

GETTING THE
DEAL THROUGH 

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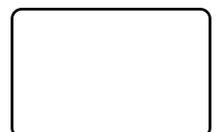


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Turkey

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General structuring of financing

1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

In Turkey, the Turkish Law on Private International Law and International Civil Procedure Law, No. 5718, (MÖHUK) (for the official Turkish text of the Law see the Turkish Official Gazette No. 26728, dated 12 December 2007) addresses the law applicable to private law transactions and relationships that involve a foreign element, the international jurisdiction of Turkish courts, and the recognition and enforcement of foreign judgments without prejudice to any applicable international conventions to which Turkey is a party.

MÖHUK, in its article 24/1, permits, in principle, the freedom of contract (party autonomy) which enables the contracting parties to choose the law governing their contract. The parties' choice of applicable law may govern the whole or a part of their contract. If there is a valid and binding choice of foreign law clause in a loan agreement, Turkish courts must apply foreign law to the contract. However some relevant collateral agreements may be subject to deviating choice of law principles (eg, liens over property are subject to the principle of *lex rei sitae*).

If jurisdiction as to venue is not determined in accordance with the principle of exclusive jurisdiction, the parties may agree upon the handling of the dispute, between each other, containing the foreign element and arising from an obligation relationship before the court of a foreign state or arbitral tribunal. Any judgment or arbitral award rendered by a foreign court or an arbitral tribunal may be recognised and enforced by a judgment of a Turkish court.

2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

In general there are no restrictions regarding acquisitions of Turkish entities by foreign entities. However, there is a limitation for foreign natural and corporate bodies in the Turkish media sector. The shareholding of any foreign natural person or corporate body in any Turkish media service provider may not exceed 50 per cent of the relevant media service provider pursuant to article 19 of the Law on the Incorporation of Radio and Televisions and Broadcasting Services. Furthermore, any foreign natural or corporate body cannot be a shareholder at more than two media service providers in Turkey.

Besides these, entities that are subject to, for example, financial or energy markets supervision are also subject to certain change-of-control provisions. For example, if there is a certain change in shares that affects control of a bank, then the permission of the Banking Regulation and Supervisory Board is required pursuant to article 18 of the Banking Code. In case of any acquisition which shall grant the acquirer the right of control of any listed company, then such acquirer has to make an offer to the other shareholders for their shares pursuant to article 26 of the Capital Market Law. Furthermore, according to competition legislation, any acquisition which shall result in the limitation of competition in order to create or strengthen any dominant position is prohibited pursuant to article 7 of the Competition Law.

There are no restrictions on cross-border lending. However, for statistical purposes the debt owed to foreign entities must be reported to the Turkish Central Bank.

3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

Acquisitions are usually financed in the form of bank loans. However, contingent on the deal, financings consisting of a mix of equity and debt are also possible. Syndication is also usual depending on the transaction volume. Debt components usually comprise financing of the purchase price, refinancing of existing loans as well as working capital funds.

4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

Principally, Turkish law does not require 'certain funds'. Nevertheless, exceptions exist (eg, if a bidder makes a voluntary or mandatory takeover offer for a listed company, the offer document shall contain the information on the fund and the amount).

5 Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

The usual acquisition financing documentation provides for strict rules regarding the purpose and use of the debt tranches. A violation of the provisions governing the application of funds usually constitutes a breach of contract.

6 What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

Turkish financial institutions that provide financing to a company require a written licence from the Turkish Banking Regulatory and Supervisory Board. The requirements for the incorporation of the banks are arranged by the Banking Code and the requirements for the incorporation of financing companies are arranged by the Leasing, Factoring and Financing Companies Act in Turkish law.

Foreign banks and financial institutions may, according to the Decree No. 32 on the Protection of the Value of the Turkish Currency (article 17), provide foreign currency or loans in Turkish lira to any resident borrower, without any permission or licences from any Turkish regulatory authority.

7 Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

Withholding tax on interest payments made by resident to non-resident undertakings varies based on the type of the payment. There is no withholding tax in case of interest payments made for the loans extended by financial institutions, foreign international institutions and foreign banks. There is a 1 per cent withholding tax requirement in case of interest payments made for the secondary subordinated bank loans, 5 per cent in case

of delayed interest payments originating from supply of goods, and 10 per cent in all other cases.

8 Are there usury laws or other rules limiting the amount of interest that can be charged?

The parties to a Turkish commercial loan agreement may freely agree on any interest rates. However, the parties may consider the general civil law principle of *contra bonos mores*.

9 What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

It is usual in a financing for a borrower to indemnify lenders against any cost, expense, damage, loss or liability incurred as a result of its breach of the provisions of the finance documents as well as defaults, failure to pay or if any obligation of a borrower under or in connection with any finance document or if any obligation guaranteed by the borrower becomes unenforceable, invalid or illegal.

10 Can interests in debt be freely assigned among lenders?

Pursuant to Turkish statutory law, creditors may freely assign claims arising from loan agreements in general. However, general banking secrecy or data protection provisions may have to be considered by the creditors. Furthermore, foreclosure of any or certain types of assignment may be agreed by the parties.

11 Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

There is no rule governing such a case in Turkish law.

12 May a borrower or financial sponsor conduct a debt buy-back?

Principally, this is possible. However, the relevant financing agreements can restrict it.

13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Depending on the size of the transfer, borrowers may acquire a blocking minority which allows them to block early terminations.

Guarantees and collateral

14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

Turkish law generally imposes no limitations on foreign companies providing guarantees for the benefit of their Turkish affiliates or subsidiaries. Any foreign-registered company which shall submit securities as contingencies other than cash credits has to get permission from the Banking Regulation and Supervisory Board for the finance documents.

15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

Pursuant to article 380 of the new Turkish Code of Commerce, transactions a joint stock company execute for the advancement of funds, provision of loan or security with the purpose of the acquisition of its shares by a third party is prohibited. In the case of the providing of such guarantees or collateral or financial assistance conflicts with such provisions, the relevant agreements are considered null and void. However, it will not apply to transactions performed by banks or financial institutions in their ordinary course of business; and to transactions effected for share acquisition by the employees of the company or the employees of a subsidiary company. Nevertheless, if these exempted transactions have the effect of reducing the reserves of a company below certain levels, such transactions may become void. It is believed that the article 380 prohibition of financial assistance provision should not be extended to the limited liability company's transactions. Hence, one solution could be the conversion of the joint stock company to a limited liability company. The other alternative could be a post-acquisition upstream merger. However, risks are attributable to all alternatives as there is no precedent for such cases yet.

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

Turkish civil law provides for two main types of security investments; real securities and personal securities. Broadly speaking real securities includes the mortgages on immovable properties and pledges on movable properties (shares, goods, etc) and rights (ie, IP rights, mining licences, etc) as well as commercial enterprise pledges. Personal securities include suretyship and guarantee agreements.

Also bonds, cheques are considered as ways of securities as well as an assignment of any property on the belief that it will be assigned back to the previous owner when the payment obligation considered has been fulfilled.

In principle the charges are considered as one of the aspects that should be decided by the parties within the principle of 'freedom of entering into a contract'. However, it may be subject to restrictions on those contracts linked to the public interest, namely, mortgages for no commercial purpose.

A commercial enterprise pledge may be considered as blanket lien which sets a pledge on the entity's movable properties without transferring the right of usage. The movable properties in this case should be understood as the commercial title, operating devices and IP rights. All asset grant is not possible where the law requires a specific procedure to comply with to hold that security valid for the third parties (ie, real estate mortgage).

17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

The ways of perfecting certain types of collateral may be governed by different aspects of law and bodies depending on the subject of collateral.

This depends on the specific type of security. For example, registration requirements exist concerning mortgages. According to the mandatory rules of Turkish law, the agreement for the mortgage of land has to be arranged by Land Registry Office and has to be signed by the parties at the Land Registry Office. The commercial enterprise pledge agreement prepared by a Turkish notary public located at the same district where the commercial enterprise is registered must be registered with the relevant trade registry where the commercial enterprise subject to pledge is registered. A transfer of shares in a limited liability company requires the approval of signatures of the parties by a notary public, whereas a pledge or transfer of shares in a stock corporation or of moveable property does not. A pledge or transfer of moveable property generally requires the transfer of possession of the asset. If an IP right is pledged, registration at the Turkish Patent Office may be required. The contract for the assignment of claims or proceeds has to be in written form.

18 Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

Generally, there is no requirement for renewal procedures under Turkish law. But, in a pledge of goods, the right of pledge ends if the pledgee ceases to possess the goods.

19 Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

No explicit legal provisions exist in Turkish law stating that approval of a works council or other similar consent is necessary before granting a guarantee or security.

20 Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

If there is any pledge of goods, the possession of the goods subject to pledge may be held by a third party as an agent on behalf of the pledgee or pledgees. For example, parties may agree that the pledged good be kept in safe custody on behalf of the pledgee or pledgees throughout the pledge period. If the pledgee assigns its rights arising out of the pledge agreement to a third party, then possession of the pledged goods may be transferred to such third party or trustee, who may start to act as an agent of the third party. For mortgages, the identity of the holder of the secured claim and holder of the therefore granted security is required to be known.

21 What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

Turkish statutory laws do not explicitly deal with creditor's protection before the release of collateral. Nevertheless, there are several provisions leading to such protection. For example, the holder of a mortgage is protected as long as it is registered in the Land Register and the mortgage itself cannot be deleted without the holder's consent. Moreover, secured parties entitled to rights in rem benefit from a certain level of protection pursuant to the Turkish civil law's provisions on 'acquisitions in good faith'.

22 Describe the fraudulent transfer laws in your jurisdiction.

Depending on the circumstances of the individual case, Turkish laws provide for several provisions on fraudulent transfers. For example, if a debtor has transferred his or her assets to third parties at a lower price than the actual value of such assets, then creditors may demand the cancellation of the transfer and the judicial sale of the assets in order to collect their receivables. Besides this, if a debtor transfers his or her assets to third parties in order to prevent his or her creditors' collections, the creditors may also demand the cancellation of the transfers made to the third parties that were not in good faith provided that they claimed execution proceedings against the debtor from the five-year period of transfers. The fraudulent transfers may also form a criminal offence.

Debt commitment letters and acquisition agreements

23 What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?

The documentation is principally determined by the type of deal, mainly the target, the enterprise volume and the volume of debt as well as if the lenders intend to syndicate parts of their share internationally. The standard documentation published by the Loan Market Association can be used. However, some banks use their templates. Commitment letters are signed in order to finance the acquisition of bank credit and always subject to the fulfilment of various conditions. If the provisions of the General Credit Commitments have not been delivered and examined by the borrowers prior to signing the commitments, then the commitments shall be null and void according to the new Turkish Code of Obligations. It is also prohibited to add unusual clauses to the commitments, contrary to bona fide principles, in order to worsen the positions of the borrowers.

24 What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

It basically depends on the deal and the parties' negotiating power. Principally, sellers expect that the banks' commitment is subject to reasonable conditions precedent only.

25 What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

Conditions precedent contained in commitment letters mainly depend on the characteristics of individual transactions. Commitment letters contain conditions as to compliance; usually material adverse changes, breach of representations or warranties, execution of final documentation within a certain period, regulatory requirements and approvals, as well as satisfactory due diligence results.

26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Banks often ask for flex clauses. Nevertheless, such clauses are subject to the new mandatory arrangements for general terms and conditions prescribed by the new Turkish Code of Obligations. As such clauses may be assessed against bona fide principles in order to worsen the positions of the debtors or in case such clauses have not been examined by the debtors prior to the signing of the commitments, then such clauses shall be considered void.

27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

In Turkey, securities demands do not play a crucial role in acquisition financing.

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

The key elements are, inter alia, conditions precedent, drawdown and utilisation rules, representations and warranties, covenants, prepayment and repayment provisions, indemnification and collateralisation.

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

In Turkey, commitment letters and acquisition agreements need not be publicly filed.

Enforcement of claims and insolvency

30 What restrictions are there on the ability of lenders to enforce against collateral?

The ability of lenders to enforce collateral is not restricted. Nevertheless, exceptions exist pursuant to general principles of Turkish civil and insolvency law.

31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

Turkish insolvency law provides for the possibility of suspension of bankruptcy proceedings, for which a debtor who is overindebted may apply, under certain strict requirements (inter alia, on the basis of a detailed rescue concept). If such proceedings are granted, the debtor may continue management on an in-possession basis in order to follow the rescue concept by being protected against any creditor enforcements. Turkish insolvency law also provides for a specific agreement called concordatum, which could be made by and between the debtor and the creditors. Having signed the concordatum, the debtor may either delay the payment dates of debts or make discounts on a definite ratio with the approval of the creditors. If such proceedings are granted, the debtor may also continue management of an in-possession.

32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

In execution proceedings, the secured creditors (ie, lien holders) prevail against the other unsecured creditors on condition that the date of the lien is prior to the date of the attachment of the other unsecured creditors. So that, in case of the sale of the attached asset or the receivables, the secured creditors collect their proceeds at first and, if any sum remains, then the other unsecured creditors shall contribute to the remaining sale price. The secured creditors prevail against the other unsecured creditors in bankruptcy proceedings on the same condition related to the dates of the lien and the attachments.

33 In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders. What are the rules for such clawbacks and what period is covered?

Turkish Insolvency law provides for several clawback rules pursuant to which transactions entered into within a certain period of times prior to insolvency may be challenged. The preference periods may also vary whether the subject borrower or lender is in default or not. The period may depend on the type of transaction and type of insolvency that the pursuing party may choose to for the liquidation procedure. In any case the date of request for claw back cannot be longer than five years which may be claimed by any governmental body, court or third party, following the date of transaction (Turkish insolvency law articles 277 and the following articles).

It may also depend on whether or not such transactions were made on gratuitous contracts, on the time lag between such transactions and the application for insolvency proceedings, the requirements differ. For example, a transaction between the debtor and a third party might be contested if it was made during the last year prior to application, provided that such third party was, on the date of the transaction, aware of the debtor's insolvency or the application.

A transaction with a third party which was made on gratuitous contracts may be contested in any case if it was entered into during the last two years prior to the application. Longer clawback periods exist in specific cases. For example, a transaction the debtor entered into with a third party in order to disadvantage other creditors is contestable within five years provided that the third party was aware of such intention of the debtor at the date of the transaction.

Please also see questions 22, 28 and 31.

34 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

Creditors are generally ranked as follows: (i) secured creditors; and (ii) unsecured creditors. Secured creditors prevail over unsecured creditors on condition that the date of the lien is prior to the date of the attachment of the unsecured creditors.

Unsecured creditors are ranked as follows:

- compensation claims of the workers depends on the severance and notice pay of their contracts of employment;
- subsistence money concerning judgments rendered for family law disputes;
- compensation claims of persons who are 'under custody';
- claims determined as 'privileged' by specific clauses of the laws; and
- other claims.

The debtor is entitled to submit to the court a restructuring plan under certain circumstances determined by law. Restructuring plans may disadvantage the creditors by way of a stay of payment dates or discounts on the amount of payments made by the debtor. Restructuring plans have to be admitted by the ordinary majority of creditors and in such case the total

amount of the claims of creditors who accept the plan have to represent two-thirds of the total claims.

35 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

Mortgages are ranked up to the degree of themselves. Mortgages ranked in a prior degree shall prevail to the mortgage in a subsequent degree. If any vacancy of any degree, the mortgage ranked in a lower degree cannot upgrade to the higher degree unless otherwise agreed by the owner and the mortgagee in a mortgage agreement. Pledges (moveable pledges) are ranked according to what date they were established. The owner of a moveable may also establish a secondary pledge on the pledged moveable. In such a case, the owner instructs the first pledgee to deliver the moveable to the second pledgee after the payment of the first pledge. The pledgee may also establish a subsequent pledge on the moveable with the consent of the owner.

36 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

Turkish insolvency law does not explicitly deal with the treatment of claims arising from an original issue discount. Therefore, the aforementioned general principles of Turkish insolvency law apply.

37 Discuss potential liabilities for a secured creditor that enforces against collateral.

Turkish law does not provide specific liabilities for secured creditors. As for a general duty of care, a secured liability shall be liable against the owner if any damage on the pledged moveable occurs due to a fault of the pledgee. The owner of a property is liable to the pledgee in case of any depreciation on the value of the property. The pledgee may demand new securities for his receivables in case of any depreciation. The pledgee may also demand from the owner not to commit any act that may give rise to any depreciation on the value of the property.

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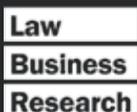
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