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A GUIDELINE IN ADDRESSING LEGAL AND COMMERCIAL RISKS IN CROSS-BORDER COMMERCIAL AGREEMENTS[1]

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This article aims at providing a general guideline in addressing some of the legal and commercial risks in cross-border commercial agreements. This article focuses on B2B agreements that are concluded between merchants, both of which have equal negotiation power. Therefore, the agreements concluded between a commercial enterprise and a consumer i.e., B2C, agreements are not within the scope of this article.An important feature that distinguishes B2B commercial agreements is that these agreements can be concluded within the framework of freedom of agreement principle, whereas B2C agreements would generally be limited with regulatory requirments to protect consumers. Consequently, in a B2B agreement the parties will have the ability to decide on terms according to their wishes while drafting these agreements.

Which Provisions Should Be Considered When Drafting Commercial Agreements?

Governing Law: The issues of which law will be applicable to a commercial agreement is of great importance especially for the agreements that contain "foreign element". The governing law to be applied to an agreement under Turkish law is regulated in Article 24 of the Turkish International Private Law and Procedural Law ("TIPPL"). Accordingly, the parties of a commercial agreement are free to determine which jurisdiction is to be applied to the agreement. The governing law chosen by the parties does not necessarily be the law of a country associated with the parties. The parties can also make a partial choice of law; for example, they can decide to apply Turkish law to a certain part of the agreement while deciding to apply for instance German law to another part. In addition, the choice of law can be made at any stage; for example, if the parties agree, they can decide on the make a choice after the dispute has arisen.

Validity of the Agreement: Another issue that could be neglected and creates problems in practice is the valid establishment of the agreement. Under Turkish law, an agreement does not need to be in written form, unless the law requires for a specific form for certain types of contracts.Nevertheless, it is recommended to conclude them in a writing so that the terms agreed upon by the parties can easily be proved. There may be special form requirements for certain type of agreements in different jurisdictions. If the parties choose a different jurisdiction as the governing law that they are not familiar with, they should check whether such an agreement is subject to a special form requirement in such jurisdiction.Payments in Foreign Currency or Turkish Lira: According to the Turkish Code of Obligations ("TCO"), if a payment in a currency other than TRY is agreed in the agreement, the debtor will have

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the right to make the payment in TRY as converted at the foreign exchange currency rate announced by the Turkish Central Bank on the payment date, unless the agreement contains "in kind" payment statement or a phrase to that effect. Therefore, if the payment is requested to be made exactly in foreign currency, a statement such as "it shall be paid exactly in US Dollars" should be added to the agreement.

Interest Rate: Pursuant to Article 8 of the TCC, merchants can freely determine the interest rates applicable to commercial transactions, if such rate is decided in good faith. In addition, pursuant to Article 20 of the TCC, as a reflection of the principle that no commercial work or service is done free of charge, an interest may be requested even if the parties did not agree to apply a certain interest rate in case of a default in payment. Article 8 of the TCC also allows accrual of compound interest on open accounts and loan agreements. Nevertheless, it is recommended that the parties agree on the interest rate and which type of obligations will attract interest in the agreement. Because, in the absence of a specific provision regarding applicable interest rate,statutory interests and statutory rates will be applicable, and the statutory interest will likely to be lower than the commercial interest rates realized in the market and may vary according to the governing law of the agreement.

Limitation of Liability: It is strongly recommended to provide a limitation of liability clause, to limit the losses or compensation that the counter party may request under the agreement. Nevertheless, under Turkish law, limitation of liability will not be valid in cases where the loses occur because of a gross negligence or willful misconduct of the defaulting party. Under Turkish Law, as a rule, the parties to a commercial agreement can limit their liability only before a damage occurs under such agreement.

Penalty Payments: Turkish law allows the parties to provide a penalty clause in commercial agreements, in case of a breach of an obligation under the agreement. A penalty payment can be requested in addition to the losses that the non-defaulting party suffers because of such breach. The main difference between compensation of losses and a penalty payment is that, the non-defaulting party may request the penalty payment without having to prove that it suffered losses and the amount of such losses. In other words, a defaulting party would be obligated to pay a penalty once the non-defaulting party can prove that defaulting party breached an obligation upon which a penalty payment is triggered pursuant to the agreement. Therefore, even if the non-defaulting party does not have any damages, he will be able to demand the penalty payment. Thus, the parties can conclude agreements with high economic value with the assurance of being able to impose sanctions on the other party without the burden of proving their losses. Although the judges are given the authority to deduct the excessive penalties within the scope of Turkish Law, they may not use this authority for the debtors who are merchants. On the other hand, a ceiling may be stipulated between the parties regarding the total amount of penalty clause. Different jurisdictions may provide for differing regimes concerning penalty payments, so the validity and the applicability of a penalty clause must be reviewed by a qualified lawyer of such jurisdiction. For instance, under English law, if the parties provided a penalty payment in the agreement, such penalty may be regarded as the pre-determined amount of the damages that the parties may seek under the agreement, and even if they incurred damages greater than such amount, no further compensation can be sought from the defaulting party.

Protection of Intellectual Property Rights: It is recommended that matters such as use of the trademark, transfer of intellectual property rights, the limits and duration of use or the prohibitions regarding trademark use must be regulated in the agreement between the parties.

In connection with IT and technology related matters, it is important to protect background information. The background information is all IP that is developed/controlled/owned the developer prior to commencement of, and/or outside the scope of a project/agreement and even if this background information is utilized in a project, the agreement must determine clearly by whom the ownership of the background information will retained.

Another way to structure this could be to define "foreground information". Foreground information is the IP that is specially generated for the customer requirements (excluding any background information and third-party licenses). If all foreground IP is agreed to be transferred to a customer, the developer should consider whether he should keep for instance, a non-exclusive, perpetual, free of charge and worldwide license for himself over the foreground IP so that it can be used in future researches & developments.

Inspection and Notice Periods Regarding Defective Goods: Article 223 of the TCC provides a general principle for sale agreements and states that the purchaser shall examine the goods as soon as possible in the ordinary course of business. Article 23 of TCC, on the other hand, establishes more specific statutory limitations for commercial sales between merchants. These time limitations are quite short. Pursuant to Article 23 of the TCC, the purchaser must report any obvious defects within 2 days after receipt of the goods, and must examine the goods and report the defects, within 8 days after receipt of the goods. If the purchaser discovers any hidden defects (i.e., defects which cannot be determined with an ordinary inspection), he shall notify the sellers as soon as this defect is discovered pursuant to the general principle provided under Article 223 of the TCO. In any case, reporting of the defective goods and any claims relating thereto is subject to a statutory limitation of 2 years pursuant to Article 223 of TCO. These examination periods as well as the periods related to hidden defects can be extended by the parties by agreement.

Default: It is recommended the agreements provide provisions governing what constitutes an event of default and the consequences of default. These may include breach of the agreement as well as other circumstances such as bankruptcy, change of control etc. It is also recommended to include cure periods for defaults which may be cured by giving a reasonable period. TCO sets forth remedies available under the law in case of a breach of contract but these remedies may not be sufficient or provide sufficient protection, and therefore the parties must include a section in this regard suitable for the commercial transaction.

Term and Termination (Right to Exit): It is recommended to include provisions regarding the duration and renewal of the agreement. In this context, provisions on termination of the agreement by default (i.e. upon fault of the other party); provisions on the termination of agreement after a certain period of time without any fault of any party (termination after a certain notice period without a cause) should be provided especially in long term agreements. This would give an exit right to the parties who may not wish to continue to be bound by such an agreement even though there may not be a default. Also, automatic renewal provisions are not recommended as most of the time there is not a tracking system that alerts the parties prior to renewal time of the agreement, and this may cause unintentional renewals.

Force Majeure: If the obligations in the agreement cannot be fulfilled due to force majeure reasons the parties could not foresee, such as the Covid-19 pandemic, it may be possible for the parties to rely on force majeure. In this respect, in the agreement, the situations that will be considered as force majeure, and what the terms and consequences of these situations will be, should clearly be determined. If force majeure is not regulated in the agreement, the regulations in the governing law for the agreement will apply to such situation.There are certain remedies provided under Turkish law, that may be used in case of a force majeure

event, even if such a clause is not provided in the agreement. Nevertheless, these remedies may not always address the issues. Also, the governing law chosen for the agreement, may not provide any remedy mechanism that the parties may benefit under such law. Therefore, a good description of what constitutes a force majeure event, and the consequences thereof is recommended to be included in the commercial agreements.

Tax gross-up: This is one of the issues that is usually neglected in commercial agreements. The tax costs that impact the pricing of the goods or services may change during the term of a commercial agreement and may impact the pricing and profitability. A tax gross-up mechanism that would reflect the increased taxes to the price may be useful especially in long term commercial or supply agreements.

Risks Regarding Competition Law: Non-compete, exclusivity and determination of resale prices are provisions that are generally prohibited under Turkish law, unless there is an explicit exception according to which the parties can provide such a clause. If the parties need to provide these types of provisions, such agreement should be reviewed by a competition law expert. Given the aggravated consequences ofcompetition law breaches (i.e., Turkish Competition Authority had the right to impose fines up to 10% of the turnover of the breaching enterprises), the parties must conduct such a review with a competition law expert to avoid any such risks.

Protection of Personal Data: It is necessary to determine whether there is a personal data transfer between the parties of the commercial agreement. There may be personal data transfer in some business relations. For example, in areas such as marketing, promotion, research, human resources, information technologies how collected data is protected and what it is used for, are important. If there are such personal data transfer, it is recommended that the parties should determine the responsibilities in this respect and provide for an indemnity mechanism in case of a breach of these regulations.

Dispute Resolution Methods: In practice, when it comes to dispute resolution methods, four methods stand out among others. The first one of these is "negotiation". Negotiation is the method that is least expensive and does the least harm the relationships. However, unfortunately, especially in confrontational cultures, the parties may not achieve a positive result through negotiation. The second method is "litigation"; in other words, it is to apply before the national courts. Today, since there is no international court for the settlement of international commercial disputes, only national courts are competent in the resolution of such disputes. The third method is arbitration, in which a similar litigation process is carried out, and the fourth method is "voluntary mediation".

Pursuant to Article 47 of the TIPPL, if there are foreign elements, the parties may choose the jurisdiction of a foreign court to resolve the disputes arising from an agreement.

With an arbitration clause included in the agreement, the parties may decide to settle the contractual disputes between them by arbitration instead of national court. In this is the case, the parties will no longer be able to apply to the national courts. In arbitration, the parties are free to choose the place of arbitration, the language in which the judgment will be made, the persons who have the authority to decide on the dispute, in other words, the arbitrators. Unlike cases heard before national courts, arbitration proceedings are conducted in privacy and generally completed in shorter periods.While there is an appeal process in national courts, the decision of the arbitral tribunal is final and binding on the parties, and the arbitral decisions may be cancelled only due to limited procedural reasons. The New York Convention of 1951 comes into play if the foreign arbitral decision is to be enforced in a place other than the

arbitration venue. Compared to enforcement of national court decisions, enforcement of arbitration decisions will be subject to almost same uniform rules all over theworld since many countries, including Turkey, are party to this Convention. In these respects, arbitration is a more advantageous dispute resolution method compared to national courts. However, the arbitration process can be a more costly process compared to the litigation process in national courts, considering the fees of the arbitrators and the administrative costs to be paid to the chosen arbitration institution.Another dispute resolution method, voluntary mediation, is based on "win-win" principle. In the mediation process, it is aimed to resolve the dispute in a reasonable manner without focusing on which party is right or what the law regulates about the dispute. If the parties voluntarily want to resolve the dispute through mediation and negotiate the in faith, the chances of reaching to a settlement would be quite high.

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