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GLOBAL GUIDE 2022
CONTRACT FORMATION AND ENFORCEMENT

Contract Formation and Enforcement in Turkey: Overview

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FORMATION OF CONTRACTS

Authority and Capacity

1. What are the authority/capacity rules for entering contracts?

Individuals

Individuals who are 18 or over and are capable of discernment have the capacity to enter into contracts. Individuals below the age of 18 and those with limited capability can enter into contracts with the consent of their legal representatives if they are capable of discernment.

Companies

Capital companies (including joint stock companies (*anonim şirket*) and limited companies (*limited şirket*)) have the capacity to enter into contracts through their corporate bodies (general assembly and board of directors/managers).

In a liquidation process, the liquidation officer(s) can carry out the company's activities. The company's capacity is limited to acts relevant to the liquidation procedure.

Foreign Companies

The capacity of foreign companies is not regulated by Turkish law but governed by the law of its jurisdiction of incorporation.

Certain restrictions apply to foreign companies for certain transactions in Turkey, such as acquisitions of real estate.

General Partnerships

An ordinary partnership (*adi ortaklık*) is not a legal entity under Turkish law. Under the Code of Obligations No. 6098, each partner is entitled to represent and act on behalf of the partnership, unless the partnership agreement provides otherwise. Therefore, the capacity of each partner should be checked when entering into a contract with a general partnership.

Limited Liability Partnerships (LLPs)

LLPs do not exist in Turkey. Limited partnerships divided into shares (*komandit şirket*) are similar to LLPs but are subject to the same rules as capital companies (see above,*Companies*).

Trustees

Trustees (*kayyum*) can be appointed to represent companies in liquidation proceedings. Similarly, custodians (*vasi*) can be appointed to represent individuals who have limited capacity. The appointing court determines the scope of the trustee's or custodian's authority to represent the company or individual.

Charities

Associations (*dernek*) and foundations (*vakıf*) are legal entities and have the capacity to enter into contracts through their legal bodies (for example, general assembly, board of directors, or board of auditors, as applicable) if they are duly established in Turkey.

Public Bodies and Local Authorities

Public legal entities (including certain public bodies and local authorities) and other public bodies that are not legal entities have the capacity to execute contracts through their authorised representatives.

Agencies

Under Turkish law, a representative can be appointed by a principal through a signature circular, a power of attorney, or other specific agreement. The agreement should be reviewed before entering into a contract with a representative.

Formal Legal Requirements

2. What are the essential requirements to create a legally enforceable contract?

The general provisions of the Code of Obligations apply to contracts generally. The essential requirements to create a legally enforceable contract are:

- Offer.
- Acceptance.
- Intention to create a legal relationship (express or implied).

An offer made with an intention to initiate negotiations is not an offer but an invitation to make offers. For a contract to be concluded, the offer and acceptance must be mutual and consistent.

The offer must include the essential terms of the contract. If the offer sets a deadline for acceptance, the offeror is bound by the offer until the deadline expires. After then, the offeror can revoke the offer. If there is no set deadline for acceptance, an offer can be withdrawn if it is not accepted within a reasonable time.

Acceptance is a definite and unilateral declaration of intention by the offeree and must be addressed to the offeror. Conditional acceptance is considered as a refusal of the initial offer and as a new offer. Acceptance of an offer can be inferred from conduct, such as dispatch of the goods or payment of the price.

The Code of Obligations does not expressly regulate "battle of the forms" situations. In these cases, the courts consider that any inconsistent terms do not apply and that the parties' standard terms that are similar are binding. However, if it is obvious that the parties would not have concluded the contract without the excluded terms, the entire contract is void. If the parties agreed on the essential terms of the contract but failed to agree on secondary terms, the court will consider the nature of the transaction and the presumed intention of the parties.

3. Which types of contracts, if any, must be in writing to be valid and enforceable? Under what circumstances are oral contracts valid and enforceable?

Freedom of form is one of the main principles of Turkish contract law. However, certain contracts require a written or an official form to be valid and enforceable.

Contracts that must be in writing include:

- Pre-emption contracts.
- Assignments of claims and receivables.
- Suretyship contracts.
- Certain consumer contracts.

Contracts that require an official form include:

- Sale contracts relating to immovable property or purporting to transfer ownership of immovable property (before the relevant land registry).
- Sales of shares in a limited company (before a notary public).
- Establishment of a company (before a notary public or the relevant trade registry).

Oral contracts are valid and enforceable, but may be difficult to prove and therefore give rise to disputes. Under the Code of Civil Procedure No. 6100, contracts with a value exceeding TRY6,640 (for 2022) must be evidenced in writing before the courts. Therefore, contracting parties generally prefer to enter into contracts in writing.

A contract that must be in writing must be signed by all parties that undertake an obligation. In a real estate sale contract, both parties incur obligations and must therefore sign the agreement.

4. Are there language requirements for the validity of contracts? Is translation into the language of your jurisdiction required? If so, when is this required?

Law No. 805 on the Mandatory Use of the Turkish Language in Commercial Enterprises requires Turkish companies and enterprises to use Turkish in all contracts they enter into in Turkey. This obligation does not cover transactions taking place outside Turkey with foreign parties. While decisions of the Turkish courts on this matter are conflicting, in practice the Turkish language requirement is not mandatory for contracts between Turkish residents and foreign nationals, except for contracts that must be executed before a public authority (such as a notary public or land registry). Some court decisions have held that certain contract terms (such as arbitration and penalty clauses) drafted in English with a Turkish party are invalid. To reduce the risks of invalidity and unenforceability, it is therefore advised to execute contracts in two languages, with the Turkish version prevailing in case of inconsistency.

Additionally, translation into Turkish is required for the purposes of filing a contract with a governmental agency or for dispute resolution before a court.

5. Are contracts in electronic form (email, web-based or otherwise) legally enforceable?

Contracts in electronic form are valid and enforceable if they comply with the Law on Regulation of Electronic Commerce No. 6563 and other applicable legislation, including the following:

- Law on Electronic Signature No. 5070.
- Regulation on Distance Contracts.
- Regulation on Distance Contracts in Financial Services.
- Consumer Protection Law No. 6502.

Electronic contracts are subject to the same requirements as other contracts (see *Question 2*). However, service providers must comply with information obligations before concluding an electronic contract. Non-compliance with these obligations does not invalidate the agreement but results in criminal and civil liability.

Under the Code of Civil Procedure, contracts with a value exceeding TRY6,640 (for 2022) must be evidenced in writing. The written document must meet certain conditions to be admissible as evidence (for example, it must be a tangible object, contain a statement of will, and include the parties' signatures).

Digital material can be submitted in court as evidence of a contract if it is printed out and duly signed (by hand or with a secure electronic signature (see *Question 17*)).

Preliminary Agreements and Pre-Contract Considerations

6. Which types of preliminary agreements are most frequently used and for which types of transactions? Are preliminary agreements presumed to be non-binding?

One or both parties can enter into a preliminary agreement to enter into the main contract. This type of preliminary agreement is binding if it meets all the requirements for a valid contract (see *Question 1* and *Question 2*). Under the Code of Obligations, when the law requires a specific form for the validity of the main contract, the preliminary agreement must also be made in that form. In practice, preliminary agreements to enter into a main contract are most commonly used in sales of immovable property. If one of the parties fails to enter into the main contract, the other party can bring a claim to request execution of the contract.

Other types of preliminary agreements used in practice include term sheets, letters of intent, memorandums of understanding, and so on. These preliminary agreements are not specifically regulated by Turkish law. They establish a general framework for the negotiation of a main contract. The dominant view in legal doctrine is that these preliminary agreements are not binding. However, the parties can agree that certain provisions are binding (for example, confidentiality, termination, and dispute resolution).

7. Are there limitations on the use of exclusivity or lock-out provisions in preliminary agreements under local law?

Exclusivity or lock-out provisions that restrict negotiation with third parties in preliminary agreements are enforceable if they are specifically expressed to be binding. There are no limitations on the enforceability of exclusivity provisions under Turkish law.

8. What are the principles and rules (if any) on pre-contractual liability?

During the pre-contractual phase, the parties must act in accordance with the principle of good faith (see *Question 10*). The parties may be liable in accordance with the principle of *culpa in contrahendo* (that is, fault in the conclusion of a contract). If a negotiating party breaches its pre-contractual duties and is at fault, and the other party suffers damage as a result, the breaching party must compensate the other party.

9. Can negotiations become legally binding in any circumstances?

In principle, negotiations are not binding until a contract is concluded. However, pre-contractual liability can be triggered if a party causes damage or loss to the other party during negotiations (see *Question 8*).

10. Is the concept of "good faith" in negotiations recognised and applied? If so, how?

The concept of good faith is a fundamental principle of Turkish contract law. Every person must act in good faith in the exercise of their rights and in the performance of their obligations (Article 2, Civil Code No. 4721). Therefore, negotiating parties must act in accordance with the principle of good faith. During negotiations, each party must provide the other with any information that may affect their decision to conclude a contract. For example, consumer legislation specifically imposes certain disclosure requirements during the pre-contract stage (such as an obligation to disclose defects in goods). In addition, the parties must not engage in deceptive conduct. A party who is aware that the other party is mistaken must warn the mistaken party. Further, negotiating parties must take precautionary measures to protect each other's assets and personal rights. If a party breaches its pre-contractual obligations, this may lead to cancellation of the contract and/or give rise to liability for damages under the *culpa in contrahendo* principle (see *Question 8*), regardless of whether a contract is concluded.

Formalities for Execution

11. What formalities are required for a contract to be considered validly executed?

The freedom of form principle is one of the main principles of the Code of Obligations. The validity of a contract does not require any specific form, unless otherwise required by law or the parties' agreement (see *Question 3*).

Individuals

Individuals can act on their own behalf or on behalf of others under a power of attorney. Execution of a contract by an individual usually requires the handwritten signature of the individual or their authorised representative. Although not common, the Code of Obligations also allows the use of signatory stamps.

Companies

Companies must be represented by their legally authorised representatives appointed under a signature circular or a power of attorney. Representatives usually execute contracts with their handwritten signature but can also use an electronic signature (see *Question 17*). Affixing a company seal/stamp is not a requirement but is common practice in Turkey. The parties do not need to initial each page of the contract, although this is common practice for evidentiary purposes. Contracts can be signed in counterparts. There is no witnessing requirement. Except for certain contracts subject to specific formal requirements, signatures need not be notarised and contracts need not be registered.

Foreign Companies

The same rules apply as for domestic companies (see above, *Companies*). In practice a proof of authority of the signatories is requested. This can be a corporate document/resolution or trade registry extract (as applicable) notarised and apostilled or certified by the Turkish consulate. A legal opinion from foreign counsel may also be required depending on the type and value of the contract.

General Partnerships

The individual or corporate partners of a general partnership enter into contracts on behalf of the partnership (see *Question 1, General Partnerships*). Execution formalities depend on the nature of the partners (that is, individuals or legal entities).

Limited Liability Partnerships (LLPs)

Not applicable (see *Question 1, Limited Liability Partnerships (LLPs)*).

Deeds

12. Are deeds (or equivalent) recognised and used? If yes, when are deeds (or equivalent) required?

Deeds as understood in common law jurisdictions are not recognised under Turkish law. However, certain contracts and transactions require an official form (see*Question 3* and *Question 14*).

13. What are the legal formalities for creating and executing a valid deed (or equivalent)?

See *Question 12*.

Notarisation, Legalisation, and Registration

14. When is notarisation required in your jurisdiction?

Generally, notarisation is not required for contracts unless otherwise provided by law or the parties. Notarisation is required for the validity of certain contracts that must be in official form (see *Question 3*), such as:

- Share transfers and pledge agreements (for limited companies).
- Pledges of movable assets.
- Sales of motor vehicles, ships, and aircraft.
- Promises to sell real estate.
- Articles of association of a company (if not signed before the relevant trade registry).

The parties are also free to execute other types of contracts before a Turkish notary public, although they will incur additional notary costs. There are only public notaries in Turkey.

Notary fees are based on official tariffs published annually and consist of fixed or proportional fees, depending on the transaction.

Notarisation confers official authenticity to documents.

The Notary Law allows electronic/online notarisation through the use of a secure electronic signature (see *Question 17*), subject to certain exceptions. However, electronic/online notarisation is not used in practice.

15. When is an apostille or legalisation required for contracts in your jurisdiction and how is it carried out?

Turkey is a party the HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961 (Apostille Convention).

A document subject to notarisation that is notarised outside Turkey must either be:

- Apostilled in the jurisdiction of notarisation.
- Legalised by the Turkish consulate in the jurisdiction of notarisation (if that jurisdiction is not party to the Apostille Convention).

The apostille or legalisation confirm the authenticity of the document.

Notarised and apostilled/legalised documents must also be translated into Turkish by a certified translator and the translation must be notarised by a Turkish notary public.

Notarised documents to be used outside Turkey are apostilled by the relevant district governorship in Turkey or legalised by the embassy or consulate in Turkey of the jurisdiction where the document will be used.

16. If registration is required, which contracts require registration and where?

Certain agreements that must be in official form are subject to registration requirements. For example:

- A company's articles of association must be registered with the relevant trade registry.
- A sale of real estate and the creation of encumbrances over real estate must be registered with the relevant land registry.
- A share transfer agreement (limited companies) must be executed before a Turkish notary public and registered with the relevant trade registry.

The parties are represented before governmental authorities through their authorised signatories or representatives.

To be registered as shareholders or managers/directors of a Turkish legal entity with the relevant trade registry, foreign legal entities and individuals must obtain a tax number from a Turkish tax office. There is no such requirement for executing contracts before notary publics or land registries. However, foreign nationals purchasing real estate in Turkey are subject to special permit requirements.

Electronic Signatures

17. Can contracts and deeds (or equivalent) be validly executed with an electronic signature in your jurisdiction?

Under the Law on Electronic Signature No. 5070, a secure electronic signature has the same legal force as a handwritten signature.

A secure electronic signature can be obtained from an authorised service provider. A secure electronic signature is an electronic signature that:

- Allows the identification of the signatory once attached to a document.
- Has a tracking mechanism that allows identification of any amendments made to the document after the electronic signature has been inserted.

The following contracts cannot be executed with an electronic signature:

- Security agreements (such as surety agreements, pledges, and so on).
- Transactions that require an official form or specific procedure (such as promises to sell immovable property, sales of immovable property, mortgages, and so on).

Remote Document Execution

18. Is remote execution of documents valid and common practice?

Remote execution of documents through virtual closings and completion meetings is valid and common in Turkey. Execution in counterparts is possible and need not be specified in the contract to be valid and enforceable.

Powers of Attorney

19. What are the main types of powers of attorney in your jurisdiction?

Legal entities and individuals can grant powers of attorney to carry out transactions on their behalf. There are generally no limitations on the type or scope of powers that can be conferred by a power of attorney. The type, scope, and duration of a power of attorney are determined by the agreement between the principal and attorney.

Powers of attorney can be general or specific. However, certain powers must be clearly and explicitly stated in a power of attorney to be effective, such as:

- Initiating lawsuits.
- Settling disputes.
- Referring a dispute to arbitration.
- Filing for bankruptcy or concordat (a type of debt restructuring agreement).
- Opening a bank account.
- Selling or transferring real property.
- Placing restrictions on the use of real property.
- Making donations.
- Becoming a guarantor.

20. What are the main transactions when powers of attorney are used?

Powers of attorney are commonly used in Turkey. They can be used for almost all types of transactions, unless otherwise provided by law. The main transactions when powers of attorney are used include:

- Attending completion meetings/closings.
- Executing contracts (including share sales).
- Incorporating companies
- Carrying out formalities before governmental and public authorities.
- Registering transactions with land registries.

21. What are the key provisions in a power of attorney?

The key provisions in a power of attorney are the:

- Identity of the attorney.
- Scope of powers.
- Right to delegate authority.

An attorney can only delegate their powers if they expressly have the right to do so under the power of attorney.

A power of attorney can be granted for an indefinite or a limited time. The principal can revoke indefinite powers of attorney at any time.

22. What are the legal requirements and formalities for the execution of a power of attorney?

In principle, powers of attorney granted in Turkey must be notarised by a Turkish notary public, subject to some exceptions (for example, powers given for the representation of shareholders in general meetings).

Certain powers of attorney require an official form (for example, powers relating to a sale/purchase of real estate and to a grant of mortgage). These must be drafted by a notary public and include a photograph of the principal.

Powers of attorney must be in Turkish to be used in Turkey but can be drafted in an additional language.

If the principal is a legal entity, its legally authorised signatory/signatories must sign the power of attorney with their wet-ink signature. The application of a corporate seal or stamp is not a legal requirement but is common practice in Turkey.

23. Are foreign powers of attorney recognised in your jurisdiction? If so, must a foreign power of attorney comply with legal requirements and formalities to be effective?

Foreign powers of attorney are recognised in Turkey if they comply with the requirements of Turkish law (see *Question 22*).

Additionally, foreign powers of attorney must be notarised and apostilled or legalised to be effective in Turkey (see *Question 15*). The notarised and apostilled/legalised original must be translated into Turkish and notarised by a Turkish notary public.

CONTENT OF CONTRACTS

24. What are the main types of contractual terms in your jurisdiction?

Turkish law does not expressly classify contractual terms.

To form a valid contract, the parties must agree on all the essential terms of the contract. It is therefore possible to distinguish between "essential" and "non-essential" terms. Essential terms include, for example, the subject matter and price. Failure to agree on non-essential terms does not affect the validity of a contract. Any gap will be filled by the courts.

Other areas of law may also imply mandatory terms into a contract (see *Question 26*).

Examples of the main types of contractual terms used in practice include the following:

- **Express terms.** These are terms that the parties have formally agreed on.
- **Conditions.** A condition can either be a:
  - condition precedent, under which certain contract terms will be effective when the condition is met; or
  - condition subsequent, under which the contract will terminate on the occurrence of a specified event.
- **Warranties.** Warranties are statements in a contract that refer to current and past matters and facts. The Code of Obligations governs warranties in sale of goods contracts and includes rules on the seller's liability for defects. Warranty liability under sale of goods contracts can be contractual or statutory. The seller is liable for defects that affect the quality of the goods or eliminate or significantly reduce their value in terms of their purpose, use, and benefits that the buyer expects from them. The Consumer Protection Law and the Commercial Code also apply to consumer sales and commercial transactions, respectively. The concept of guarantee is different from that of warranty. A guarantee is provided by a guarantor for the performance of an obligation by a party.

25. Can contract terms be implied from the conduct of the parties or incorporated by reference?

Mutual consent to contract terms can be explicit or implicit.

In the absence of a relevant contractual or legal provision, the court can imply terms into contracts by reference to customs and trade usage. If there is no custom or trade usage, the court will consider the real or presumed common intention of the parties. When the court cannot determine the real or presumed common intention of the parties, the following rules can be taken into account:

- An ambiguity is generally interpreted to the detriment of the person who drafted it.
- An ambiguity is generally interpreted in favour of the party that is under obligation.
- Non-essential terms can be interpreted in a way that supports the validity of the contract.

The parties can incorporate terms and conditions by reference to another document, such as general terms and conditions of a party. However, standard terms and conditions can only be binding if the relevant party provides sufficient information about its terms and the other party explicitly accepts these terms (Code of Obligations).

26. Which mandatory terms and standards are implied into a contract by operation of law?

Generally, the parties are free to agree on contract terms. However, the law implies mandatory terms into certain contracts. These cannot be limited or excluded by the parties. For example:

- The Consumer Protection Law implies some mandatory terms into consumer contracts. Terms in consumer contracts that are not clear, are ambiguous, or have more than one meaning must be interpreted in favour of the consumer. In addition, unfair terms in consumer contracts are deemed null and void.
- The Code of Obligations implies mandatory terms into certain types of contracts, such as sale contracts, contracts of work, and contracts of services.

However, optional rights can be limited by the contract. If the contract does not address these optional rights, the parties' rights are implied by law. For example, a buyer in a sale contract has the following optional remedies if the goods are defective:

- Rescission of the contract.
- Reduction of the contract price.
- Repair of the defective product.
- Replacement of the defective product.

27. Is the concept of "reasonable," "commercial," or "best" endeavours or efforts legally recognised?

Turkish law does not expressly regulate effort-related qualifiers, but these concepts are commonly included in contracts to limit the parties' contractual obligations. If the contract does not define these terms, they can be interpreted by the court in accordance with the general rules of contract interpretation.

In contrast, the Code of Obligations recognises the concepts of "duty of loyalty" and "duty of care." For example, in contracts of works, the contractor owes a duty of loyalty and care to the customer while performing the works. When determining breach of this duty of care, the courts consider the behaviour of a prudent contractor who undertakes works in a similar field in accordance with the relevant professional and technical standards. Similarly, a contractor has a duty of care under a services agreement and an attorney has a duty of care under a power of attorney. The Commercial Code also provides that merchants must act prudently in all matters related to their business activities.

28. Does local law require that special notice be given of any contract terms for them to be effectively incorporated in a contract?

In line with the freedom of form principle, the law does not generally impose any specific form or notice requirement to effectively incorporate terms in a contract. Therefore, contract terms such as liability exclusions and warranty disclaimers are not subject to any form requirement to be valid. However, the Code of Obligations imposes special form requirements for certain clauses to be validly incorporated into the contract. For example, any surety granted by an individual must be handwritten and include the maximum amount, date, and nature of the surety.

29. Are there commonly used contract clauses in your jurisdiction that are not usually included in contracts from other jurisdictions?

Commonly used contract clauses in Turkey that may need to be added to foreign contracts include the following:

- **Notice provisions.** In contracts between merchants, certain notices relating to termination, default, and rescission must be served by a notary public, telegram, registered mail, or email with a secure electronic signature to be admissible as evidence (Article 18, Commercial Code).
- **Parallel debt provisions.** Parallel debt provisions are commonly used in the Turkish market for secured financings with multiple lenders. This mechanism allows a security agent to register the security in its name and demand payment of a debt on behalf of all lenders. Parallel debt provisions are used to achieve a similar result as trust structures, which are not recognised in Turkey.
- **Language provisions.** Under Law No. 805 on the Mandatory Use of the Turkish Language in Commercial Enterprises, all written correspondence with Turkish entities must be in Turkish (see also *Question 4*). Correspondence in a foreign language may not be admissible as evidence before the Turkish courts. Therefore, it is common practice to add a clause providing that any notice given under or in connection with the contract must be accompanied by a Turkish translation, if required by Turkish law.
- **Dispute resolution provisions.** If the parties wish to submit their contractual disputes to arbitration, this should be expressly set out in the original contract. Otherwise, the Turkish courts will assume jurisdiction.

30. Are there contract clauses from other jurisdictions that are ineffective or not standard practice in your jurisdiction?

Contracts from other jurisdictions (especially common law jurisdictions) may include dispute resolution clauses referring to both courts and arbitration. Under established Turkish case law, the parties' consent to arbitrate must be absolute. Any statement that can be construed as an implicit submission to the jurisdiction of the local courts may lead the courts to conclude that consent to arbitration is not absolute. Therefore, dispute resolution provisions should be amended so that they designate either the courts or arbitration.

VARIATION, ASSIGNMENT, AND WAIVER

31. How can the parties vary the contract terms agreed between them?

The parties can mutually agree to amend the contract. The variation must comply with the same formal requirements (if any) as the original contract. Therefore, if the contract is required to be in writing, the variation must also be in writing. Consideration is not required to amend a contract, although stamp duty may be payable.

32. What are the main ways to transfer contractual rights and obligations to a third party?

As a general rule, contractual rights can be freely assigned without the debtor's prior approval, unless otherwise provided by law or the contract. A transfer of contractual rights must be in writing to be effective.

The whole contract can also be transferred if the following requirements are met:

- All parties (transferor, transferee, and counterparty) must sign the transfer agreement, or the counterparty must consent to the transfer.
- The transfer agreement must be in the same form as the original agreement (that is, if the original agreement is in writing, the transfer agreement must also be in writing).

(Code of Obligations.)

Personal rights cannot be assigned to a third party under Turkish law. Personal rights include rights related to legal capacity, moral compensation, family law and inheritance law, as well as rights to health, bodily integrity, protection of honour, dignity, and name, and moral rights of authors and creators. Any transfer of personal rights is null and void.

33. What are the rules relating to waiver of contractual rights?

Whether contractual rights can be waived depends on the nature of the rights. Advance waivers are allowed for certain rights (for example, set-off rights) and prohibited for others (for example, the right to invoke a statute of limitations). Additionally, certain contractual rights can never be waived, whether in advance or at the time they arise (for example, employees' entitlement to paid annual leave). It is therefore necessary to review the rules on waivers on a case-by-case basis.

When allowed, a waiver must be express and in writing.

ENFORCEMENT AND REMEDIES

Invalid and Voidable Contracts

34. What makes a contract void, voidable, or invalid?

Under the Code of Obligations, a contract must comply with the following general conditions to be valid:

- The parties must be authorised and capable to enter into a contract (see *Question 1*).
- The parties' intentions must be actual and sound.
- The contract must not be contrary to mandatory legal provisions, morality (*boni mores*), public order, or personal rights.
- The subject of the contract must be possible.

Invalidity of some terms does not generally affect the validity of the remainder of the contract if it is clear that the parties would still have entered into the contract without the invalid provisions. Therefore, severability clauses are common and generally valid in Turkey.

Contracts signed as a result of fraud/misrepresentation, duress, or mistake are voidable. In this case, the innocent party must notify the other party of its intention to invalidate the contract within one year from discovering the fraud, mistake, or from the end of duress. Otherwise, the contract will remain binding.

When there is a clear disproportion in the contract due to a party's inconsideration or inexperience, that party can request invalidation of the contract or a re-balancing of the parties' obligations within one year from becoming aware of the disproportion, and in any case no later than five years from the date of the contract.

Discharging Contracts

35. On what basis can a party be discharged from performing its contractual obligations at law?

In principle, the parties are free to terminate or discharge a contract by agreement at any time.

A party is released from performing its contractual obligations if performance becomes impossible for reasons that are not attributable to that party (Article 136, Code of Obligations). The obligor must notify the creditor promptly of any impossibility to perform the contract. Otherwise, the obligor is liable to compensate the creditor's damages arising from non-performance.

In the event of hardship, the obligor can request a judge to adapt or terminate/withdraw from the contract (if adaptation is not possible). To claim hardship, the following conditions must be met:

- An unexpected and unforeseen (and not expected to be foreseen by the parties) event occurs after the conclusion of the contract.
- The obligor's negligence did not contribute to the occurrence of the event.
- Performance has become materially burdensome for the obligor because of the event, in light of the principle of good faith.
- The debtor has not yet performed its obligations.

(Article 138, Code of Obligations.)

If one party is unable to perform its obligations (for example, due to bankruptcy), the other party can refrain from performing its own obligations and request a guarantee for the performance of the other party's obligations.

There is no statutory definition of force majeure under Turkish law. However, the parties are free to include a force majeure clause in the contract.

36. On what basis does a party have the right to terminate the contract?

A contract can include a termination clause that regulates the parties' right to terminate the contract.

In the event of breach, the non-breaching party can:

- Seek specific performance (to the extent possible) and compensation for loss arising from the delay.
- Waive its right to specific performance and seek compensation for loss arising from the breach.
- Seek termination of the contract and compensation for damages.

(Code of Obligations.)

If the contract requires continuous performance and the obligor is in default, the creditor has the right to unilaterally terminate the contract and claim compensation for damages arising from early termination, in addition to compensation for breach.

Certain notices between merchants must be made through means specified by law to be admissible as evidence. For example, notices relating to breach, termination, or rescission must be made by a notary public, registered mail, telegram, or registered electronic mail system using a secure electronic signature (Article 18, Commercial Code).

A contract can also be terminated in the event of hardship or on the occurrence of a force majeure event (see *Question 35*).

Termination, default, and acceleration clauses triggered by a concordat application are not enforceable if the underlying agreement is important for the continuation of the company's activities (Execution and Bankruptcy Code No. 2004). There are no other restrictions on a party's contractual right to terminate the contract based on the other party's insolvency.

Contract Liability and Exclusion of Liability

37. What are the key rules on privity of contract and third party rights?

Turkish law recognises the principle of relativity of contractual obligations, under which a contract is only valid and binding between the parties. There are no express provisions recognising privity of contract.

However, parties to a contract can:

- Provide an undertaking of performance by a third party (Article 128, Code of Obligations). The party providing the undertaking will be liable for any damage arising from non-performance by the third party.
- Contract for the benefit of a third-party (Article 129, Code of Obligations). In this case, the third party or their successor can request performance if this is customary and conforms to the contracting parties' intentions.

38. What are the main rules relating to excluding and limiting contractual liability?

It is generally possible to include contract terms excluding or limiting a party's liability. For example, the parties can include monetary caps, time limits, or exclude liability for indirect, special, or consequential damages, loss of profits, loss of use, loss of production, loss of contract or opportunity, or loss of goodwill.

However, provisions excluding or limiting liability for wilful misconduct and gross negligence are null and void. Additionally, it is not possible to exclude an employer's liability under an employment contract or a seller's liability for defective products under a sale contract, even for slight negligence (Code of Obligations).

39. What are the main defences to breach of contract claims?

Defences to breach of contract claims include:

- Impossibility of performance or hardship (see *Question 35*).
- Non-performance by the claimant.
- Breach of the duty of good faith (see *Question 10*).

Contract Remedies

40. What are the main remedies available for breach of contract?

The following remedies are available in the event of breach of contract:

- Specific performance and compensation for damages arising from delay in performance.
- Termination and compensation for damages arising from the breach.

A request for specific performance must be made in good faith and be fair. Specific performance cannot be requested for breach of a secondary obligation or if the innocent party unilaterally terminated the contract, in which case only compensation for damages can be sought.

Turkish law distinguishes between:

- **Positive damages.** These refer to losses suffered by the innocent party as a result of non-performance or inadequate performance, including loss of profit. They can be requested if the innocent party wishes to continue its contractual relationship with the breaching party.
- **Negative damages.** These can be claimed if a contract is invalid, becomes impossible, or is terminated by the innocent party. Negative damages are defined as losses suffered by the innocent party as a result of entering into a contractual relationship in the expectation of proper performance by the other party.

Punitive damages are not available under Turkish law.

The parties can also agree on a clause specifying the amount payable in the event of breach or inadequate performance (see *Question 41*).

41. Are clauses setting out a fixed or ascertainable amount of compensation/damages valid in your jurisdiction? Are these clauses subject to any limitation?

Clauses specifying the amount of compensation for breach or inadequate performance of a primary obligation are valid and commonly used in Turkey. Turkish law does not differentiate between liquidated damages and penalty clauses, and the expression "penalty clause" is usually used in practice. The agreed amount of compensation can exceed the actual damages suffered by the non-breaching party. The non-breaching party does not need to suffer actual damages to seek compensation under a penalty clause. However, the court can reduce the agreed amount if it considers it to be excessive, unless the breaching party is a merchant. If actual damages exceed the penalty amount, excess damages can be claimed in addition to the penalty if the claiming party proves the fault of the breaching party, unless otherwise provided by the contract.

ENFORCEMENT AND CROSS-BORDER ISSUES

Choice of Law

42. Is the choice of a foreign law in a contract upheld by local courts?

In principle, choice of law clauses are valid and enforceable unless they are clearly contrary to rules of public policy. There is no established standard for determining whether a matter is against public policy, and there is no statutory definition of public policy. Therefore, a court will use its discretion by taking into account all the circumstances of a given case. Generally, public policy is the set of rules that determines the fundamental political, social, economic, moral, and legal framework and protects the fundamental interests of society.

Certain matters cannot be governed by a foreign law, such as a sale/purchase of immovable property and certain employment matters.

Jurisdiction

43. Is the choice of a foreign jurisdiction in a contract upheld by local courts and/or arbitration tribunals?

A contractual choice of foreign jurisdiction is valid and enforceable if the dispute:

- Arises from a contractual relationship.
- Contains a foreign element.
- Does not fall within the exclusive jurisdiction of Turkish courts.

(Private International and Procedural Law No. 5718.)

Additionally, the jurisdiction clause must designate the competent courts with sufficient precision.

However, a Turkish court can assume jurisdiction in the following cases:

- The subject matter of the dispute falls within the exclusive jurisdiction of the Turkish courts.
- A foreign court declined jurisdiction because the jurisdiction clause is not valid.
- An objection to the jurisdiction of the Turkish court is not filed on time.

Under Turkish law, a valid and binding arbitration clause requires the explicit and definite intention of the parties to submit the matter to arbitration. Additionally, the Court of Cassation has held that arbitration agreements between Turkish entities and foreign entities must be in Turkish.

A contracting party from a foreign jurisdiction does not need to appoint a process agent in the contract.

Enforcement of Foreign Judgments and Awards

44. How are foreign judgments and arbitration awards recognised and enforced in your jurisdiction?

Foreign Judgments

The Turkish courts recognise final foreign judgments issued in commercial disputes, unless any of the following applies:

- The matter falls within the exclusive jurisdiction of the Turkish courts.
- The foreign court did not have a genuine connection with the parties or subject matter of the contract.
- The judgment violates Turkish public policy.

The courts will enforce a foreign court judgment that satisfies the above criteria, without re-examination of the merits, if all the following conditions are met:

- There is reciprocity between Turkey and the jurisdiction of the foreign court with respect to enforcement of court judgments.
- The defendant was duly summoned and represented in accordance with the procedural rules applicable to the foreign court.
- The judgment is not incompatible with a final judgment of a Turkish court relating to the same issues, or in certain circumstances with an earlier judgment obtained in the foreign jurisdiction.

Foreign Arbitral Awards

Turkey is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and enforces arbitration provisions and awards issued in other contracting states within this framework.

The Private International and Procedural Law regulates the recognition and enforcement of arbitral awards that do not fall within the scope of the New York Convention. These awards can be set aside if a party shows any of the following:

- Any of the parties lacked capacity or the arbitration agreement is not valid under the relevant governing law.
- The appointment of the arbitrator or arbitral tribunal did not comply with the procedure set out in the International Arbitration Law No. 4686.
- The award deals with a matter not contemplated by, or not falling within the scope of, the arbitration agreement. Any decisions on matters submitted to arbitration can be recognised and enforced if they are severable.
- The composition of the arbitral tribunal or the arbitral procedure did not comply with the arbitration agreement or the law of the seat of the arbitration.
- The principle of equality of the parties was not respected.

Additionally, a court can set aside a foreign arbitral award *ex officio* if:

- The dispute is not arbitrable under Turkish Law.
- The award is contrary to Turkish public policy.

OTHER KEY ISSUES

45. Are there additional and important issues of law and practice relating to contracts, negotiation and enforcement that are not otherwise addressed in this Q&A?

Not applicable.

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