
THE
PROJECTS AND
CONSTRUCTION
REVIEW

FIFTH EDITION

EDITOR
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

THE PROJECTS AND CONSTRUCTION REVIEW

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EDITOR'S PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, Critique de la pensée juridique modern (Daloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the Royal Institution of Chartered Surveyors (RICS), the Chartered Institute of Arbitrators (CIArb), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). Some important issues recently discussed during the annual meeting of the International Academy of Construction Lawyers (IACL) have also been included for a broader debate. All of these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from three new jurisdictions in this year's edition: East Timor, Nigeria and Saudi Arabia. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 30 countries has shown us that to understand the world we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms who graciously agreed to participate.

Finally, I dedicate this fifth edition of *The Projects and Construction Review* to a non-lawyer, a non-engineer, but yet a most noble man: Ozias Bueno, my dearest father, whose tenderness, dedication and wisdom has given me nothing less than the desire to also be a model father to my own little son.

Júlio César Bueno

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Chapter 29

TURKEY

*H Ercument Erdem*¹

I INTRODUCTION

Given that Turkey has undergone major reforms, structurally and in terms of strategy, in its economic policy in recent years, its performance has been remarkable. The main objective of its economic policy is to increase private investment and decrease state interference. This focus has borne fruit in many areas, including the privatisation of roads, bridges, ports and the power sector. Moreover, one sector in Turkey subject to a major transition is the health-care system, with the launch of health-care projects that are designed to be realised through public-private partnerships (PPPs).

With these ambitious objectives regarding infrastructure and energy, the use of project finance transactions in infrastructure investments is increasing day by day. The funding for infrastructure projects comes from different entities, including multilateral agencies and Islamic banks. Multilateral agencies and development banks played a significant role in the financing of the Marmaray project, the railway tunnel under the Istanbul strait. The financing of the project was arranged by the Undersecretariat of Treasury under the Ministry of Finance. Accordingly, a loan agreement was signed between the Japan Bank for International Cooperation and the Republic of Turkey. The loan was an Official Development Assistance loan. Moreover, a principal loan agreement between the European Investment Bank and the Republic of Turkey was also signed.

II THE YEAR IN REVIEW

Because of Turkey's emerging economy and the need to develop infrastructure, new infrastructure investments have been concluded in various industries. These industries

¹ H Ercument Erdem is a senior partner at Erdem & Erdem Law Office.

include transportation, health care, energy and construction. The government allocated more than \$30 billion to the infrastructure sector in 2014. Some of the most interesting projects are described below.

i Third Bosphorus Bridge and North Marmara Highway

The Third Bosphorus Bridge and the North Marmara Motorway, a project with a declared investment cost of 4.5 billion Turkish lira, is set to be the world's widest and longest combined road and rail bridge. It aims to transport passengers from Edirne to İzmit by a new rail system and will interconnect Atatürk Airport, Sabiha Gökçen Airport and Istanbul's third airport, Istanbul New Airport. The project is structured on a build-operate-transfer (BOT) model and its construction began in 2013, with completion expected at the end of 2015. Responsibility for the construction and operation of the project will lie with a consortium for 10 years, two months and 20 days, and will be transferred to the Ministry of Transport at the end of this period.

ii Akkuyu Nuclear Power Plant

In the energy sector, Turkey has recently completely privatised power distribution and is aiming to complete the privatisation of its power generation assets in a few years. Turkey aims to increase its installed power capacity and the energy sector, therefore, requires significant infrastructure investment; the Akkuyu Nuclear Power Plant project has been established to this end. The power plant requires \$22 billion in financing and will reach initial operational status by 2020. In addition to Akkuyu Nuclear Power Plant, Turkey intends to build a second nuclear power plant in Sinop, in the Black Sea region. However, the construction of these nuclear power plants has raised public concern with respect to the environment.

iii Third airport project

One of Turkey's mega projects, the third airport project, located in the northern part of Istanbul's European side, will be the biggest airport in the world and is targeted to be opened on 2017. The tender for the construction of the project was won solely by Turkish firms, namely the Cengiz-Kolin-Limak-Mapa-Kalyon consortium, a joint venture of Turkish companies established in May 2013, and which promised to pay the state €22.1 billion plus tax over 25 years starting in 2018.

iv Kanal İstanbul project

The Kanal İstanbul project, creating an artificial sea-level waterway and establishing a new town on its banks with a residential capacity of approximately 500,000, in buildings limited to a maximum height of six storeys, is planned for construction in Istanbul. The details of the project have not yet been revealed and the tendering process will commence in the coming months.

v Health campus projects

Turkey enacted a new law regarding the construction and renovation of health-care facilities under the PPP model. Consequently, various health-campus projects have been

initiated. One of the projects in the construction phase, the Ankara Etlik Integrated Health Campus project, is anticipated to be the largest integrated hospital campus in the world.

vi Urban renewal projects

Law No. 6303 on the Transformation of Areas at Risk of Natural Disasters was published in the Official Gazette dated 31 May 2012. This law aims to restore and renovate buildings within areas deemed to be at risk from earthquakes, or prone to destruction during natural disasters. The law affects 6.5 million residential buildings and restoration of some of these has begun.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In Turkey, ownership structures of project financing are consistent with international standards. Generally, for the construction phase, joint ventures and consortiums are established. Typically, the infrastructure is operated by a project company. The legal form of the project company is usually a joint-stock company.

The BOT model is a financing method commonly used in developing countries to carry out projects with high costs. To a large extent, infrastructure projects such as the construction of roads, bridges, dams, sewage plants, highways, rail systems, airports and ports in Turkey are structured on a BOT basis. The BOT model is regulated by the Law on the Procurement of Certain Investments and Services within the Context of the Build-Operate-Transfer Model, which was published in 1994. Projects concluded under the BOT model have certain advantages, such as being exempt from stamp duty and certain other fees. Other than BOT, build-operate and build-lease-transfer (BLT) models are also used in Turkey.

ii Documentation

Turkish law does not have specific rules with regard to the documentation in project finance transactions. However, the documentation in large project finance transactions in Turkey is fairly similar to that used in international markets. Depending on the particular project, project documents mainly comprise project agreements, operation and management agreements, term sheets, construction contracts (mostly engineering-procurement-construction (EPC) contracts), direct agreements and finance documents such as common term agreements and facility agreements. Offtake sales contracts and power sales agreements are also used in relevant projects.

In BOT projects, a governmental concession is required. However, there is no single standard concession agreement that is used in every transaction. With respect to PPP projects for health facilities, the agreement for the construction and procurement of certain services for said health facilities must include certain provisions in accordance with the Law on Construction and Renovation of Health-care Facilities and Procurement of Services by the Ministry of Health under the Public Private Partnership Model and Amendment of Certain Law and Decrees No. 6428 (Law No. 6428).

iii Delivery methods and standard forms

In Turkey, some PPP transactions for the construction of health-care facilities have started to use EPC contracts whereby the contract provides for the work to be done by the contractor at a fixed price. Fixed-price, turnkey contracts transfer the risks to the contractor, who is responsible for the design and construction of the works for a lump sum.

Turkish domestic construction contracts are subject to the provisions of the Turkish Code of Obligations, the Turkish Civil Code and the related articles of the Public Procurement Law. However, there is a need to set uniform rules for construction contracts for large construction projects that include foreign parties. Accordingly, in Turkey, the most commonly used standard construction contract forms are those of the International Federation of Consulting Engineers.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The management of risk is a crucial issue in project finance transactions. There are different types of risk that may be encountered in a project finance transaction. Larger projects tend to identify all risks and allocate these risks beforehand.

Construction projects mostly include risks on delay in completion. In a limited-recourse project financing, different risks will be allocated to different parties and generally the project company will bear the risk of delay. However, the project company will transfer the risk of delay to the contractor through the construction contract.

In many project finance transactions, there is a risk of not obtaining the necessary permits and approvals since infrastructure projects require many permits and licences to be obtained. Generally, these permits and licences are regulated as conditions precedent to the drawdown.

Other risks that may be faced in project finance transactions include operational risks, environmental risks and insolvency risks. Operational risks will mostly be transferred to the operation and management contractor.

ii Limitation of liability

The main purpose of a liability limitation agreement is to limit compensation claims for damages incurred because of the negligent behaviour of the obligor. In contractual relationships, such compensation claims may be filed where the obligation has not been performed or has not been duly performed by the negligent obligor.

The general principles of the Turkish Code of Obligations, such as freedom of contract or the requirement of mutual consent, apply to such agreements as well. This also means that any agreement with terms that go against imperative rules of law, moral rules, personal rights and public order shall be invalid.

Furthermore, the Turkish Code of Obligations does not allow limitations of liability for gross negligence and wilful intent. This interdiction is stipulated as an imperative rule of law, thus any agreement or clause contradicting this rule shall be invalid. The joint negligence of the creditor shall trigger a reduction in the amount of compensation.

Under Turkish law, as in many other legal systems, *force majeure* removes liability for the non-performance of the contract. However, parties can define in the contract which situations would constitute a *force majeure*, and Turkish law also allows penalty clauses. However, compensation cannot be obtained under a penalty clause in the event of a *force majeure* or other fact for which the obligor is not at fault or negligent.

iii Political risks

The Kurdish question

The Kurdish issue has been one of Turkey's most delicate and complicated political problems since the 1980s. However, there is a peace process under way that includes a diverse cross section of stakeholders from all regions in Turkey and a fairly stable atmosphere has been established.

Property rights

The right to own property is recognised under the Constitution of the Republic of Turkey and everyone has property rights pursuant to the Constitution. The only restriction on property rights is that they may not be exercised contrary to the public good.

Asset expropriation

Foreign investors in Turkey enjoy the same rights and incentives as Turkish citizens, and even though Turkey is faced with excessive expropriation of assets by the government, these are mostly for urban renewal projects or the construction of power plants. Therefore, there is a very low risk that a large-scale project will be expropriated or nationalised since the Turkish government supports such projects and regards them as necessary for the development of the Turkish economy. Moreover, in cases of expropriation, compensation is granted. However, most of the unrest with regard to construction projects generally results from protests from non-governmental organisations and individuals who are against these projects. Still, as noted above, the government stands behind such projects and therefore they are not considered to involve political risk.

V SECURITY AND COLLATERAL

In Turkish practice, funders secure themselves through a number of securities and impose substantial legal obligations on the project company or borrower. In addition, they frequently take co-guarantees from the guarantors.

i Mortgage

Generally, in transactions involving real estate, a mortgage over the real estate will be established. A mortgage may be established to secure a current or future receivable. Under the Turkish Civil Code, the general rule is that the possession of a certain sum, in Turkish lira, must be demonstrated in the land registry to establish a mortgage over an immoveable property. However, there is a significant exception to this rule. The mortgage over an immoveable property may be established in a foreign currency for loans provided in foreign currencies by the relevant credit institutions. For the establishment of a mortgage, a mortgage agreement must be concluded between the

owner of the immovable property and the lender. According to a provision of the Land Register Law, mortgage transactions facilitated by banks may be registered with the land registry without the issuance of an official contract through reference to the credit or loan agreements between the creditor and the debtor. With respect to the establishment of mortgages, Turkish law conveniently allows banks to secure their credits through the mortgage.

ii Share pledge

Where a special purpose vehicle (SPV) is employed, the pledge of shares and all the related rights of the project company in favour of the lenders will be established. The rules with regards to the establishment of the share pledge (in joint-stock companies) are dependent on the share type. However, no registration requirement is foreseen for the share pledge. In addition, if the SPV is a limited liability company, the share-pledge agreement must be notarised. The pledge may be registered with the company's share ledger where the shares are registered shares.

iii Commercial enterprise pledge

A pledge over moveable property and, if applicable, a commercial enterprise pledge, are two types of security generally requested by funders. In a commercial enterprise pledge, the moveables are pledged entirely by a single pledge agreement without the delivery of their possession. The pledge agreement on commercial enterprises must be in statutory form notarised by the public notary in the registry district of the commercial enterprise.² This form is a requirement for the validity of the pledge. In addition, a list indicating all the elements within the scope of the pledge and their distinctive characteristics must be annexed to the pledge agreement. In addition, the registration of the pledge agreement is a validity requirement and has a constitutive effect for the pledge. Other securities include a pledge on the project bank accounts, assignment of the receivables and insurances.

iv Step-in rights

In Turkey, step-in rights are not regulated within a legal framework. However, in PPPs and privatisations, it is common to see step-in and substitution provisions allowing the lenders to appoint additional obligors or a permanent substitute for the borrower.

VI BONDS AND INSURANCE

i Bonds

Typically certain bonds are used in large project finance transactions and construction contracts. In construction contracts, performance bonds, securing the performance obligations of the contractors, are generally used. Bonds are guaranteed by a bank.

² Law No. 1447 on Commercial Enterprise Pledges, Article 4.

Bank guarantees are usually used as well. By means of bank guarantee, the guarantor bank undertakes to pay the beneficiary any amount up to the defined maximum upon its first demand. This guarantee may be exercised where certain obligations are not fulfilled.

There is also a new regulation regarding the treasury guarantee, which was recently published in April 2014. The Regulation on the Assumption of Debts by the Undersecretariat of Treasury enables a commitment on assumption of debts by the Undersecretariat of Treasury in BOT projects having a minimum investment amount of 1 billion Turkish lira and BLT projects conducted by the Ministry of Health and Ministry of Education having a minimum investment amount of 500 million Turkish lira. The commitment on assumption of debts shall be granted in a manner that shall include 85 per cent of the principal credit amount where the agreement is terminated through the fault of the project company; whereas, it shall include 100 per cent of the principal credit amount in the event of termination of the agreement where the project company is not at fault. Pursuant to said regulation, the debt assumption agreement will not be published in the Official Gazette of Turkey, a provision highly criticised since it removes transparency.

Sukuk, Islamic leasing certificates, is another financing instrument that has come into use in Turkish markets recently. The government has passed a regulation on the issuance of leasing certificates. The Treasury and participation banks generally use sukuk as a financing instrument.

In Turkey, project bonds are not used often. However, for projects involving multinational parties, project bonds are emerging and are likely to be considered for future projects.

ii Insurance

Usually, PPP projects regarding the construction of health facilities require different types of insurance in the construction and operation phases. PPP projects include construction insurance, which is generally 'all risk' insurance, covering the contract works executed, materials and temporary works, against all risk of physical loss or damage. Also, usually there is insurance to cover advance loss of profits due to delay. Operational insurance covers the assets of the project against all risks of physical loss or damage, including natural hazards and acts such as terrorism. Operational insurance usually covers medical malpractice as well.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

In Turkey, enforcement of security and bankruptcy proceedings are resolved in accordance with the rules set forth in the Execution and Bankruptcy Law (EBL). In many project finance transactions, the lenders secure themselves through mortgages and pledges over moveable property.

In the case of a pledge, the creditor is obliged to foreclose the pledged property instead of conducting a general seizure. Moreover, if a mortgage has been granted as a security for a loan agreement, a specific enforcement method, entitled enforcement proceeding, through foreclosure of the mortgage will be applicable.

The lender may enforce the security through an official enforcement proceeding and the seized immovable property may only be sold in a public auction. A provision in the security agreement stating that the pledged immovable property shall become the property of the creditor if the debt is not paid is deemed to be invalid under Turkish law. Moreover, a court proceeding is the only available mechanism to seize the assets of the project company in an enforcement proceeding.

Pursuant to the EBL, the first receivables that will be paid are the pledged receivables and other receivables shall be paid only after the pledged receivables are satisfied. Still, if the pledge is enclosed by the bankruptcy estate, the real estate tax, customs, estate duty, etc. arising from the pledged property shall be paid first from the sale price. In addition, the expenses borne during the foreclosure shall be deducted from the sale price. The only items that will be paid before the payment to the lender are the taxes arising from the sale of such property and the expenses incurred due to such a sale. Afterwards, the lender's receivables shall be paid together with the interest accrued until the date of sale. However, the amount paid in such a manner shall be limited to the value of the pledge.

According to amendments made to the EBL, the general rule is that public receivables such as taxes are not privileged receivables. For instance, attorneys' fees regarding such immovable property are considered as privileged receivables. Consequently, these privileges shall be paid primarily from the sale of the property, as with pledged receivables. Where this receivable, which shall be paid from the sale of the property, coincides with the right of mortgage, the priority shall be resolved by determining which receivables arose first and, accordingly, those receivables shall be paid first.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Turkey has several laws and regulations regarding the protection of the environment and the licences and permits required with regards to the environment. The principle regulation on protection of the environment is the Environmental Law. The licences and permits that have to be obtained pursuant to the Environmental Law are determined in a special regulation, the Environmental Permit and Licence Regulation, which was published in the Official Gazette dated 10 September 2014. According to the Environmental Permit and Licence Regulation, enterprises that produce high levels of environmental contamination must obtain an environmental permit or environmental licence and permit. These enterprises are listed as an annex to the Regulation and include power plants, ports, hospitals (with capacity of over 20 beds), hotels and integrated plants.

Because the vast majority of projects are construction projects, Turkey adopted a new Environmental Impact Assessment Regulation (EIAR) on 25 November 2014. With the new regulation in place, shopping malls, housing estate projects and golf facilities are subject to selection and elimination criteria and they are not under an obligation to obtain a positive EIA decision in the first phase. Moreover, hospitals are not included in the scope of the EIAR, thus are not obliged to obtain such a report. Many other large-scale projects will be subject to the provisions of the EIAR because of their potential to harm the environment. An EIA report will be prepared for projects listed in

the Regulation and no permits, approvals or building-use permits may be granted unless the EIA is passed or it is deemed that an EIA is not required. However, the new EIAR has loosened the previous regulation, allowing greater freedom in the construction sector in relation to specific projects.

The Regulation on the Application of Articles 17/3 and 18 of the Forest Law entered into force recently. This Regulation enables the construction of certain facilities, such as roads, airports, railways, tunnels, hospitals and educational buildings, in forest areas in the public interest. Consequently, construction projects in forest areas may be expected in the future.

ii Equator Principles

Turkish banks are not yet signatories to the Equator Principles. However, in Turkey most of the large project finance transactions involve multinational banks that are signatories, and a number of projects refer to the Equator Principles.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

Turkey does not have a uniform PPP law and currently there are two laws regulating PPPs.

The first is the Law on Construction and Renovation of Health-care Facilities and Procurement of Services by the Ministry of Health under the Public Private Partnership Model and the Amendment of Certain Laws and Decrees No. 6428 (Law No. 6428), which set forth the framework for the construction of health facilities.

With respect to the tender process, projects planned under Law No. 6428 shall not be subject to the State Tender Law No. 2886, nor to the Public Tender Law No. 4734. The tender authority is the highest-ranking administrator of the related unit of the central organisation of the Ministry of Health and its affiliate institutions.

The private investor shall provide a bid bond and a performance bond each equal to at least 3 per cent of the fixed investment amount (the total investment amount relating to the construction or renovation works and medical equipment requiring large financial resources as stated within the agreement) or the bid. During the operation period, the investor shall provide a bond in the amount of 1.5 per cent of the fixed investment amount or the bid. Moreover, the equity of the contractor allocated for construction cannot be less than 20 per cent of the periodic investment amount as determined in the project agreement.

With the amendment to Law No. 6428 on 1 March 2014, retroactive amendments to the tender documents and agreements after the tender period to prevent the termination of high-budget and long-term projects were enabled.

With respect to the filing of a lawsuit before the Constitutional Court by certain members of the parliament, requesting the annulment of all of the provisions of Law No. 6428, and of some provisions in particular, on the basis that those provisions are contrary to certain articles of the Constitution, the Constitutional Court, in its decision dated 1 April 2015, rejected the request of the annulment of all of the provisions of Law No. 6428 and ruled that the provisions of Law No. 6428 are not contrary to the Constitution with the exception of the phrase 'or procure its audit' set forth in the first

sentence of Article 4(4) of Law No. 6428. The said phrase has been cancelled on the basis that Law No. 6428 does not specify the qualifications of those auditors or the sanctions applicable to them in the event of a violation of their duties; that wording is, therefore, contrary to the 'principle of clarity and definiteness' and therefore contradicts Article 2 of the Constitution.

The most significant and recent PPP transactions include those for Kayseri Integrated Health Campus, Ankara Etlik Integrated Health Campus and Ankara Bilkent Integrated Health Campus.

Another type of PPP regulation concerns the construction of education campuses and student dormitories. However, while the legal structure has been put in place, no projects have yet been completed in this area.

ii Public procurement

Turkey has a general public bidding law and this legislation ensures equal treatment, transparency, competition, confidentiality, public supervision, reliability and the efficient use of sources for tenders. After the tender procedure is concluded the agreements are drafted pursuant to the Public Tender Agreement Act No. 4735.

The complaints of applicants or interested parties regarding the illegality of transactions or acts during the tender phase are reviewed by the relevant administration, and the Public Procurement Board reviews complaints about such decisions. However, these complaints do not suspend the tender procedure. If a transaction, which is the subject of a complaint, is found to be illegal, the tender will be cancelled. Resort may be made to these remedies only before the relevant agreement is signed. For the parties to file a lawsuit, these administrative remedies must first be fulfilled and a stay of execution may only be rendered by the courts.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Turkey's investment legislation complies with international standards and offers equal treatment for all investors. Foreign investment is regulated by the Foreign Direct Investments Law No. 4875 (FDIL), which aims to encourage foreign investment, to protect the rights of investors, to ensure investors and investments meet international standards and to increase the volume of foreign direct investment through international treaties and various laws.

In accordance with the FDIL, the Undersecretariat of Treasury is entitled to determine the framework for direct foreign investment by taking into account the national development plan and annual targets, the country's general economic situation and global investment trends. The Undersecretariat receives statistical information on the investments of foreign investors but can use them only for statistical purposes. Therefore, there is a notification-based system with respect to foreign investments.

Another substantial issue in this respect is work permits for foreigners. The employment of foreign personnel is possible through a work permit obtained from the Ministry of Labour and Social Security. Certain developments have been made to ease the process, including an online application and requiring the relevant authorities to give their decisions within specific periods, which are set forth in the relevant regulations.

With the amendment to the Land Register Law in 2012, the reciprocity principle has been removed in relation to the acquisition of immovable property. Foreign legal entities established pursuant to the laws of their country may own immovable property within the framework of their special laws and subject to certain restrictions. The Council of Ministers may impose certain restrictions where it is in the country's best interests.

Turkey introduced its Investment Incentive Programme in April 2012 and determined certain incentives in line with this programme thereafter. The new investment programme is an investor-friendly programme, aiming to boost investment support. A foreign company having its registered office abroad may file an application to benefit from the incentives, through opening a branch in Turkey, or through establishing a limited liability or joint-stock company in Turkey. The new incentive tools generally comprise customs duty and VAT exemption, social security premium support and free land allocation.

i Removal of profits and investment

In accordance with the rules in Turkey, foreign investors are subject to equality of treatment with local investors. Pursuant to the FDIL, the net profit, dividend, sale, liquidation and compensation amounts, the amount to be paid in return for licensing, management and similar agreements, as well as external loan principal and interest payments may be freely transferred abroad. Therefore there are no controls that restrict removal of profits from Turkey.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific courts or tribunals in Turkey when dealing with project finance transactions or construction contracts. Unless an alternative dispute resolution method is agreed by the parties, the jurisdiction of Turkish national courts is determined pursuant to the Code on International Private and Procedure Law No. 5718.

Pursuant to the Code, the jurisdiction of national courts when dealing with a dispute arising from a contractual relationship that fulfils the criterion of having a 'foreign element', is determined based upon the venue and competence rules applied in internal law to such disputes. Therefore, in such cases, the Code of Civil Procedure No. 6100 shall apply. Turkish national courts shall also have jurisdiction if there is a prorogation agreement between the parties.

ii Arbitration and ADR

Arbitration is the most widely used method of alternative dispute resolution when dealing with disputes from project finance transactions or construction contracts.

The Ministry of Justice has proposed a draft law that would aim to render Istanbul as an efficient centre of international arbitration. In the legal justification of said law, it is emphasised that the Istanbul Arbitration Centre is mostly influenced by the German Institution of Arbitration and the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic.

Turkey ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1991; thus, it is common to include arbitration clauses in contracts having an international nature. However, arbitral awards shall not be rendered on a non-arbitrable dispute pursuant to Turkish law or on a dispute that is against Turkish public policy; otherwise, they may not be recognised and enforced. In Turkish law, a non-arbitrable dispute refers to disputes arising from the subjects that are not dependent on the parties' own will, such as disputes related to family matters or matters, or transfer of ownership rights, regarding immovable properties. The decision of recognition and execution rendered by a national court for an arbitral award shall provide the same legal effect as a national court decision on the dispute.

Turkey is also party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and to the Energy Charter Treaty. Turkey has signed bilateral investment treaties with 89 countries to date.

Turkey has also adopted a new law to render mediation a more efficient method of alternative dispute resolution. This law not only deals with domestic issues, but also aims to handle disputes having an international scope.

XII OUTLOOK AND CONCLUSIONS

Turkey has adopted an investment-friendly approach in recent years and it is realising its ambitious agenda related to investments in infrastructure and construction. Accordingly, project finance transactions are increasing daily in Turkey. Infrastructure and construction projects will remain important in the Turkish economy in future years, in line with Turkey's objective to become one of the strongest economies in the world.

It seems that construction of roads, urban renewal projects, PPP projects in the health sector and projects related to power generation will continue to attract more investors each year. Turkey has achieved a fairly stable economic development, providing opportunities to investors through its new investment incentives and treasury bonds. Many positive changes are occurring in the infrastructure sector and the economy is developing, despite the challenges and risks identified.

Appendix 1

ABOUT THE AUTHORS

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Erdem & Erdem Law Office

H Ercument Erdem is the senior partner of Erdem & Erdem Law Firm. He specialises in international commercial law, mergers and acquisitions, privatisations, corporate finance and arbitration. He is involved in many cross-border projects concerning project finance, privatisation or mergers and acquisitions. He has participated in several arbitration proceedings as president arbitrator, sole arbitrator and party arbitrator, and has represented local and international clients in arbitration. He is also emeritus professor of commercial law at the Galatasaray University faculty of law and he teaches negotiable instruments law, corporate law, competition law and international commercial law. He is the vice chair of the ICC CLP Commission and a member of the ICC Institute Council.

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