



Cross-Border Financing Report **2015**

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Section 1 – Bank licences

1.1 What licences or approvals do lenders need to have if lending to a borrower in this jurisdiction if a) the lender is a bank or b) the lender is not a bank?

In general, commercial loans are not subject to a specific type of licence under Turkish law. However, banks must obtain a banking licence from the Banking Regulation and Supervision Agency (BRSA).

1.2 Are any exemptions available and/or are any techniques typically used to structure around such requirements?

None.

Section 2 – Security interests

2.1 Can security be taken over the following asset classes and what documentation or formalities are required to create, perfect and maintain such security?

- a) shares
- b) bank accounts
- c) receivables
- d) contractual rights
- e) insurance policies
- f) real property
- g) plant and machinery
- h) intellectual property
- i) debt securities
- j) future/after acquired property
- k) floating charges over all assets

Shares

Yes. Share pledge procedure depends on the type of the company. For joint stock companies, in the case of bearer shares, transfer of possession is required and written agreement is advisable. For registered shares, written agreement and/or endorsement, followed by the transfer of possession is required for the establishment of the pledge, and registration to the company's share book is a key element for perfection of the pledge. For limited liability companies, the share pledge agreement must be notarised and the share pledge needs to be registered with the share book to perfect the pledge. If the company, shares of which are subject to pledge, is a regulated entity, establishment of a pledge may also require obtaining the relevant regulatory authority's approval (eg the Energy Market Regulatory Authority or BRSA).

Bank accounts

Yes. A written agreement is required for a bank account pledge and a notification to the relevant bank is advisable.

Receivables

Yes, through or a receivables pledge. For the assignment of a receivable, a written agreement must be executed. While consent of the debtor is not required, notification to the debtor is advisable. Assignment of a receivable will also result in the transfer of all ancillary rights, such as mortgages and pledges. For a pledge of a receivable, a written agreement is required and the receivable must be sufficiently precise and transferrable. While consent of the debtors is not required, notification to the debtor is advisable.

Contractual rights

Yes. The explanations for the receivables also apply to the security over contractual rights.

Insurance policies

Yes, except for liability insurances, security can be taken over insurance policies. The explanations for the receivables also apply to the security over insurance policies.

Real property

Yes, through a mortgage transaction. An official deed must be prepared in official form by, and registered with, the local title deed registry.

Plant and machinery

Yes, through a commercial enterprise pledge or separate individual pledge agreements. A written agreement must be executed before a notary public along with a list of pledged items, and be registered with the trade registry within 10 days for the establishment of the pledge. Machinery can be pledged separately by execution of a written agreement and by delivery of possession of such properties. The latter is not usually preferred due to the delivery of the possession of machinery. Plants can also be pledged through a mortgage.

Intellectual property

Yes, through a separate pledge agreement or in a commercial enterprise pledge. A separate pledge agreement must be in writing and registration with the Turkish Patent Institute is required for the pledge for perfection.

Debt securities

Yes. Security over debt securities can be taken by way of a pledge agreement. In general, in order to pledge debt securities, a written pledge agreement must be executed and the possession of the debt security must be assigned to the pledgee. In addition, where a negotiable instrument exists the procedure for the pledge differs, depending on the type of negotiable instrument.

Future/after acquired property

Yes. Security over future/after acquired property can be taken by way of a pledge agreement provided that they can be sufficiently determined. Turkish law does not require the pledgor to have the ownership of the property for the pledge agreement to be valid.

Floating charges over all assets

The concept of a floating charge does not exist in Turkey.

Stamp tax and notary fees, among others, are applicable to written agreements over the secure amount. There is an exemption from stamp tax for loans granted by financial institutions, and the security agreements relating to loan are also exempt from stamp tax. This exemption does not cover loans granted by parties which are not considered as financial institutions. Also, where the registration is required with the public registries, a registration fee over the secured amount must be paid. Where registration and/or notarisation is a requirement the process can take up to five business days.

2.2 Highlight any issues with securing obligations that may arise in the future.

Security can be taken over future receivables by way of an assignment of such receivables, provided that the content and amount of such receivables are identifiable; otherwise such assignment shall be invalid.

2.3 Can a universal security agreement be used to grant security over all assets in this jurisdiction?

The concept of universal security agreements used for granting security over all assets is not recognised under Turkish law.

2.4 Can security be granted for the benefit of different classes of creditors under the same security agreement and if so, are there any issues that creditors should be aware of in adopting this approach?

The parties can agree to a contractual subordination of debts and arrange the order of debts to be paid. However, such agreement shall not be effective in a case of bankruptcy. In addition, a mortgage can be established over a real estate for the benefit of different creditors, and in the event of bankruptcy such creditors shall have priority as to the distribution of the proceeds of the mortgaged property. The rank between mortgagees shall be determined due to their fixed ranks registered with the title deed.

2.5 Can security trustee or security agent structures be used in this jurisdiction to secure obligations that are owed to fluctuating creditor classes?

Security trustee or security agent structures are not recognised under Turkish law. However, a non-Turkish trustee or agent may be used by a pool of lenders in Turkey if such trustee or agent is duly authorised under the law of its principal place of business.

2.6 Briefly outline any issues to consider when transferring loans and accompanying security interests between lenders.

The transfer of loans is made through an assignment of the receivables and ancillary securities. Parties to the transfer should take into account the taxes and duties as well as registration costs, all of which will be the same as the initial loan and security package.

2.7 Can security be granted by third parties? Are there any rights of contribution, subrogation or similar that might arise as a result of granting/enforcing third party security that ought to be/can be waived?

Generally, yes. However securities granted to third parties may be subject to restrictions depending on the type of the company. For instance, certain restrictions are applicable to securities granted in favour of third parties by publicly-traded companies, except for banks, financial institutions and investment companies.

Subrogation automatically takes place where the third party pledgor or surety performs the main debtor's obligation to the creditor. A guarantor will not be subject to subrogation; however he can recourse to the debtor in accordance with the unjust enrichment provisions regulated under the Turkish Code of Obligations.

2.8 Briefly outline the registration requirements, if any, applicable to security interests created in this jurisdiction, including considerations such as the timing, expense and the consequences of non-registration.

Please see question 2.1.

2.9 Briefly outline any regulatory or similar consents that are required to create security (other than board/shareholder approvals).

Please see question 2.1.

Section 3 – Guarantees

3.1 Briefly explain the downstream, upstream and cross-stream guarantees available, with reference to any particular restrictions or limitations?

Downstream, upstream and cross-stream guarantees are generally available under Turkish law; however, there are certain limitations as to upstream and cross-stream guarantees. Pursuant to the Turkish Commercial Code, parent

companies cannot direct their subsidiaries to undertake liabilities such as providing surety or guarantee. However, where the parent company holds 100% of the subsidiary's shares, it can impel the subsidiary to provide such guarantee provided that such guarantee is part of the group of companies' financial plan and does not risk the subsidiary's financial future.

Also, pursuant to Turkish Commercial Code, joint stock companies cannot provide financial assistance for the acquisition for its own shares.

3.2 What regulatory or other consents are required to grant downstream, upstream and cross-stream guarantees (other than board/shareholder approvals)?

Please see question 2.1.

3.3 Briefly outline any enforceability concerns associated with the granting of downstream, upstream and cross-stream guarantees that lenders should be aware of (eg any exchange controls or similar obstacles).

While enforcing a guarantee, enforceability concerns differ depending the type of security used. Where a guarantee agreement exists, which stipulates a separate obligation from the main obligation, the creditor may directly raise claims against the guarantor, and validity of the main obligation shall not affect the validity of the guarantee agreement. However, if a surety agreement is used, the creditor may raise his claim against the third party where the debtor defaults on his obligation, and the validity of the agreement is dependent on the main agreement.

Section 4 – Enforcement

4.1 Do local courts generally recognise and enforce foreign-law governed contracts?

Yes.

4.2 Will the local courts generally recognise and enforce a foreign judgment that is given against a domestic company in foreign courts (particularly the New York or English courts) without re-examining the merits of the decision?

Yes. Turkish courts recognise and enforce foreign judgements without re-examining the merits of the decision if the following conditions set out under the International Private and Procedure Law (IPPL) are satisfied: (i) the foreign court decision must be final, ie the appeal process for the case must be concluded, or the time period to appeal must have expired in a final way, or there should be no appeal process available for the decision; (ii) the decision must not relate to a matter which falls under the exclusive jurisdiction of Turkish courts, eg the courts where the immovable property is located has exclusive jurisdiction to hear disputes regarding *in rem* rights on such property; (iii) the application for the decision must not violate Turkish public policy; and, (iv) while rendering the decision, the opposing party which the enforcement decision is sought against, must be duly summoned or represented in accordance with the procedural rules of the foreign country's law.

4.3 Will the local courts recognise and enforce an arbitral award given against the company without re-examining the merits of the decision?

Yes. Turkey is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, accordingly, Turkish courts recognise and enforce foreign arbitral awards made in the territory of another contracting state.

4.4 When enforcing security, what factors significantly impact the time such enforcement takes and the value of the proceeds received from such enforcement? For example, are there any statutory requirements such as (a) holding a public auction; (b) court involvement; or (c) obtaining regulatory consents?

In order to liquidate an attached property a sale request should be made before the execution office for a public auction. Movable properties must be

sold within two months and immovable properties must be sold within three months of the sale request. Objections against the valuation made for public auction and the auction itself may lengthen the enforcement process. The preferred bid must satisfy at least 50% of the valuation amount plus expenses and the amounts owed to secured creditors. In case no bid satisfies such requirements, there will be subsequent auctions held until those conditions are met.

While private auction is not explicitly prohibited by the law, it has not been tested before the Turkish courts and is not a widely-applied method.

4.5 Are there any restrictions that apply specifically to foreign lenders when taking enforcement action?

Pursuant to the IPPL, foreign real persons or legal entities taking enforcement action before Turkish courts or execution offices must provide collateral for the amount that will be designated by the court for the purpose of covering litigation expenses and the opposing party's losses, unless a bilateral treaty exempting foreign persons from such an obligation exists between Turkey and relevant foreign country.

Section 5 – Bankruptcy and insolvency proceedings

5.1 Briefly, outline the main bankruptcy/insolvency processes in this jurisdiction, including any control or influence that creditors can exert on the process, the timeframes usually involved and any mandatory filing requirements.

In order to commence general bankruptcy proceedings against a debtor the creditor is required to request a payment order to be delivered through the relevant execution office to the debtor. If the debtor does not object to the payment order within seven days of receipt the order becomes final and enforceable. The creditor may apply to the competent commercial court requesting bankruptcy of the debtor within one year from the receipt of the payment order. In the event the debtor objects to the payment order, the creditor may request the competent commercial court to waive the objections and commence the bankruptcy process. The court will examine the objections and the request and if the objection is not found rightful it will issue a payment order demanding payment within seven days. If payment does not occur in that period the court will declare the debtor's bankruptcy.

Creditors may also directly apply to the competent commercial court to commence bankruptcy proceedings without making an application before the execution offices, where one of the conditions listed in the Enforcement and Bankruptcy Law is fulfilled (eg the debtor does not have a certain address, is involved in fraudulent misconducts which will infringe creditors' rights or hides the assets subjected to execution processes).

Upon declaration of bankruptcy by the court, all assets of the debtor are taken over and managed by a bankruptcy estate established before the official bankruptcy office and the assets are liquidated. The proceeds are then distributed to creditors on a pro-rata basis.

Debtors may request the postponement of the bankruptcy from the commercial court by submitting an improvement plan. If the court finds such a plan feasible it may grant postponement of bankruptcy for up to a year, which may be extended for another four years. During postponement, a court-appointed administrator monitors the improvements and compliance with the improvement plan. The court can rescind its postponement decision and declare the debtor bankrupt based on the administrator's report.

5.2 Are there any preference, fraudulent conveyance, clawback, hardening periods or similar issues or preferential creditor rights that lenders should be aware of?

Courts, under certain circumstances regulated under Enforcement and Bankruptcy Law, have the authority to invalidate transactions the bankrupt debtor has entered into, upon the request of the creditors. The transactions made for no consideration may be invalidated under the condition that they have taken place within two years before the bankruptcy of the debtor. Transactions with the purpose of harming the creditor may also be invalidated provided that the creditor has commenced the bankruptcy or execution proceedings within five years from such transaction. Lastly, the following transactions may be invalidated provided they took place no more than a year before the declaration of bankruptcy of the debtor: (i) the pledges made for securing existing debts; (ii) non-cash payments; (iii) payments for undue debts; or, (iv) annotations of rights *in personam* at the title deed registries.

Once the assets of the debtor are sold, certain receivables have priority as to distribution of the proceeds such as taxes, state receivables, duties, employees' wages for the last year and secured obligations.

5.3 Do bankruptcy/insolvency processes provide for any kind of stay/moratorium on enforcement of lender claims? If so, does the stay/moratorium apply to the enforcement of security interests?

Once the debtor is declared bankrupt no enforcement and execution proceedings can be pursued against the debtor. However, the pledgee of a pledged asset shall have priority as to the distribution of the proceeds of such asset.

Section 6 – Your jurisdiction

6.1 In no more than 200 words, outline any cross-border financing trends specific to your jurisdiction?

Since the Turkish equity capital markets have been quiet for the last few years, project finance and acquisition finance have been more favourable for borrowers. Public-private partnership structures have been increasingly utilised to finance infrastructure projects, especially in the healthcare sector.

Since a legislation change in 2014, covered bonds in the market have increased. Also, the legislature is intending to regulate and increase Islamic financing. Accordingly, one state bank has established Turkey's first state-owned Islamic bank and two others have announced their intention follow suit. The legislation is yet to be developed and tailored to the needs of the market, though, so Islamic financing is not as widely used as other existing financing methods.


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Gamze Çiğdemtekin is a leading corporate and M&A lawyer in Turkey advising major international and Turkish clients in several sectors, including energy, banking and insurance, manufacturing, cements, chemicals and pharmaceuticals. Her expertise includes advising on a wide range of corporate and finance transactions with a particular focus on M&A, private equity, energy projects and competition law. She is ranked as a leading M&A lawyer in Turkey by several law directories and Forbes Turkey's survey listed her as one of the top lawyers by number of cases handled before the Competition Authority. Prior to establishing Çiğdemtekin Dora Aracı, she was a partner at White & Case's Istanbul office and also played a key role in helping Kinstellar and Chadbourne & Parke establish their Istanbul offices.


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Tuna Çakırca has extensive experience including M&A/corporate and capital markets work. Her M&A experience includes representation of both sell and buy side clients in a wide range of sectors. She has also represented underwriters, issuers and/or selling shareholders, most recently for electricity and telecommunications companies. Additionally, she has extensive experience in representing foreign and local companies in connection with their corporate, commercial, regulatory, employment and real estate matters. She continues to assist many multinational companies in their day-to-day businesses in such areas. Prior to joining Çiğdemtekin Dora Aracı she was a senior associate at Chadbourne & Parke and formerly an associate at Kinstellar and White & Case in Istanbul.