a literal reading, it appears that the court is to grant an interim relief, not merely approve the relief granted by the arbitral tribunal and order its implementation. Thus, it seems that the court will first determine whether or not to grant an interim relief, and if it decides to grant it, whether to approve the relief already granted by the arbitral tribunal, with or without modifications, or grant a wholly different form of relief.[80] The court enjoys absolute discretion in this regard. The reasoning is that there is not in existence a legislative framework that foresees the enforcement of foreign court or arbitral tribunal ordered interim relief since such lack the finality element required.[81]

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overruled (Court of Appeal, 23rd Civil Division, Date: 14 January 2014, File No.: 2013/9336, Decision No.: 2014/69 (<www.kazanci.com>, October 2015)). The reasoning requirement applies to both decisions granting interim injunctions and decisions regarding objections to decisions granting interim injunctions: Court of Appeal, 15th Civil Division, Date: 27 February 2013, File No.: 2013/682, Decision No.: 2013/1379 (<www.kazanci.com>, October 2015). Note that under Turkish law foreign court decisions, whose enforcement is sought in Turkey, need not have reasoning. The Court of Appeal General Assembly on the Unification of Case-Law opined that the requirement imposed in the Constitution applies exclusively to judgments rendered by Turkish courts (Court of Appeal General Assembly on the Unification of Case-Law, Date: 10 February 2012, File No.: 2010/1, Decision No.: 2012/1 (<www.kazanci.com>, October 2015)).

[78] Article 6(3), IAL.

[79] For a discussion of such problems see, Draft Notes on ICC Turkey Working Group on Implementation of the Code of Civil Procedure and International Arbitration Law (28 December 2015), 56 *et seq*.

[80] See, A. Yeşilırmak, Draft Notes on ICC Turkey Working Group on Implementation of the Code of Civil Procedure and International Arbitration Law (28 December 2015), 559, where the author approves such position: "Assistance refers to the following: Make an application to the court and request interim attachment or injunction. If the court deems it appropriate, it may read the arbitrators' order and may benefit from it, or merely consider it…unfortunately Article 6 of the IAL is the worst drafted provision of the law. "

[81] See, B. Erdem, Draft Notes on ICC Turkey Working Group on Implementation of the Code of Civil Procedure and International Arbitration Law (28 December 2015), 57, 59: "If a party

The aforementioned interpretation, if strictly adopted by the courts, has the following pitfalls: First, the provision will cause unnecessary time and expense to be incurred by the parties.[82] Consider a scenario where a party, following the constitution of the arbitral tribunal, seeks interim relief from the arbitrators, as opposed to from the court (upon preference or mandatorily, due to direction of applicable rules)[83] and, following intense debate between the parties, the arbitral tribunal grants the interim relief requested. The result of such interpretation of Article 6(3) would be that, where court assistance is required to ensure party compliance, a repeat of arguments made before the arbitrators is required. Such need for repetition will inevitably lead to a waste of time, energy and resource, which could be otherwise put to better use.

Second, the adoption of such interpretation would undermine the arbitrators' jurisdiction (who possess better knowledge on the case than almost all others), and consequently, party agreement.[84] Where parties have agreed that all disputes - inclusive of disputes as to whether interim relief should be granted - should be determined by the arbitrators, courts should respect such agreement, unless strong reasons exist not to do so. The court should approve the interim relief granted by the arbitrators, without examining the reasoning behind it, unless such order contravenes public policy or contains some form of procedural impropriety.

Third, and most importantly, where a court re-examines the dispute regarding the interim relief and determines whether it should be granted, it essentially assumes certain functions of the arbitral tribunal, which may have binding consequences on the arbitral proceedings and the determination of the merits of the dispute. Such is contrary to the spirit of Article 6(3). Article 6(3) relates to court assistance, not court intervention. Had the parties preferred court ordered interim relief, they would have made an application pursuant to Article 6(1). Consequently, it is suggested that it would be more in line with the spirit of arbitration if courts approved the interim relief granted by arbitrators and ordered its enforcement, provided that strong reasons not to do so are not present. An amendment of the IAL to this effect may therefore be appropriate.

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refuses to comply with an interim relief granted by the arbitrators, the applicant must, if it seeks an interim relief capable of execution, make an application to the court and obtain the relief sought; the provision is clear...I do accept, however, that the wording regarding assistance to be provided by the court is somewhat vague, it can be changed." See also, Z. Akıncı, *Milletlerarası Tahkim* (International Arbitration), (Istanbul: Vedat Publishing, 2013), 134.

[82] See, O. Demirkan, Draft Notes on ICC Turkey Working Group on Implementation of the Code of Civil Procedure and International Arbitration Law (28 December 2015), 58: "I consider the current wording of Articles 5 and 6 [of the IAL], stating that the attorney may seek the court's assistance, to be very unclear; it may be a little harsh but I consider it almost meaningless for us attorneys and practitioners."

[83] See for instance, Article 28(2) of the Rules of Arbitration of the International Chamber of Commerce (2012), requiring the existence of "appropriate circumstances". *Contra* see, Article 31(4) of the Rules of Arbitration of the Istanbul Arbitration Center (ISTAC) (2016).

[84] See generally, A. Yeşilırmak, Draft Notes on ICC Turkey Working Group on Implementation of the Code of Civil Procedure and International Arbitration Law (28 December 2015), 59-60.

VII. Ancillary Issues

Request for enforcement of relief. Where an application for interim attachment is granted, the applicant must request from the relevant enforcement office (the enforcement office within the court's jurisdiction) the enforcement of the interim attachment within 10 days of the decision. Otherwise, the interim measure will cease to have effect.[85] A similar obligation exists for interim injunctions.[86]

Amending or lifting the relief. The debtor/counterparty is entitled to request that the interim attachment/interim injunction be amended or lifted, as the case may be, where appropriate security is provided as counter security (i.e., money, real property pledge, bank guarantee).[87] Further, an interim injunction may be amended or lifted (without security being granted) in case of change in circumstances.[88]

Arbitration culture and awareness. On a separate note, it would be wise to be cautious regarding the lack of arbitration culture amongst Turkish judiciary, due in part to the history and limited use of arbitration in Turkey. Local counsel must therefore be vigilant to guide the court where such appears necessary.[89]

VIII. Conclusion

Turkey has a legislative framework with respect to interim measures in aid of arbitration (foreign and domestic) proceedings that serves the purpose sought and mostly meets the system users' expectations. It has a very comprehensive set of rules that can be easily followed and applied. Further, most rules conform to logic and are reasonable, without much idiosyncrasies. It may be seen as more advantageous compared with position in certain common law jurisdictions where such rules are uncodified and therefore require detailed research and analysis. In that respect, it can be taken as example. Provided that conditions set out are satisfied, the fruits of arbitration may be preserved through conservatory measures preventing the owner's (legal, beneficial or otherwise) rights of disposal over the subject matter or, in appropriate cases, limiting its peaceful enjoyment.

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[85] Article 261(1), EBL.

[86] Article 393(1), CCP. Note that the period foreseen in the CCP is one week.

[87] Article 266, EBL; Article 395(1) CCP. See, Court of Appeal, 23rd Civil Division, Date: 7 February 2013, File No.: 2013/156, Decision No.: 2013/632 (<www.kazanci.com>, October 2015). See also, H. Pekcanıtez, O. Atalay & M. Özekes, *Medeni Usul Hukuku* (Law of Civil Procedure) (Ankara, Yetkin Publishing, 2013), 1044-1046.

[88] Article 396(1) CCP. See, Court of Appeal, 23rd Civil Division, Date: 25 June 2014, File No.: 2014/1474, Decision No.: 2014/4876 (<www.kazanci.com>, October 2015). See also, H. Pekcanıtez, O. Atalay & M. Özekes, *Medeni Usul Hukuku* (Law of Civil Procedure) (Ankara, Yetkin Publishing, 2013), 1042-1043.

[89] See, A. Yeşilırmak, Draft Notes on ICC Turkey Working Group on Implementation of the Code of Civil Procedure and International Arbitration Law (28 December 2015), 47, where the author mentions the need to train Turkish judges and improve arbitration awareness among the Turkish judiciary.

However, certain provisions/requirements inherent in the IAL and/or the judicial approach to interim measures of protection are in need of reform or clarification, to ensure that interim measures continue to serve as a tool for maximization of justice. All obstacles to being able to preserve a legal right that requires immediate protection should be removed, as far as such is possible. As noted above, the following issues should be addressed by the legislature to ensure that uncertainties/loopholes do not lead to loss of rights: (i) time frame within which arbitration proceedings must be commenced post granting of interim measures; (ii) standard of proof required with respect to applications for interim measures; (iii) automatic implementation of fixed security amounts; and (iv) court assistance to interim measures granted by arbitrators. Only once such loopholes are 'filled' will the IAL fulfill its purpose of assisting the users of international arbitration. Amendments to such effect will also no doubt enhance confidence in the IAL and the Turkish legislative framework regarding arbitration, and lead to a greater use of Turkey as seat of international arbitrations.

Finally, one should remain cautious regarding the lack of arbitration culture amongst the Turkish judiciary and also the undesirable consequences of an unjustified request. With respect to the latter, considering that a categorical percentage is applied, taking into account the amount in dispute, careful consideration should be made before a request for interim relief is made. Failure to do so may give rise to unpredictable losses, requiring compensation by the unjustified applicant.