



Trade successfully with Turkey

Ten Important Principles

10 Principles that can help make your supply relationship successful

Introduction

Given its geographical location at the crossroads between East and West, Turkey has traditionally been a strong trade partner for both Europe and Asia, and in recent decades has been increasingly involved in business relations with partners in Western Europe. Firmly intent on joining the European Union, the country has set off down the path of European integration,

both commercially and legally. Accordingly, relationships involving trade with Turkey do not normally require any greater level of preparation or legal review than trade with other neighbours of the European Union.

Turkey is a free-market economy with few restrictions on imports. There are, however, certain particularities of

Turkish law which a supplier should take into account when planning sales to customers in Turkey. This overview sets out ten rules that are quite simple to follow and can help make your trading relationships lasting and successful.

1. Put it in writing

Before a foreign supplier enters into a cross-border sales contract with a Turkish company it is essential to have a written supply agreement that regulates all details of the relationship. While this simple rule holds true for any cross-border relationship, be it with Turkey or any other country, having detailed written documentation is particularly important in sales relationships with Turkish companies, because the latter (as well as local authorities and state courts) tend to take a more formal approach, based on a literal interpretation of the written documentation, than is

common among their Western European counterparts. Supply agreements must contain sufficient information about the specifications, quantity and quality of the products, the purchase price and payment provisions, as well as specific terms and time of supply, e.g. by indicating delivery terms using INCOTERMS.

Generally speaking, imports to Turkey are free of restrictions, and import prohibition applies to only a limited range of goods. These include certain agricultural products, some dyes and chemicals, various waste products and

products that endanger the ozone layer. Several other goods such as seeds and certain chemicals are subject to special import permits issued by the Turkish authorities which must be presented during customs clearance.

Likewise, there exist very few price regulation rules in Turkey, though the government does regulate the prices of certain items. In particular, pharmaceutical products are strictly regulated and subject to pricing restrictions.



2. Turkish law is very European

In cross-border relationships between Turkish and foreign companies, the parties are free to choose the law governing their supply relationship. While European suppliers often sell to Turkey based on agreements governed by German, English, French or another foreign law, there is generally no reason to be concerned about choosing Turkish law as the governing law for your supply contract.

Turkish civil and commercial law is largely based on the Swiss and German civil and commercial codes, and hence it is very similar to European continental law systems. In 2011 a new Turkish Commercial Code was adopted which

will come into force in July 2012. The Code will further liberalise Turkish commercial law and aims to make the legal framework for commercial activities more attractive to foreign investors and suppliers. That said, as a matter of practice, foreign suppliers tend to choose the foreign law of their country of origin, as this is typically better known to them and can be applied coherently to sales in other jurisdictions as well. However, agreements governed by the Vienna Convention on the Sale of Goods are rarely used.

As a rule of thumb, when it comes to the choice of governing law it is advisable for the parties to make a choice that

they both feel comfortable with and that can be easily applied by the courts or arbitrators in case of a dispute. In other words, it should be a law with settled court practice and under which both parties will be able to nominate experienced arbitrators. In addition, be aware that certain mandatory provisions of Turkish law, e.g. Turkish commercial and competition law, may be applicable even if the supply agreement is governed by foreign law. However, the vast majority of contractual terms can be agreed without limitation.

3. Verify your partner's authority

It is important to verify the corporate authority of the company you are dealing with at the outset: before entering into any supply contracts. Again, this is a simple rule that should be kept in mind in any sales relationship. However, the corporate authority of a Turkish legal entity must be established under Turkish law. To this end, it is common for foreign suppliers to request the following documentation from their Turkish partners:

- articles of association certified by the relevant trade registry;
- certificates of activity issued by the relevant trade registry;
- resolution of the board of directors approving the terms of and the transactions contemplated by the supply contract and authorizing a specified person or persons to execute the supply contract on its behalf; and

- a signature circular (an official document signed before a notary) setting out the name, signature and incumbency of the authorized signatories.

Under certain circumstances, additional corporate approvals may be required on the Turkish side. There are essentially two situations that should be kept in mind. Firstly, if the exposure under the supply contract will amount to a significant sum, it may be advisable to request a notarized board resolution approving the execution of the relevant supply contract or a capacity opinion issued by a reputable Turkish law firm. Secondly, where members of the management of the Turkish company are directly or indirectly involved in the contemplated transaction, there may exist a conflict of interests which requires the approval of the transaction by the general meeting of shareholders.



4. Securing your payment

The majority of supply relationships between Western European suppliers and Turkish customers have been successful over many years. There is no reason to be concerned about the risk of non-payment merely because the supplies are being made to Turkey. Nevertheless, a supplier should seek the same level of protection that it requires when selling within its home country or to other parts of the world. This means that supplies should be made only to a creditworthy entity that has sufficient assets for payment of claims to be enforceable.

In addition, a supplier should typically consider additional security that can be provided by the Turkish partner to secure fulfilment of the customer's payment obligations. Below we list the main types of security available in Turkey, which most suppliers will be familiar with.

- A guarantee (garanti sözleşmesi) or surety (kefalet) can be granted by another corporate entity or individual. The main difference between a guarantee and a surety is that the surety is accessory in nature (i.e. dependent on a principal obligation) and its validity therefore depends on the enforceability of the underlying supply agreement, whereas the guarantee, once issued, constitutes an independent payment obligation in the event of default. Thus, the validity of the underlying contractual relationship does not affect the enforceability of the guarantee.

As a matter of practice, Turkish partners tend to use surety instruments more regularly than guarantees. However, it is expected that this practice may change once the recent amendments to the Turkish Commercial Code become effective

in July 2012. The new provisions will make it more difficult to execute a suretyship agreement. In particular, to be valid it will have to be executed in writing, with the maximum guaranteed amount specified in handwriting. Also, the new rules expand the scope of the surety's liability to include any accrued interest and expenses for legal proceedings against the customer whose payment obligations are secured, which is not the case under the current rules.

- A payment guarantee issued by a reputable bank as an irrevocable, confirmed letter of credit undertaking to pay a certain amount or to accept or purchase bills of exchange drawn by the seller for the amount of the sales, or as a promissory note or a bill of exchange accepted or availed (endorsed) by the bank. Bank guarantees in Turkey are always issued as guarantees on first demand.
- A mortgage of immovable property (ipotek). A mortgage is one of the most common and secure instruments for a creditor to guarantee its receivables in Turkey, provided that the customer has immovable property that it is willing to use as collateral. To duly establish a mortgage, an official mortgage deed must be executed and registered with the title deed registry. The mortgagee will also typically wish to carry out a due diligence review of the property before accepting a mortgage. This is often time-consuming, so it is not usually expedient for a foreign supplier to negotiate a mortgage to secure a supply relationship.
- A pledge of moveable property including receivables, bank accounts, shares, etc. As a general rule, in order to validly establish a pledge

under Turkish law, possession of the moveable property must actually be transferred to the pledgee or to an agreed third party. An exception is moveables that are registered with a registry by law, such as motor vehicles, construction machinery and an enterprise pledge. In all other cases, the pledge must involve the actual transfer of possession, which is why pledges are rarely used in connection with supply relationships.

- Assignment of receivables, including future receivables, if their subject matter is determined. This can be an effective security instrument, particularly where the Turkish customer purchases goods for the purpose of reselling them.

Whatever type of security the parties ultimately agree to, it is in any event essential to clearly define the payment obligations in the underlying supply agreement to ensure that the secured obligations are defined in sufficiently specific terms. This is particularly important where the supply agreement takes the form of a framework agreement and deliveries and payments are made on the basis of separate orders.



5. Protect your intellectual property

Turkish law provides for the protection of intellectual property such as patented inventions, copyrighted works and registered trademarks and service marks. The protection of patents is granted for 20 years or 7 years from the date of application, depending on the procedure of examination (detailed or summarized) for which the applicant applies. Protection of registered trademarks and service marks is granted for 10 years. Copyrights are protected for 70 years after the author's death.

Under Turkish intellectual property laws, the Turkish customs authorities may suspend customs clearance procedures

at the request of any applicant if there is evidence of a breach of intellectual property rights. If the circumstances are unclear, to prevent abuses and to secure the importer's rights the customs authorities may request that the applicant provide security equivalent to the value of the goods in question. If within 10 days the customs authorities are not notified of the institution of legal proceedings or interim measures, the suspension of customs clearance will be lifted and the goods may be cleared under the normal procedure.



6. Compete fairly

Irrespective of the governing law chosen by the parties, any supply agreement relating to supplies to Turkey is subject to mandatory Turkish competition rules. When joining the European Customs Union in 1996, Turkey made a commitment to introduce EU standards on the protection of competition into its laws and to establish a regulator to enforce them. As a result, the Turkish competition rules are very similar to those in the European Union. In brief, Turkish competition law prohibits agreements, concerted practices, and decisions that prevent, distort or restrict competition or that have the potential to do so, as well as the abuse of dominance, whether by a single firm or several firms acting jointly. While Turkish law does not establish any particular market share test for presuming or identifying market dominance, in practice EU case law is considered relevant.

In the case of supply relationships, it should be noted that exclusive purchase agreements limiting the reseller's purchases to a single brand from a single manufacturer or seller are considered to be restrictive of competition, and so require meticulous analysis of the status of competition on the given market.

Supply agreements that are governed by foreign law and contain clauses on limitation of liability should be carefully assessed, as they may not be enforceable in Turkey, especially where a customer or third party has a significantly weaker bargaining position than the supplier and thus requires legal protection. Manufacturers are typically liable for defective products.

7. Take advantage of free trade zones

Foreign suppliers should be aware that in Turkey there are a number of free trade zones, i.e. special areas in which state intervention in the economy is minimized. Free trade zones are nonetheless part of Turkey's sovereign territory, and all of the civil and commercial rules apply just as they do in other parts of the country. However, many provisions relating to foreign trade do not apply in such zones, which can make it significantly easier and cheaper to supply goods to customers there than in other regions. Clearly, if

it is intended to ultimately supply the products to a customer outside a free trade zone, the normal import rules will apply, irrespective of whether the products are imported directly or via a free trade zone.

A number of previously existing tax advantages for customers in free trade zones were abolished at the end of 2008. However, there is still a range of legal advantages to Turkish partners with respect to currency regulation,

restrictions on the quality and price of products, employment rules as well as transfer of international revenue and earnings. These factors can also have indirect benefits for foreign suppliers. Suppliers should therefore bear these legal aspects in mind when negotiating supply agreements to ensure that they receive a 'fair share' of the economic advantages available in Turkish free trade zones.

8. Stay on top of tax and customs rules

As mentioned above, Turkey is a member of the EU Customs Union. The Customs Union is based on the principle of free circulation of goods within the European Union, but membership also entails alignment with certain policies, such as technical regulation of products, competition, and protection of intellectual property. As a result, imports of goods from EU member states are not subject to customs duties or levies. Imports of agricultural goods and coal and steel products are not within the scope of the Customs Union and are subject to separate preferential agreements.

Supply relationships with suppliers from other jurisdictions outside the

European Union are subject to the normal Common Customs Tariff applied by Turkey. Turkey has however entered into various free trade agreements with several other countries that are trade partners of the European Union.

Be aware that the supply of goods to Turkey may be subject to taxes and/or withholdings in Turkey such as VAT, special consumption tax (SCT) and stamp duty. The standard VAT rate is 18%. Reduced rates apply to printed products, pharmaceutical and medicinal products, textile products, etc. The SCT is an excise tax levied on certain goods such as petroleum, petroleum derivatives and solvents, any types of

vehicles (cars, planes, yachts), tobacco, alcoholic beverages, cola and luxury products. Stamp duty applies to a wide range of documents including, but not limited to, contracts, agreements, notes payable, letters of credit and letters of guarantee, financial statements and payroll documents.

While Turkey has entered into various bilateral agreements on the avoidance of double taxation, it is normally advisable for suppliers to verify tax risks in advance and to include appropriate contractual tax gross-up and indemnity provisions in their supply agreements.



9. Enforcement of rights is no more difficult than in other countries

As a rule, decisions of foreign courts are enforceable in Turkey, provided that Turkey is a party to a treaty on mutual enforcement of court judgements with the relevant country. In addition, the principle of reciprocity of the enforcement of court judgements is applied between Turkey and most Western European countries, including Germany, the United Kingdom, Italy, Switzerland and Austria.

Nevertheless, it is normally easier and more expedient for the parties to refer any disputes to a suitable arbitration

tribunal by including an arbitration clause in the supply agreement. Foreign arbitral awards are generally enforceable in Turkey. However, it should be kept in mind that some legal matters cannot be referred to arbitration under Turkish law, including labour disputes and antitrust matters, for example. Turkish state courts have exclusive jurisdiction over such matters.



10. Insure your sales

As holds true for any supplies to other countries, there remain certain risks associated with supplies in Turkey that cannot be entirely excluded even if all legal aspects have been assessed and complied with. Turkey still suffers from a certain degree of currency instability and rather high inflation, which can affect the ability of Turkish customers to meet their payment obligations under supply agreements. It is therefore

often advisable for suppliers to consider export credit insurance for their supplies to a Turkish customer.

To obtain credit insurance for exports to Turkey, a company may typically have to provide the underlying supply agreement and, possibly, proof that sufficient security has been obtained from the Turkish customer, e.g. in the form of a guarantee or surety from the

customer's ultimate parent. Insurance policies will normally exclude coverage for risks arising out of circumstances that are under the supplier's control. Such circumstances may include the legal validity of the underlying supply agreement, the validity of the security obtained by the insured party and compliance with any corporate approval and regulatory requirements.

C L I F F O R D
C H A N C E

Legal support in preparing the Ten Important Principles recommended by Atradius was provided by Torsten Syrbe, partner with Clifford Chance CIS and Clifford Chance's Istanbul office.

This overview is intended to provide general guidance on the legal framework applicable to supply relationships with Turkish customers. It is not intended as legal advice and cannot replace a thorough analysis of specific supply arrangements.

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