

UNENFORCED FOREIGN ARBITRAL AWARDS: MEETING THE *PRIMA FACIE* STANDARD OF PROOF IN PROVISIONAL ATTACHMENT APPLICATIONS?

Pelin Baysal & Deniz Metin

Until a foreign arbitral award becomes enforceable in Turkey, it is crucial for the claimant to secure the collection of a due claim by seeking a provisional legal measure, such as a provisional attachment, from the court. This step often becomes essential to mitigate the risk of the debtor dissipating assets before the enforcement proceedings are finalized.

When evaluating provisional attachment requests, courts review the provisions governing the enforcement of foreign arbitral awards to assess whether the claim is due. Under Turkish law, the enforcement of foreign arbitral awards is regulated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated June 10, 1958 (“**New York Convention**”), and the International Private and Procedural Law No. 5718 (“**IPPL**”).

Article 60 of the IPPL stipulates that foreign arbitral awards must be finalized and enforceable, or binding on the parties to be enforced. Similarly, Article 5(1)(e) of the New York Convention requires foreign arbitral awards to be binding for enforcement. This brings forth a critical question: Must these conditions also be met for a court to approve a provisional attachment request based on a foreign arbitral award? In other words, can foreign arbitral awards that have not yet been enforced satisfy the *prima facie* evidence requirement, which is one of the conditions for granting a provisional attachment order?

Given these provisions, the relevance of enforcement conditions in approving a request for a provisional attachment requires thorough evaluation.

Conditions for Provisional Attachment and *Prima Facie* Evidence

The conditions for provisional attachment are outlined in Article 257(1) of the Enforcement and Bankruptcy Law (“**EBL**”). According to this provision; (i) the debt in question must remain unpaid despite its due date, and (ii) it must not be secured by a pledge. When these conditions are satisfied, the court may issue a provisional attachment order in favor of the claimant.

In addition to these two conditions, Article 257(2) of the EBL sets forth additional requirements for claims that are not yet due. These include (i) the debtor lacking a

fixed domicile, or (ii) the debtor attempting to dissipate assets or engaging in similar actions. However, these additional conditions do not apply to overdue claims. The legislator presumes that a debtor who fails to pay a debt despite its due date, is acting in bad faith. Consequently, even without explicit intent to dissipate assets, the debtor's property may still be subject to a provisional attachment order.

A claimant seeking a provisional attachment is not obligated to decisively prove the conditions specified in Article 257(1). It is sufficient for the court to evaluate the presented evidence and reasonably conclude that the claim is due and unsecured by a pledge. This standard is known as *prima facie* evidence.

Provisional Attachment Requests Based on Foreign Arbitral Awards

Turkish courts are divided on whether a foreign arbitral award that has not yet been enforced satisfies the *prima facie* evidence requirement for a provisional attachment order.

Some courts have determined that a specific and due claim granted by a foreign arbitral award meets the conditions outlined in Article 257 of EBL.¹ Such awards are deemed sufficient to fulfill the *prima facie* evidence requirement. In other words, while the lack of enforcement may prevent the execution of the award, it does not necessarily bar the claimant from seeking a provisional attachment based on it.

Conversely, some Regional Appellate Courts have rejected such requests, presenting opposing arguments.² These decisions contend that "the existence and maturity of the claim cannot be established based on a foreign arbitral award that has not been enforced" and that "the lack of enforcement renders the foreign arbitral award insufficient, on its own, to approximately prove the existence of a due monetary claim."

Evaluation

As is well known, foreign judgments and arbitral awards must be enforced to become executable in Turkey. Moreover, unlike decisions rendered by Turkish courts and local arbitral awards issued under the Code of Civil Procedure No. 6100 ("CCP"), the enforcement of foreign court judgments and arbitral awards is suspended if the enforcement decision is subject to appeal under Article 57 of the IPPL. As a result, claimants holding a foreign arbitral award may be forced to wait for years to enforce their award. During this time, the claimants' only available recourse against the debtor is to secure their claims by obtaining a provisional attachment order from the court, which requires providing a certain amount of security.

In our view, enforcing a foreign arbitral award is not a prerequisite for determining whether the compensation awarded to the claimant is due. A binding arbitral award

¹ Turkish Court of Cassation, 6th Civil Chamber's decision numbered 2014/3906 E., 2014/4941 K., dated 14 April 2014; İstanbul Regional Appellate Court, 13th Civil Chamber's decision numbered 2023/1411 E., 2023/1290 K., dated 14 September 2023.

² İstanbul Regional Appellate Court, 43rd Civil Chamber's decision numbered 2023/690 E., 2023/538 K., dated 25 May 2023; İstanbul Regional Appellate Court, 43rd Civil Chamber's decision numbered 2022/1976 E., 2022/1448 K., dated 27 December 2022.

provides strong evidence to satisfy one of the key conditions for provisional attachment orders; the maturity of the claim.

In accordance with the provisions of both the New York Convention and the IPPL, foreign arbitral awards should be denied enforcement only if they meet the specific and narrowly defined barriers outlined in these regulations. Moreover, in enforcement proceedings, the burden of proving the existence of any such barriers rests with the respondent. Consequently, the enforceability of foreign arbitral awards is treated as a presumption. Therefore, there is no legal obstacle to issuing a provisional attachment order based on a foreign arbitral award that has not yet been enforced.

In this context, limiting provisional attachment orders to only enforced foreign arbitral awards would fall short of adequately protecting the claimant's rights. Provisional attachment must be available at an earlier stage to ensure the claimant's interests are effectively protected.

It is well established that in enforcement proceedings initiated in Turkey, courts are not authorized to assess the substance of the dispute. Their role is limited to conducting a procedural review of the foreign arbitral award to determine whether it meets the conditions for enforcement. Accordingly, when reviewing an arbitral award that has already determined the maturity of a debt, the court should not re-evaluate the debt's maturity. In this regard, for provisional attachment requests based on foreign arbitral awards, the claimant should only be required to reasonably convince the court that the conditions for enforcement are met.

The most crucial factor in demonstrating the conditions for enforcement are met is proving that the arbitral award has not been set aside. This also serves as supportive evidence in determining the maturity of the debt.

Granting a provisional attachment order should not necessitate conclusive proof that the arbitral award meets all enforcement conditions. Indeed, proving the fulfillment of all enforcement conditions exceeds the standard of *prima facie* evidence and requires conclusive proof. The court only needs to reach a reasonable belief about the existence of the claim and the conditions necessary for a provisional attachment order. Requiring a higher standard of proof would cause the provisional attachment, as a provisional legal protection measure, to stray from its fundamental purpose of protecting the claimant's rights. It is essential to emphasize that provisional legal protection measures, such as provisional attachment orders, must be executed promptly and effectively to fulfill their intended purpose.

Conclusion

Before a foreign arbitral award becomes enforceable in Turkey, provisional legal protection measures play a critical role in preventing risks, such as the debtor dissipating assets.

The primary purpose of provisional attachment, as one such measure, is not to satisfy the claimant but to secure the effectiveness of the lawsuit or enforcement proceedings initiated or intended to be initiated by the claimant. As such, provisional

attachment orders serve as a legal mechanism that claimants should utilize proactively, even before initiating enforcement proceedings.

In this regard, it is necessary to resolve the differing opinions among the chambers of the Regional Appellate Courts, regarding the evaluation of unenforced foreign arbitral awards in provisional attachment applications. At the very least, foreign arbitral awards that are not subject to set-aside proceedings or where such proceedings have been conclusively rejected should be recognized as *prima facie* evidence for establishing the necessary conditions required for a provisional attachment. This approach aligns with the text and purpose of the provisional attachment provisions under the EBL, and ensures the effective protection of the claimant's rights, which is the primary objective of provisional attachment measures.

For further information, please contact:



Pelin BAYSAL
pelin@baysaldemir.com



Deniz METİN
deniz@baysaldemir.com