



## PRECAUTIONARY ORDER ON THE LETTERS OF GUARANTEE DURING CONCORDAT

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A Turkish court might declare concordat when a debtor, who has, or is threatened to be defaulted on his debts, agrees with its creditors on the restructuring of most of his debts.<sup>1</sup> The concordat project governs how, when and to which extent the debt will be repaid. Upon its declaration, the concordat binds all creditors, even the ones that did not consent to it.

When the court accepts to review the concordat application, the court also provides three-months of provisional stay (geçici mühlet) during which it must take all precautions to protect the debtor's assets.

The question is whether a court can issue a precautionary order to prevent the liquidation of the letters of guarantee ("LoGs"). This is a tricky question as, under Turkish law, the LOGs create a guarantee agreement between the bank and the addressee (i.e., the creditor). Therefore, its destiny is independent from the underlying contract between the debtor and the creditor, which is subject to the concordat project.

Turkish courts have so far taken two dissenting positions:

- A precautionary order cannot be adopted in respect of the LoGs ("First Position")<sup>2</sup>. The rationale is that a court should not intervene in the independent LoG guarantee provided by the banks. Even if it does, the debtor's liabilities will remain intact, as once the bank makes a payment under the LoG, it can seek recourse towards the debtor under the counter guarantee arrangements.
- Such order can be adopted ("Second Position")<sup>3</sup>. This is mainly because the liquidation of the LoGs hinders the cash flow (if not its assets), and as a result, the debtors' ability to honour its obligations to the creditors that are not secured by such LoG.

This causes significant ambiguity in practice. Under the First Position, while the secured creditor of the LoG is satisfied, the overall success of the concordat project might be hindered due to debtor's aggravated cash flow. While the Second Position secures the integrity of the concordat project, it deprives the secured creditor of its contractual right to cash the LoG.

In view of this, the overall expectation from the Court of Cassation is the exercise of its duty<sup>4</sup> to unify the dissenting opinions among the regional courts.

<sup>1</sup> Under Article 302 of the Enforcement and Bankruptcy Law, the concordat must at minimum cover either (i) half of the creditors and receivables; or (ii) one fourth of the creditors and two-thirds of the receivables.

<sup>2</sup> İstanbul BAM 17. HD 2020/1324 – 1522, 09/07/2020; Sakarya BAM 7HD, 12.02.2020, 2265/211.

<sup>3</sup> İstanbul BAM 17HD, 13.12.2018, 2680/218; İstanbul BAM 17HD, 13.06.2019, 119/1072

<sup>4</sup> This duty is enshrined under Article 35 of Law No. 5235.