

SECURITY FOR COSTS OF LEGAL ACTION

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In General

Security for costs is money that a plaintiff is ordered to provide to the court as a condition of continuing with a claim or execution proceeding, and which will be applied on any costs order that may be made against the plaintiff. It provides a safeguard to the defendant in financial terms so as to ensure that he is not unduly burdened by having to bear his own costs in defending claims by plaintiffs who may be unable or unwilling to pay costs to the defendant when ordered by the court.

In principle, there is no requirement to furnish security of any kind for the plaintiff or intervener of a lawsuit or creditor of an execution proceeding (real and/or legal person), who has a domicile in Turkey. Nevertheless, there are two different articles in two codes which provide exceptions to that principle.

1-Code of Civil Procedure:

Code of Civil Procedure is the main legislative provision dealing with security for costs. It contains a list of situations where courts have discretion to order security for costs.

a-Obligation:

Article 84/1 of the Code of Civil Procedure provides that the plaintiff or intervener of a lawsuit or creditor of an execution proceeding must provide security for litigation costs, if;

a. he/she is a Turkish citizen who does not have habitual residence in Turkey,

b. he/she is adjudged a bankrupt, or files a voluntary petition in bankruptcy or is involved in ongoing debt restriction proceedings or for whom certificates of unpaid debts have been issued.

In the sub-article 2, it is further provided that a security order may be made by the court at any stage of the proceedings.

Moreover, according to the sub-article 3, in the case of mandatory joinder, security must be provided only if each party fulfils one of the above mentioned conditions.

b-Purpose:

As is evident from the content, the purpose of this article is to provide security for the court and execution proceeding fees in cases where the plaintiff's claim is dismissed or the plaintiff fails to prove his/her claim at the end of the litigation or execution proceeding and is to compensate defendant for the costs borne and the damages incurred. A security for costs order is to ensure that a successful defendant will have a fund available within Turkey to enforce a costs order.

c-Conditions to be satisfied:

The court shall make an order for security for costs under the provision 84 if the plaintiff, intervener of a lawsuit or a creditor of an execution proceeding;

(i) is the citizen of Turkey, and

(ii) does not have "habitual residence" in Turkey, meaning that the plaintiff is not permanently settled in Turkey. In the context of the article 84, the phrase "habitual residence" should be construed according to its ordinary and natural meaning, and that a person is ordinarily resident in a place if he habitually and normally resides lawfully in such place from choice and for a settled purpose, apart from temporary or occasional absences, even if his permanent residence or "real home" is elsewhere. In other words, any Turkish citizen who domiciles abroad and visits Turkey temporally will need to furnish security if to commence a legal action or execution proceeding.

or,

(i) is adjudged a bankrupt, or

filed a voluntary petition in bankruptcy, or

is involved in ongoing debt restriction proceedings, or

is a person for whom certificates of unpaid debts have been issued.

d-Exceptions to the Security for costs:

Article 85 of the Civil Procedure Code provides cases in which the plaintiff is except from providing security;

-where the plaintiff is supported by legal aid,

-where the plaintiff possesses real estate assets, or claims secured in rem, in Turkey that suffice to cover the costs of the proceedings,

-where a legal action to protect the benefits of an infant is before the court, and

-where an execution proceeding for a debt secured by a court judgment is in question.

e-Amount and form of security:

The amount and form of security is determined by the court at its sole discretion (art. 87 of the Code). However, if the parties have settled the amount and form of security with an agreement, the court shall apply the relevant provisions of such agreement.

Generally, the amount can be deposited in the form of cash, securities, real property (mortgage) or bank letters of guarantee (bond).

The amount of security required by an order for security for costs may be increased or decreased by the court at any time.

f-Default of plaintiff:

Where the plaintiff defaults in giving the security required by an order, the court may dismiss the proceeding against the defendant.

g-Release of security:

Any security furnished pursuant to an order made under the provision 84 of the Civil Procedure Code will be released on the filing of the written request of the plaintiff, provided that the grounds of the order requiring the security is no longer exist.

2- International Civil and Procedure Law:

Another legislative regulation that deals with security for costs is the International Civil and Procedure Law (Law no 5718). This law 5718 comprises a clause similar to that of the Code of Civil Procedure mentioned above.

a-Obligation:

The article 48/1 of this Law 5718 provides that the foreign plaintiffs whether real or legal person are obliged to post security for the costs in the amount required by the court upon commencing of a court action.

b-Purpose:

The purpose of a security for costs order in this article 48 is to protect defendants from foreign plaintiffs who commence speculative litigation at no financial risk to themselves (by reason of their lack of assets). It is aimed at protecting the Turkish party from having to recover costs orders it may be granted in the proceedings against the foreign plaintiff abroad. When security for costs is ordered, the plaintiff cannot take any further step in the action until the security is posted.

c-Conditions to be satisfied:

The difference in treatment laid down in article 48 of the Law 5718 is moreover based only on the criterion of nationality and not the criterion of habitual residency. Thus, even the foreigners that have a domicile in Turkey are not qualified to be exempted from this obligation.

d-Exceptions to the Security for costs:

The exemption is provided in the sub article 2 of the article 48 which states that the security for costs does not have to be furnished, however, where there is reciprocity, that is to say, where the country of which the plaintiff is a national does not require Turkish nationals to give such security when they sue its nationals.

The list of the bilateral agreements that Turkey has signed with other countries can be obtained from the Ministry of Justice.

However this clause in International Private and Civil Procedure Code has obviated by the Hague Convention on Civil Procedure 1956 (hereinafter Hague Convention). According to the art.17 of the Hague Convention there may be no security, bond or deposit of any kind imposed by reason of their foreign nationality, or of lack of domicile or residence in the country, upon nationals of one of the contracting states,

- having their domicile in one of these States, who are plaintiffs or parties intervening before the courts of another of those States. As a result nationals from the contracting states of the Hague Convention shall be
- exempted from this obligation for the cases filed in Turkey.

e-Amount and form of security:

In connection with the amount and form of security for costs, the Law 5718 provides no provisions. Therefore, the provisions of the Code of Civil Procedure will apply. only Fixing the amount to be provided by way of security is part of the exercise of the court's discretion.

f-Default of plaintiff:

Same as the case for Code of Civil Procedure mentioned above, if the plaintiff defaults in giving the security required by the court, the court may dismiss the proceeding against the defendant.

g-Release of security:

Any security furnished pursuant to an order made under the provision 48 of the Law 5718 will be released on the filing of the written request of the plaintiff, if the grounds of the order requiring the security is no longer exist.