

## Temporary Legal Protections under Turkish Law (Preliminary Injunction and Preliminary Attachment)

In an ideal world, anyone whose legally recognized rights are violated would have the right to apply to a competent judicial authority (normally a court) and seek appropriate remedy. Fortunately, it is the case in Turkey. However, in order not to face any unpleasant surprise at the end, one should know -from the outset of the relevant legal proceeding- how to effectively use applicable legal precautions protecting its rights. Failure in resorting to such precautions on time may lead to severe consequences for any claimant.

In accordance with Turkish law, the aforesaid precautions are collectively referred to as “temporary legal protections” (TLP) (*gecici hukuki koruma*). Considering that legal proceedings may last for years, the primary function of TLPs is ensuring the applicability of future judgments (or execution proceedings) by means of preemptive measures on either the subject matter of present (or future) disputes or other debtor assets. The most noteworthy TLPs under Turkish law are preliminary injunction (*ihiyati tedbir*) and preliminary attachment (*ihiyati haciz*). Although they are similar in many aspects, they are not substitutes at all. Accordingly, the circumstances of each case should be thoroughly analyzed so that the appropriate TLP is properly designated and immediately claimed before court.

Preliminary injunction and preliminary attachment are two separate TLPs over which even lawyers (and judges!) may sometimes get confused. Therefore, this article should not be considered as a comprehensive analysis of a matter that problematic. Below you may find the outlines of these core TLPs.

### 1. Preliminary Injunction (PI)

Every legal case (*i.e.*, lawsuit) has a subject matter (*e.g.*, manufactured goods, real property etc). In whatever nature they are, the subject matters of lawsuits are usually under defendants’ control/possession and thus vulnerable to their interventions. Acting in bad faith, a defendant may, -prior to or throughout the relevant lawsuit- make various maneuvers which may result in the claimant’s rights being forfeited even if the claimant finally obtains a judgment in favor. For instance, in the event the ownership of a real property is challenged before court, the defendant may sell and transfer the ownership of such property to a third party. Moreover, imagine that your company owns a precious land on which the construction of a plant is contemplated. One day, you realize that another company unlawfully started construction works on your company’s land. In such a case, if your company is not able to bring the said works to a stop immediately and waits until the end of the lawsuit to be filed, it may have a brand new skyscraper on its land instead of the plant. Finally, let us assume that you provided an unconditional bank letter of guarantee as security to your contractor which does not return such letter and further states that it will cash it even though you have fulfilled all your obligations. You intend to file a lawsuit against your contractor whereby the claim would be the return of the letter of guarantee, but before doing so, you understandably want to prevent it from turning such letter into cash.

PI is the right legal tool to impede unwelcome situations like the ones described above. If a PI was granted by the court in the aforementioned cases, the defendant would be banned from (i) selling the real property, (ii) continuing the construction works, and (iii) converting the bank letter of guarantee into cash, respectively. The most important point to bear in mind is that a PI can only be applied on “the subject matter of a lawsuit” (*muddeabih*), which is the matter (whatsoever) subject to dispute between the parties.

Some PI essentials are as follows;

- PI may be granted (i) before, (ii) when (*i.e.*, simultaneously) or (iii) after the relevant lawsuit is filed. Needless to say that a pre-lawsuit PI is much more effective.
- In cases where there is a substantial threat of irreparable damage, PI may be granted without the defendant being notified of it.
- In order to be granted a PI, the claimant has to demonstrate to the court that there is a substantial likelihood of success on the merits of the lawsuit.

- As a pre-requisite to PI, the court may order the claimant to provide a security aiming at the compensation of the defendant's possible damages in case the lawsuit is subsequently dismissed. In practice, a security amounting to 10 to 15 percent of the subject matter of the lawsuit is required.
- The cases where a PI may be demanded are only described, not exhaustively listed. This means that unless otherwise stated by law, any claimant may resort to PI as a TLP provided that its conditions are met.
- In case PI is granted in the presence of both parties, no subsequent objection can be made against it unless the circumstances -when the PI was granted- have drastically changed.
- In case PI is granted prior to the lawsuit, the claimant has to file such lawsuit in 10 (ten) days from the PI date. Otherwise, the PI is automatically lifted.
- In case PI is granted prior to the lawsuit and in the absence of the defendant, the defendant may subsequently object to it before the court. Such objection does not automatically suspend the execution of the PI unless the court decides otherwise. Since PI is of temporary nature, the court's decision upon objection is not appealable.
- PI is automatically lifted when the court decides the merits of the case unless the claimant has already made a demand to the contrary.
- In case the lawsuit is dismissed, the defendant may sue the claimant for any damages incurred as a result of the execution of PI.

## 2. Preliminary Attachment (PA)

As a TLP, PA serves the same purpose with PI: Ensuring the applicability of future court judgments. However, the cases where a PA may be granted and the subject matter(s) on which PA is applied are totally different.

First of all, PA is applicable only in cases where the defendant has a (due or future) monetary debt owed to the claimant. To put it another way, PA is the right choice only when the subject matter of the lawsuit to be filed (or the execution proceeding to be initiated) is a certain amount of money.

Being granted a PA enables the (future) claimant to attach the debtor's (*i.e.*, the defendant) assets. Note that such assets are not related to the subject matter of the lawsuit to be filed. This is where PA differs most from PI. As mentioned above, PI is always applied on the subject matter of a lawsuit. On the other hand, PA is applied on debtor's assets (which have nothing to do with the subject matter of the lawsuit) in order to ensure the collection of the monetary debt owed to the claimant.

Not every creditor having a monetary receivable is automatically granted a PA. The conditions depend on whether the said receivable (*i.e.*, debt) is due or not. As would be expected, the conditions for being granted a PA for a future debt are stricter.

Below you may find a number of PA details;

- The origin of the debt to be secured through PA does not matter. It may be a contract, tort or unjust enrichment.
- In case the debt is secured by means of pledge (*rehin*), PA is not applicable to the extent the pledge is sufficient to cover the debt. The ratio behind this rule is that the claimant is already protected against the debtor's possible non-payment.
- Same as in PI, PA may be granted without the defendant being notified of it.
- In order for a creditor (*i.e.*, claimant) to be granted a PA, provision of a security aiming at the compensation of the debtor's possible damages is a must. In practice, a security amounting to 10 to 15 percent debt lawsuit is required.
- Once a PA is granted, it has to be executed (*i.e.*, debtor's assets have to be attached) in 10 (ten) days from the PA date. Otherwise, the PA is automatically lifted.
- Once a PA is executed, a lawsuit has to be filed or an execution proceeding has to be initiated against the debtor in 7 (seven) days. If not, the PA is automatically lifted.

- In case PA is granted in the absence of the defendant, the defendant may subsequently object to it before the court. Contrary to PI, the court's decision upon objection can be appealed. However, the appeal of the PA decision does not suspend its execution.
- Debtor's assets, which are attached according to PA, cannot be sold at auction before the court decides the merits of the case.
- The debtor is able to make the PA lifted by providing appropriate security instead of the attached assets.