The Lending and Secured Finance Review

Fifth Edition

Editor
Azadeh Nassiri

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THE LENDING AND SECURED FINANCE REVIEW

Fifth Edition

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CONTENTS

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PREFACE

This fifth edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 25 different countries, and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions, and on the challenges and opportunities facing market participants. I would also like to thank our publishers without whom this review would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri
Slaughter and May
London
June 2019

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Chapter 23

TURKEY

Sera Somay[1]

I OVERVIEW

Turkey is the 19th largest economy in the world, with a gross domestic product of US$784 billion.[2] Per capita, income in the country is approximately US$9,600.[3]

The banking system traditionally has a majority share in the Turkish financial sector; however, there has been an increase in the number and size of non-bank financial institutions, such as leasing and insurance companies. As at December 2018, of the 52 banks operating in Turkey, 34 are deposit-taking banks, 5 are participation banks[4] and 13 are development banks. Three of these 13 are state-controlled banks and 10 are private banks, including four with foreign capital.

Turkish Banking Law No. 5411 permits deposit-taking banks to engage in all fields of financial activities, including deposit collection, corporate and consumer lending, foreign exchange transactions, capital market activities and securities trading. The main objectives of development and investment banks are to provide medium and long-term funding for investment in different sectors.

Turkish deposit-taking banks (including participation banks) have been the main finance providers to Turkish corporates, where lending has been in the form of revolving lines of credit, acquisition financing, bridge loans, club deals, secured or unsecured term financing, limited recourse project finance, structured and off-balance sheet financing. On selective deals, Turkish banks started to use the terms of the Loan Market Association in financing transactions after adapting relative provisions to mandatory requirements of Turkish law.

Turkey's banking sector's gross assets grew by 18.7 per cent in 2018;[5] however, loan demand, which significantly outpaced deposit growth, necessitated policies promoting a higher saving ratio in the economy.

II LEGAL AND REGULATORY DEVELOPMENTS

In the second half of 2018, there were significant regulatory amendments to the lending legislation due to the depreciation and volatility of the Turkish lira, rating downgrades, an

1 Sera Somay is a partner at Paksoy.
2 www.tuik.gov.tr/PreHaberBultenleri.do?id=30886.
3 www.tuik.gov.tr/PreIstatistikTablo.do?istab_id=2218.
4 A new participation bank, Türkiye Emlak Katılım Bankası AŞ, which is 100 per cent owned by the Turkish government, obtained authorisation from the Banking Regulation and Supervision Agency on 26 February 2019.
5 www.bddk.org.tr/ContentBddk/dokuman/veri_0014_39.pdf.

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increasing inflation rate and rising distress in the private sector. To stabilise the market, particularly volatility of the Turkish lira, the Banking Regulation and Supervision Agency (BRSA) and the Central Bank of Turkey have taken certain measures by amending the lending and restructuring regimes.

One of the most dramatic changes is the restriction on the foreign currency loan utilisations of Turkey-resident corporates from banks operating both in and outside Turkey. Pursuant to the new rules, Turkish legal persons are not entitled to utilise foreign-currency indexed loans but they are entitled to utilise foreign currency loans to the extent they fall within the scope of the exceptions listed under Decree No. 32 on the Protection of Value of Turkish Currency. Certain exceptions are briefly as follows: Turkey-resident legal entities generating foreign currency income; foreign currency borrowings of public institutions, banks, financial leasing companies and financing companies; foreign currency borrowings of legal entities with a credit balance of US$15 million or greater and foreign currency borrowings of legal entities with an investment incentive certificate allowing them to borrow in foreign currency.

In addition to the foreign currency borrowing restrictions, the BRSA introduced a new regime for restructuring debt in the Turkish market owed to banks, and financial leasing, factoring and financing companies. Accordingly, restructuring should be made based on a framework agreement that was prepared by the Union of Banks of Turkey, opined by banks, and financial leasing, factoring and financing companies, and approved by the BRSA. The Banks Association of Turkey published a financial restructuring framework agreement on 11 September 2018 (the Framework Agreement) in line with the Regulation on Restructuring of Debts Owed to Financial Sector issued by the BRSA. Accordingly, a debtor (1) with a minimum credit balance of 100 million Turkish lira (including cash and non-cash loans) to Turkish financial institutions at the time of the application, (2) whose indebtedness is classified under Class 1, Class 2 or frozen credit as per the relevant BRSA regulations, and (3) against whom enforcement proceedings (subject to exceptions) have not been initiated by Turkish financial institutions, can apply for a restructuring under the Framework Agreement.

III TAX CONSIDERATIONS

Loan transactions are subject to various taxes and regulations depending on whether:

a the parties are related parties;
b the lender is a bank or a similar financial institution; or
c the lender is resident in Turkey.

i Corporate tax considerations

From a corporate tax perspective, interest payments are deductible as long as they are related to the borrowers' business.

There is an interest deduction limitation, but it is not applicable *de facto* because of the absence of secondary legislation.

ii Related-party loans

Where the borrower and the lender are related parties, the loan transaction is subject to transfer pricing and thin capitalisation rules.

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An arm's-length interest should be determined according to Turkish transfer pricing regulations. It is very similar to the Organisation for Economic Co-operation and Development legislation, adopting the same principles, definitions and methods.

According to Turkish thin capitalisation rules, a 3:1 debt-to-equity ratio is applicable for related party loans. The ratio is 6:1 if the lender is a bank or similar institution.

iii Loans from non-bank non-resident companies

Stamp tax

Loan agreements and related signed documentation are subject to 0.948 per cent stamp tax. An annually determined ceiling amount is applicable for the maximum stamp tax payable.

Interest withholding tax

A 10 per cent interest withholding tax is applicable.

VAT

Interest payments are subject to a reverse charge of 18 per cent value added tax (VAT).

RUSF

The Resource Utilisation Support Fund (RUSF) is a form of tax imposed on credit-based imports and loans. RUSF will depend on the type of currency and the average maturity of the loan:

a for Turkish lira-denominated loans, the below rates are applicable depending on the average maturity over the interest amount:
- up to one year: 1 per cent; and
- from one year and upwards: zero per cent; and

b for foreign currency-denominated loans, the below rates are applicable depending on the average maturity over the principal amount:
- up to one year: 3 per cent;
- from one to two years: 1 per cent;
- from two to three years: 0.5 per cent; and
- from three years and upwards: zero per cent.

iv Loans from banks

The taxation of loans from banks varies according to whether the lender bank operates in Turkey.

Banks operating in Turkey

The term 'banks operating in Turkey' refers to both Turkey-resident banks and Turkish branches of non-resident banks:

a stamp tax: loan agreements and related documentation signed by banks are exempt from stamp tax;

b interest withholding tax: no interest withholding tax is applicable;

c RUSF: as long as the loan is not a consumer loan, zero per cent RUSF should be applicable;

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d VAT: interest payments should be exempt from VAT; and
e banking and insurance transaction tax (BITT): the interest income derived is subject to 5 per cent BITT.

Banks operating outside Turkey

The term 'banks operating outside Turkey' refers to both non-resident banks and foreign branches of Turkey-resident banks:

a stamp tax: loan agreements and related documentation signed by banks are exempt from stamp tax;
b interest withholding tax: zero per cent interest withholding tax is applicable;
c VAT: interest payments should be exempt from VAT;
d BITT: no BITT should be applicable;
e RUSF: RUSF will depend on the type of the currency and the average maturity of the loan;
f for Turkish lira-denominated loans, the below rates are applicable depending on the average maturity over the interest amount:
  - up to one year: 1 per cent; and
  - from one year and upwards: zero per cent; and

g for foreign currency-denominated loans, the below rates are applicable depending on the average maturity over the principal amount:
  - up to one year: 3 per cent;
  - from one to two years: 1 per cent;
  - from two to three years: 0.5 per cent; and
  - from three years and upwards: zero per cent.

Separately, the RUSF rate applicable for financing provided to Turkish banks is always zero per cent, regardless of the average maturity.

IV CREDIT SUPPORT AND SUBORDINATION

i Securities

In general, the following types of security interests would be available for project financing:

a pledges:
  - over movables;
  - over shares; and
  - over bank accounts;

b mortgages;
c transfer or assignment of receivables; and
d guarantees and suretyships (which are summarised later on in this section).

Pledges

In principle, the conditions below should be met for the establishment of a pledge under Turkish law:

a secured receivable: there must be an existing underlying right, loan or debt prior to or at the time of the establishment of the pledge;
b pledge over movables: the pledge should be registered within the registry of the pledge over the movables; and
c written agreement: a written pledge agreement must be executed between the parties.

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Movable pledges

A new law aiming to facilitate the use of a movable asset pledge with regard to commercial operations entered into force on 1 January 2017 (the Movable Asset Pledge Law) along with three regulations regarding procedures under the Movable Asset Pledge Law.

The Movable Asset Pledge Law and these regulations broaden the scope of the assets that can be the subject of a movable pledge, introduce a central registration system as opposed to the previous system, which was based on physical delivery of the assets, and introduce alternative enforcement methods.

ii Scope of pledges

Pledges over movables

The scope of the commercial enterprise pledge is now extended and includes real property allocated to the operations of an enterprise as well as all the movables (including tangible and intangible assets).

Regarding a pledge on assets on an individual basis or as a group, the previous pledge system required the physical delivery of the pledged assets to the pledgee and this was one of the reasons why the commercial enterprise pledge (which didn't require physical delivery of the pledge assets) was commonly used in Turkey. The Movable Asset Pledge Law does not require the physical delivery of the pledged asset to the pledgee. The following assets are subject to this law:

a existing and future receivables, income of the enterprise;
b inventory, raw materials;
c rental proceeds, rental rights;
d IP rights, trade name;
e licences that are not qualified as administrative approvals;
f all movable assets of an enterprise such as machinery, equipment, IT hardware, etc;
g agricultural products, livestock;
h commercial projects;
i vehicles, licence plates;
j commercial routes, train wagons; and
k revenues of the pledged assets.

A pledge of the following assets is not subject the Movable Asset Pledge Law and should be regulated by the Civil Code or by its special laws:

a bank accounts;
b shares;
c derivative agreements;
d aircraft;
e ships or vessels; and
f mines.

It is also still possible to pledge vehicles under their specific traffic laws.

Pledges over shares of a company

The shares of a company can be pledged under Turkish law. The scope of the share pledge can be commercially agreed between the parties.

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A pledge over the shares of a company can only be established by entering into a written share pledge agreement by and between the pledgor and the pledgee. In addition, the pledgor should make a pledge endorsement (or blank endorsement depending on the agreement between the parties) on registered shares, and physical possession of the pledged shares must be delivered to the pledgee.

Although it is not legally required for a valid perfection of share pledge, it is advisable (to protect the pledge from third-party claims) that:

a the company whose shares are pledged passes a corporate resolution acknowledging the pledge and resolving to register it in the share ledger of the company; and

b the pledge is registered in the share ledger of the company in which the shares are pledged.

Pledges over bank accounts

A pledge over accounts held with a bank is another form of security arrangement that is generally provided under Turkish law.

A written pledge agreement is required for the establishment of a bank account pledge.

There is no requirement for a pledgor to obtain consent from the account holding bank for the pledge in favour of the creditor. However, an acknowledgment notice from the bank is highly recommended, particularly if the account bank is not a lender or a security agent, and any obligations (e.g., restricting withdrawals on paying funds direct to the creditor) are to be assumed by the bank. In addition, the same acknowledgement would serve to confirm that no prior ranking pledge, assignment or counterclaims exist.

Mortgages

In general

A mortgage can be established over immovable property or certain rights connected to the immovable property, such as a ground lease or usufruct right, to secure the payment of existing or future debts. In general, a mortgage established over immovable property covers the accessories of that property.

Conditions for establishment

A mortgage is created validly by means of an official mortgage deed, which shall be executed before the title deed registry having jurisdiction on the relevant real estate. The mortgage is recorded within a special mortgage column on the relevant page of the title deed registry where the records of the real property subject to mortgage are kept.

In principle, the amount of the mortgage must be registered, and if the amount of the receivable is indeterminable, the maximum amount secured by the mortgage agreed by the parties can be registered in Turkish lira. However, an exception for foreign loans provided by Turkish or foreign banks or credit institutions is stipulated under Turkish law as a 'foreign currency mortgage', which should be in the same currency as the loan, and can be granted for establishing a security in favour of these banks or credit institutions.

Ranking

The degree system adopted under Turkish law provides a priority ranking to mortgagees holding a mortgage with a higher degree over other mortgagees in subsequent rankings. Each

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degree of mortgage on the immovable property separately secures the obligations for which they are established up to the mortgage amount in those degrees. The degrees set the order of distribution of the foreclosure proceeds.

Transfer or assignment of receivables

Transfer or assignment of receivables is commonly utilised as a security mechanism, which includes the transfer of the receivables of the creditor (transferor) to a third person (the transferee) by execution of a written agreement.

In the case of a transfer of receivables by way of security, the following mechanisms are seen: (1) lenders collect the assigned receivables for repayment purposes; (2) the assigned receivables are collected into a reserve account for repayment or security purposes, and (3) the assignment is silent until an event of default, hence it is not perfected and the lender has the right to collect the receivables upon an event of default.

Present and future determinable receivables can be transferred through a written agreement executed between the transferor and transferee.

Although notification or approval of the debtor is not required for the perfection of the transfer, it is recommended that the transfer of receivables agreement includes a provision obliging the transferor to notify its debtors of the transfer and to request an acknowledgment of no prior ranking assignments, transfers or counterclaims from such debtors.

iii Guarantees and other forms of credit support

Guarantees

Since there is no specific legislation with regard to guarantee agreements, these agreements are subject to the general provisions of the Turkish Code of Obligations No. 6098, dated 11 January 2011 (TCO) regarding the concept of 'undertaking of performance of a third party' whereby the obligation of the guarantor is characterised by its independent nature.

Since the obligation of a guarantor is independent from the primary obligation, the invalidity or unenforceability of the primary obligation does not have any effect on the validity or the enforceability of the guarantee obligation. Therefore, unless otherwise agreed, a guarantee is effective until the risk ceases to exist.

There is no condition for the establishment of a guarantee (other than a personal guarantee) such as a written agreement or requirement to determine a limit or cap for the guarantee. However, according to the TCO, in the case of a guarantee provided by a real person (personal guarantee), the conditions for a suretyship will be applicable for the establishment of a personal guarantee.

Suretyships

Although a suretyship appears to be similar to a guarantee agreement, the security obligation of the surety depends on the validity of the debtor's debt. This is to say that when a debtor's debt becomes invalid for any reason, the surety is – contrary to a guarantee agreement – entirely released of all its obligations. Accordingly, a surety's liability is always ancillary in nature.

According to the TCO, a written agreement is required between the parties and a statement of the amount of maximum liability agreed in handwritten form by the surety should be provided under the agreement.

In addition, the suretyship period for real persons and the type of suretyship, for example, ordinary or several, should be specified under the agreement. Also, if a married

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individual is the surety, the TCO requires the spouse of the surety to provide consent on or before the date of the surety agreement, except for in certain cases. The consent of the spouse is not required for securities that are given as follows:

a for a business or company by the owner of a commercial enterprise registered with the trade registry or the shareholder or manager of a commercial company;

b by craftsmen and artisans registered with the craftsmans' associations related to the occupational activity;

c for credits used under Law No. 5570, dated 27 December 2006; or

d for credits given by credit and security cooperatives, or credits extended by state institutions and organisations to cooperative partners.

Finally, the TCO provides that if the surety is a real person, the suretyship automatically expires at the end of a 10-year period beginning from the execution of the surety agreement. However, the parties may extend the suretyship for an additional 10 years upon the consent of the surety, which may be obtained at the earliest one year before the expiration of the surety agreement.

Quasi-securities

Step-in

In recent years, common quasi-securities in the foreign lending markets have been introduced to the Turkish markets, especially for energy and infrastructure project financing transactions. One of the most important features in this regard is the step-in provision that gives lenders and banks the right to step into the project company's rights and obligations under the project documents.

In principle, the Turkish energy markets (electricity, petroleum, gas and liquefied petroleum gas) are strictly regulated and restrict the transfer of licences. However, starting with the first amendment to the electricity markets licence regulation in 2008, banks and financial institutions that provide limited or irrevocable project financing to the relevant generation licence holder within the scope of their loan agreements are also entitled to apply to the Energy Market Regulatory Authority to grant a new licence to another third party, provided that the third party agrees to take on all of the obligations arising under the relevant licence. The legal entity proposed by the banks or institutions shall be granted the related licence on the condition that it complies with the obligations under the relevant licensing regulations. There is no time restriction with respect to the transfer of licences under these regulations, such as prohibition of transfer during or after the construction or operation phase.

However, direct agreements – the objective of which is basically to enable the banks to 'step into the shoes of the project company' if it defaults in its loan obligations – are also common on the Turkish markets but only provide a contractual obligation, which may not be enforced before the regulatory or governmental authorities unless it is drafted in compliance with the above-mentioned energy regulations.

Protection under constitutional documents

Lenders or banks (through a security agent) may also acquire one single privileged share of a project company (and parent company, if necessary) to control the powers and entitlements at the corporate level and prevent certain resolutions to be taken by the company that may jeopardise the lenders' rights in the finance documents. For example, a provision stating that

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no security may be granted over any of the company assets and no disposal of shares in the project company, or no subordinated debt lent to the company, can be made without the vote of the single privileged share in the company.

Completion guarantees

Completion guarantees provided by the parent companies of the project companies are also used as a quasi-security on the Turkish lending markets. In most of the project finance transactions, lenders or banks require a completion guarantee in which the parent company undertakes relevant equity contribution to the project company, the cost overrun of the project and other financial covenants in the facility agreement such as the debt service coverage ratio.

Negative pledge clauses

Unlike certain continental law jurisdictions where negative pledge provisions are registered with the registrar of companies, negative pledge covenants, binding upon the parties, only constitute contractual undertakings under Turkish law, and specific performance cannot be imposed on the pledgor breaching such a covenant. Pursuant to the applicable legislation, such restrictive clauses cannot be agreed under movable pledge or mortgage agreements. Still, these provisions are commonly used in the Turkish lending markets. In the case of a breach of such a covenant, the claimant may request damages or, in certain exceptional circumstances, file for the cancellation of the transaction.

iv Priorities and subordination

Subordination

Although subordination is valid as a contractual undertaking and the parties have contractual claims against each other if the provisions of the subordination agreement are not honoured, Turkish law does not recognise subordination of debts in the event of the bankruptcy or insolvency of a Turkish company. Accordingly, in the event of the insolvency or bankruptcy of a Turkish company, subordination will not be upheld by the liquidators and, as a result, the claims of the subordinated creditors will rank *pari passu* with the claims of all unsecured creditors.

In practice, to give effect to subordination arrangements, the lenders request the subordinated creditors to assign or transfer all their subordinated loans – including the receivables to arise in relation to loans to be granted in the future (most commonly shareholder loans) – to them through an assignment or transfer of future receivables.

Pledged and non-pledged claims, and priorities in the ranking system

According to the Enforcement and Bankruptcy Law No. 2004, published in the Official Gazette, dated 19 June 1932, receivables of secured creditors have priority over the sale proceeds of secured assets after deduction of the relevant taxes *in rem* (i.e., taxes arising from the use or mere existence of the secured assets such as real estate taxes, motor vehicle taxes and custom duties), and expenses arising from the administration or preservation of the secured assets, or from sale auctions in the case of the bankruptcy of the debtor. In other words, if the debtor goes bankrupt, the pledged assets will be sold and the sale proceeds will be paid to the creditor whose receivables are secured through the pledged asset.

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V LEGAL RESERVATIONS AND OPINIONS PRACTICE

A legal opinion in lending transactions can be requested from both parties' (i.e., lender's or borrower's) legal counsel and it is generally referred to the lenders, including the potential assignees or transferees of the loan in the future.

i Reservations

Other than the common reservations that are used in most legal opinions of foreign lending transactions, some of the specific reservations that a Turkish lawyer should cover in a legal opinion are briefly explained below.

Enforceability

The term 'enforceable' is generally explained in the reservation section of the legal opinion, providing that enforceability may be limited to certain obligations of the parties, namely:

a bankruptcy, insolvency, liquidation, debt restructuring, reorganisation and other laws of general application relating to or affecting the rights of creditors;

b general principles of law, including, without limitation, concepts of good faith, fair dealing and reasonableness; and

c remedies available before Turkish courts.

In addition, where obligations are to be performed in a jurisdiction outside Turkey, they may not be enforceable in Turkey to the extent that their performance would be illegal under the laws of that jurisdiction.

Interest

To the extent that the application of the provisions of opinion documents relating to interest and default interest results in accrual of interest on default interest, this would not be enforceable under Turkish law on public policy grounds, but the remaining provisions of the opinion documents would continue to be effective.

Security agent concept

Although some court precedents exist that recognise the concept of an owner in trust in respect of immovable property – and in certain financing deals, a security agent was named and registered as the security right holder – the concept of a security trustee or security agent cannot yet be regarded as officially recognised under Turkish law because of the lack of court precedents. To the author's knowledge, there has been no test of the concept of a security agent before Turkish courts. However, the concept has been commonly used in major financing deals in Turkey, and in the author's view there would be no reason under Turkish law not to give effect to it.

Use of Turkish language

The Compulsory Use of Turkish Language Law No. 805, dated 10 April 1926, requires all agreements by Turkish parties to be made in Turkish. The prevailing interpretation of this rule in the market based on at least one court precedent is that this requirement does not extend to agreements between Turkish and foreign parties and, therefore, agreements

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between Turkish and foreign parties can be signed in a foreign language. However, there are conflicting decisions concluding on the invalidity of an arbitration clause executed in foreign language with a foreign party.

Notices under the Turkish Commercial Code

Pursuant to Article 18(3) of the Turkish Commercial Code (TCC), for evidentiary purposes, notices relating to default, termination or rescission should be served through a Turkish notary public, by telegram or by registered mail (return receipt requested), or electronic mail using a secure electronic signature.

Also, under the Compulsory Use of Turkish Language Law No. 805, any notice to be sent to a Turkish borrower must be in Turkish. Although this law is outdated, it is still in force and, accordingly, it would be advisable to send the Turkish translation along with any foreign language notices.

ii Choice of foreign law

Under Turkish law, the parties to a contract can freely determine the law applicable to their contractual relationship if the contract includes a foreign element.

iii Enforcement of judgments

Judgments obtained in a foreign jurisdiction are enforceable in the courts of Turkey, and courts shall not make any re-examination on the merits of the case provided that the following conditions are met:

a the judgment has become final and binding with no recourse for appeal or similar revision process under the jurisdiction where the judgment is obtained;

b there is *de facto* or *de jure* reciprocity of the enforcement of judgments between the courts of Turkey and the jurisdiction where the judgment is obtained. Reciprocity is to be evidenced by:
- a treaty between Turkey and the jurisdiction where the judgment is obtained, providing for reciprocal enforcement of court judgments;
- a provision in the laws of the jurisdiction where the judgment is obtained permitting the enforcement in that country of judgments rendered by Turkish courts; or
- *de facto* enforcement of judgments rendered by Turkish courts in the jurisdiction where the judgment is obtained;

c the subject matter of the judgment does not fall under the exclusive jurisdiction of the Turkish courts;

d the judgment is not rendered by a court that does not have an actual connection to the parties or the subject matter of the judgment (provided that this is asserted by the defendant);

e the judgment is not explicitly against Turkish public policy (a Turkish court would determine at its discretion, and on a case-by-case basis, whether a public policy concern exists); and

f due process is observed under the jurisdiction where the judgment is obtained.

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iv Financial assistance

Prior to the entry into force of the TCC (1 July 2012), there was no specific rule or restriction relating to the use of a target company's assets for securing the financing of an acquisition (financial assistance) of the target company in Turkey. It was generally accepted that if the articles of the target company enable the issuance of collateral (e.g., pledges, guarantees, sureties) in favour of third parties, the target company may grant security to secure the debts and liabilities of third parties, including its parents or subsidiaries (purchasers).

Following the entry into force of the TCC, financial assistance was introduced with certain limitations (i.e., the granting of security in favour of a third party to acquire its own shares).

These restrictions are mainly based on the prohibition of advancing funds, making loans, and providing security and guarantees by a target company for the acquisition of its own shares. However, there are two exceptions to this prohibition:

a transactions performed by banks or financial institutions, provided that these transactions are performed pursuant to their normal course of business; and

b advances, loans and securities provided to the company's employees or parent or sister company's employees to acquire the shares of the company.

The financial assistance rules in the TCC also apply to group companies (i.e., companies formed into groups consisting of a holding company or parent company that owns a number of subsidiaries).

VI LOAN TRADING

The transfer of loans by lenders is permitted via a transfer of agreement, a transfer or an assignment of rights, or by way of novation.

For the transfer or assignment of rights that need to be in writing (see Section IV.i), there may be a requirement in the loan agreement for the existing lender to consult with the borrower or to notify the borrower prior to transferring the loan. Accordingly, the borrower's consent is not legally required under Turkish law. However, if the borrower is not notified, the borrower's payments that have been made to the transferor (assignor) in good faith shall be an effective payment.

The transfer of an agreement (loan agreement) is another option for the transferor (exiting lender), remaining party (remaining lenders) and transferee (new lender), whereby a tripartite agreement, which shall be made in the same form as the original (transferred) agreement, is entered into between the transferor, transferee and the remaining party of the agreement, and the transferor cedes its title of party to the agreement together with all its rights and obligations to the transferee.

Neither the transfer of a loan agreement nor the transfer or assignment of a loan would result in termination of the original debt. Therefore, from a Turkish law perspective, the security rights attached to the original debt would not be extinguished following these assignments or transfers.

However, transfer of a loan by way of novation (i.e., the discharge of the original debt) will have the effect of extinguishing the Turkish law-governed security. In such cases, there is a requirement to re-establish the security for the new lender. A parallel debt structure may be a way of preventing the fall of the accessory security as a result of novation. For further explanations of parallel debt, see Section VII.

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The transfer of debts (in a loan agreement) is also possible and made by an agreement between the transferor (assignor), the transferee (assignee) and the debtor (borrower). The agreement does not have to be in writing. However, security providers for such debts should provide their consent in written form as well.

There are no registration requirements with the Turkish authorities for a transfer or assignment to be effective.

VII OTHER ISSUES

i Security agent concept

It is widely accepted that security agent provisions are enforceable under Turkish law under the general provisions of law. To date, there have been numerous English law-governed transactions accompanied by Turkish law security documents where the security is held by a security agent or trustee. However, none of those transactions have been tested before the courts in Turkey in respect of the security agent provisions. Therefore, there is no relevant court precedent on the subject.

Nevertheless, it is believed that:

a security interest to be taken in relation to a debt may be validly granted to an indirect agent (i.e., the security agent, acting in its own name, on behalf of and for the benefit of the secured parties or lenders); and

b if the security agent arrangement is recognised by English courts, it is likely that a Turkish court would uphold it as being valid as well.

There are some Turkish court precedents that recognise the concept of an owner in trust (i.e., fiduciary transactions) in respect of movable or immovable property, and there are also certain financing deals on Turkish markets where a security agent or trustee is named and registered as the security right holder acting in the name of and on behalf of the secured parties.

Parallel debt

In other continental law jurisdictions where this issue is also a matter of concern, the concept of parallel debt has been introduced to ensure that accessory security would not fall away as a result of a transfer by novation, and thus enable a changing class of beneficiaries to take benefit of security without the need to have a separate transfer arrangement. Under the parallel debt structure, the security agent has an independent right to demand payment of the parallel debt. The lenders are not, however, entitled to recover the debt twice. Any payment of the outstanding debt by the borrower to a lender will reduce the amount owed to the security agent pro rata (and vice versa with regard to any payment made to the security agent). The security documents will secure the debt owed to the lenders and the parallel debt owed to the security agent. As a result, even if a loan (any portion thereof) is transferred to a new lender by way of novation, the security would remain in place as it would continue to secure the parallel debt. It is believed that this parallel debt structure, which is abstract in nature, would be recognised under Turkish law. However, some scholars argue that there might be enforceability problems where the security agent is not one of the lenders.

ii Private sale

Principles or procedures for enforcing a share pledge through private sale are not regulated under Turkish law. This is a concept accepted in the doctrine. Private sale is considered

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within the context of an upfront contractual agreement between the pledgor and the pledgee whereby the pledgee is given the right in the relevant security agreement to enforce the security and cause the pledged collateral to be sold privately.

In a private sale arrangement, the pledgee's right to enforce the security will be carried out privately and outside the jurisdiction of the execution offices, avoiding the relatively lengthy and costly process of a public sale.

VIII OUTLOOK AND CONCLUSIONS

Although private sector loans are increasing, the volume is still relatively lower than that in developed countries, suggesting that there is much room for financial deepening. However, there are structural obstacles to financial deepening, such as domestic savings, which are still low, and therefore Turkey's economic growth and corporate lending rely on capital inflows, particularly external financing, to finance investments and growth.

A weak outlook for current global activity and more severe international funding strains have the potential to spill over to Turkey, which may affect the financing required by corporates. Also, as investors have become wary and many emerging markets that rely heavily on foreign investors have seen financial capital being drawn away from their economies, it is still an open question as to how Turkey, with its current account deficit, will be affected by normalisation of monetary policy in advanced economies.

Apart from this global view, there are more Islamic transactions based on commodity *murabahah* and cost-plus financing transactions on the markets. Refinancing and syndicated loans are also becoming more popular in Turkey.

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Appendix 1

ABOUT THE AUTHORS

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