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THE  
PROJECTS AND  
CONSTRUCTION  
REVIEW

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SIXTH EDITION

EDITOR  
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

# THE PROJECTS AND CONSTRUCTION REVIEW

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# EDITOR'S PREFACE

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*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 International Academy of Construction Lawyers (IACL), 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), the American Bar Association's Forum on the Construction Industry (ABA), the American College of Construction Lawyers (ACCL), the Canadian College of Construction Lawyers (CCL) and the International Construction Lawyers Association (ICLA). 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 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 four new jurisdictions in this year's edition: India, Portugal, Saudi Arabia and Thailand. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 26 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 sixth edition of *The Projects and Construction Review* to the International Society of Construction Law, a worldwide federation or alliance of national or

regional Society of Construction Law (SCL) organisations that aim to foster the academic and practical legal aspects of the construction industry. We now celebrate the hosting of the International SCL's Biennial Conference for the first time in Latin America (13 to 15 September 2016, in São Paulo, Brazil). I thank the leaders of SCL International for all their support in the organisation of this event.

**Júlio César Bueno**

Pinheiro Neto Advogados

São Paulo

July 2016

## Chapter 26

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# TURKEY

*H Ercument Erdem*<sup>1</sup>

### I INTRODUCTION

Although Turkey has undergone a number of major structural and strategical reforms, its economic policy in recent years has been remarkable. The main objective of its economic policy is to increase the share of private investment and decrease state interference in the economy. 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 healthcare system, with the launch of healthcare 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 play 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 include transportation, health care, energy and construction. The government allocated more than US\$30 billion to the infrastructure sector in 2015. Some of the most interesting projects are described below.

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<sup>1</sup> H Ercument Erdem is a senior partner at Erdem & Erdem Law Office.

**i Yavuz Sultan Selim Bridge (Third Bosphorus Bridge) and North Marmara Highway**

Yavuz Sultan Selim Bridge which is the third bridge in Istanbul crossing the Bosphorus and part of the North Marmara Motorway, is a project with a declared investment cost of 4.5 billion Turkish lira, and is set to be the world's widest and longest combined road and rail bridge. It aims to transport passengers from Edirne to Izmit 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 in August 2016. 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 privatised power distribution and is aiming to complete the privatisation of its power generation assets in a few years. In support of the growing investments, 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 US\$22 billion of financing and is expected reach initial operational status by 2020; however, its exact date of operation is not certain. In April 2015, the ground-breaking ceremony was held for the offshore structures and ports that will be used for the Akkuyu Nuclear Power Plant. It was later announced that Cengiz İnşaat won the tender for the building of the offshore structures and ports. 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 plants has raised public concern with respect to the environment.

**iii Third airport project**

One of Turkey's mega projects, the third airport project, namely Istanbul New Airport, located in the northern part of Istanbul's European side, will be one of the biggest airports in the world and is targeted to be opened on 29 November 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. This amount is the biggest in the history of the Turkish Republic.

**iv Kanal Istanbul project**

The Kanal Istanbul 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 Great Istanbul Tunnel project**

The Great Istanbul Tunnel was announced in February 2015, which is a combined three-storey tunnel project that will connect the European and Asian sides of Istanbul from



underwater and will include both motorway and railway access. Although the project is still at the tendering stage, its financing estimate is US\$3.5 billion. Also structured on BOT model, the tunnel is expected to be completed in five years.

**vi Osman Gazi bridge (Izmit Gulf transit bridge)**

Structured on the BOT model, 2,682 metre-long Osman Gazi Bridge connects Yalova and Izmit and is the longest bridge in Turkey. The construction works of the suspension bridge began in 2013 by Otoyol Yatırım ve İşletme Anonim Şirketi, a joint stock company established by Nurol-Özaltın-Makyol-Astaldi-Yüksel-Göçay Joint Venture and ended in April 2016. Built as a part of Gebze-Orhangazi-İzmir Highway Project, Osman Gazi Bridge cost approximately US\$1.1 billion.

**vii Health campus projects**

Turkey has enacted a new law regarding the construction and renovation of healthcare facilities under the PPP model. As a result, 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.

**viii Urban renewal projects**

Law No. 6306 on the Transformation of Areas at Risk of Natural Disasters entered into force through publication 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, joint ventures and consortiums are established for the construction phase. 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 high-cost projects. 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 the BOT system. The BOT model is regulated by the Law No. 3996 on the Procurement of Certain Investments and Services within the Context of the Build-Operate-Transfer Model, which was published in 1994. Projects realised under the BOT model carry certain advantages, such as being exempt from stamp duty and certain other fees. Other than BOT model, 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 the international markets. Depending on the characteristics of a 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. Off-take 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 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 Healthcare 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 healthcare facilities have started to use EPC contracts whereby the contract provides for the work to be done by the contractor in consideration of a fixed price. Fixed-price and turnkey contracts transfer the risks to the contractor, who is thereby made responsible for the design and construction of the construction works for a lump sum.

Turkish domestic construction contracts are subject to the provisions of the Turkish Code of Obligations, Turkish Civil Code and the related articles of the Public Procurement Law No. 4734. 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 (FIDIC).

## **IV RISK ALLOCATION AND MANAGEMENT**

### **i Management of risks**

The management of risk is one of the crucial points 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 before they arise.

Most construction projects include risks on delay of the 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 by way of the construction contract.

In many of the project finance transactions, there exists a risk of non-obtainment of 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, environmental 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 as a result of the negligent behaviour of the obligor. In contractual relations, 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 No. 6098, 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 are in violation of the imperative rules of law, moral rules, personal rights and public order shall be invalid.

Furthermore, the Turkish Code of Obligations does not allow liability limitations for gross negligence and wilful intent. This prohibition is stipulated as an imperative rule of law, thus any agreement or clause contradicting this rule shall be invalid. In addition, the joint negligence of the creditor shall result in 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 are allowed to 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. The peace process between 2013 and 2015 ceased in the summer of 2015. Since then, the Turkish Army and the insurgents have been in armed conflict with each other in the South-eastern cities of Turkey with many casualties from both sides.

### *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, the risk that a large-scale project will be expropriated or nationalised is very low since the Turkish government supports such projects and considers them as necessary for the development of the 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. Still, as noted above, the government stands behind large-scale projects and therefore they are not considered to involve any 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 the borrower. In addition, they frequently take co-guarantees from the guarantors.

**i Mortgage**

In general, in transactions involving real estate, a mortgage over the real estate will be established. A mortgage may be established to secure either a current or future receivable. Under the Turkish Civil Code No. 4721, 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 over 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 immoveable property and the lender. According to a provision of the Land Register Law No. 2644, 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 type of share. No registration requirement is foreseen for the share pledge, whereas if the SPV is a limited liability company, the share-pledge agreement must be notarised. The pledge may be registered in 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 need for 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. Unless, the pledge will be invalid. 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-scale 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.

Bank guarantees are commonly used as well. By means of bank guarantee or letter of 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 as a result of 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. The government has passed a regulation on the issuance of leasing certificates; there is also a communiqué passed by the Capital Markets Board. 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 commonly an ‘all-risk’ insurance, covering the contract works executed, materials and temporary works, against all risks 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 No. 2004 (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, resulting in the foreclosure of the mortgage will be applicable.

The lender may enforce the security by 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 payment will be made for 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 compensated 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 along 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 in the first place 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 are the receivables that 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 principal regulation on protection of the environment is the Environmental Law No. 2872. 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.

Since the vast majority of projects realised 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 obliged 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 EIAR provisions 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 determined as 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, Ankara Bilkent Integrated Health Campus and Yozgat 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 that the investors and investments meet international standards and to increase the volume of foreign direct investment coming to Turkey through international treaties and various legislation.

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 however can only 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 in accordance with 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 if it is in the country's best interests.

Turkey introduced its Investment Incentive Programme in April 2012 and laid out 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 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 Law, 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 Civil Procedural Code 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 Istanbul Arbitration Centre Code No. 6570 regulates the establishment and the principles and procedures of the Istanbul Arbitration Centre (ISTAC). In the legal justification of said Code, it is emphasised that the Istanbul Arbitration Centre is mostly influenced by the German Institution of Arbitration and the Arbitration Court within 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 character. However, arbitral awards shall not be rendered on a non-arbitrable dispute pursuant to Turkish law; 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 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**

In recent years, Turkey has adopted an investment-friendly approach and it is realising its ambitious agenda in relation 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 energy 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. Positive changes are under way in the infrastructure sector and the economy is developing, despite the identified challenges and risks.

## Appendix 1

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# ABOUT THE AUTHORS

### **H ERCUMENT ERDEM**

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H Ercument Erdem is the senior partner of Erdem & Erdem Law Office. 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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