

TURKEY

Discovery of evidence is not subject to Bolar exemption

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Discovery of evidence and actions for determination of evidence are separately regulated under the Civil Procedural Law. Discovery of evidence is a preliminary step taken before any action on merits and it only serves to discover and record the evidence that may be relevant to an ongoing or future action on merits.

It must be emphasised that there is no full and frank disclosure procedure under the Turkish civil law system unlike the US and UK systems. In other words, the parties can decide at their discretion which documents they will or will not submit to the court so it is not mandatory to disclose all information. Therefore discovery of evidence from a third party via court proceedings is crucial. Article 400 of the Turkish Code of Civil Procedure rules that the party asking for discovery of evidence must have a legal interest in the discovery/determination of evidence and it is accepted that a legal interest exists if the evidence is lost or it will be seriously difficult to depend on that evidence unless discovered right now.

The discovery and the collection of evidence is monitored and executed by the IP court. Especially in the enforcement of pharmaceutical patents, the patent owner, constantly blocked from enforcement due to the so-called Bolar exemption may use the discovery of evidence tool at least to complete the preparations for an enforcement action. However, every day Turkish IP courts are widening the boundaries of the Bolar exemption. As per the latest interpretations of the IP courts, Bolar immunity lasts until the Gx product launches and within this period, the patent holder cannot take any action. However, as discovery of evidence is not an action on merits, it is not blocked by the Bolar exemption and drastically helps the patent holder to discover the evi-

dence for infringement beforehand. The discovery of evidence does not have the legal character of a lawsuit, therefore the statutory period does not include this process. The tangible facts constitute the topic of discovery of evidence. The courts can also accept discovery of evidence ex parte upon the request of the patent holder if the conditions under Article 403 of the Civil Procedural Law are met. Since discovery of evidence is not an action on merits, there is no appeal mechanism. However, the counter party can oppose the decision of discovery of evidence on the ground that the conditions under Article 400 are not met. This objection is examined and concluded by the same court which conducted the discovery of evidence.

The action on determination of evidence is distinct from the discovery of evidence and is an action on merits. It can therefore be blocked by the so-called Bolar exemption depending on the interpretation of the IP court.