

THE PROJECTS AND
CONSTRUCTION
REVIEW

TENTH EDITION

Editor
Júlio César Bueno

THE LAWREVIEWS

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CONSTRUCTION
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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* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I would like to 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 a chapter from Turkey in this edition. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 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 law firms that graciously agreed to participate.

Finally, I dedicate this tenth edition of *The Projects and Construction Review* to a dear friend, the late Vinayak P Pradhan, who died on 8 March 2020. Vinayak Pradhan was an advocate and solicitor of the High Court of Malaya and the Supreme Court of Singapore. He was a partner and consultant at Skrine for more than 45 years, recognised throughout his legal career as a talented advocate, whose oratorical brilliance regularly outshone the best and was immensely respected in the arbitration world. Vinayak was appointed director of the Asian International Arbitration Centre in November 2018. The then Honourable

Attorney General of Malaysia, in announcing the appointment, described Vinayak as ‘the doyen of arbitration in Malaysia and recognised the world over for his ability, experience and leadership in the field of arbitration’. He is survived by his wife, Varsha, and his two children, Avinash and Anisha.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

June 2020

TURKEY

Reşat Gökhan Basan and Güllü Gülver¹

I INTRODUCTION

Turkey occupies a unique geographic position, lying mainly in western Asia and partly in Europe. Throughout its history, Turkey has acted as both a barrier and a bridge between the two continents, a function it still serves today.

The construction sector plays a crucial role in the Turkish economy, not only because its geopolitical position makes it a favoured place for investors but also because its proximity to Middle Eastern countries means that those countries, with petrol-related financial resources, are willing to invest. Also, a Turkish–Russian nuclear power plant and Turkish–Chinese railway construction projects are ongoing, showing that Turkey attracts interest for investments from various countries.

High levels of immigration has meant the construction industry has thrived on the low costs related to cheap labour. This benefit has been overshadowed by high interest rates and the sharp rise in the exchange rate with the Turkish lira constantly weakening compared with the US dollar. This inevitably resulted in higher costs for materials for locals mainly procuring from abroad, which in turn enormously raised the interest from foreign investors being able to invest at a lower risk in Turkey.

Other factors that kept interest high in the Turkish construction industry were the recognition of the country as a global player, being the second most important country in foreign markets in this area²; its experience in business; its young population as a driving force for infrastructure investments and new residential buildings; the ongoing need for urban renewal; and the need for rehabilitation of old infrastructures (e.g., railways or hydraulic power plants) support the economic growth in this industry. While the direct share of the construction sector to Turkey's economy is 8 per cent, the indirect share may rise to 30 per cent when different sectors related to construction are taken into account.

Turkey has continuously implemented the latest global technologies in this sector and this will lead to an even more efficient and effective approach in the next few years.³ Up to now, the construction industry lacked the involvement of governmental institutions and was mainly occupied by the private industry but, as also seen in other economies, the construction industry gives the impulse for growth in Turkey's economy as well, meaning that any growth or recession in the construction sector has a direct impact on Turkey's general

1 Reşat Gökhan Basan is managing partner and Güllü Gülver is an associate at Basan Attorney Partnership.

2 Engineering News Record, ENR TOP 250, 2019 Edition.

3 Turkish Statistical Institute, Press Release Construction Cost Index, December 2019.

economy. When analysing long-term tendencies in Turkey's economy in connection with the construction industry, this industry can be described as the most sensitive one in terms of fluctuations.⁴

II THE YEAR IN REVIEW

Turkey has seen considerable activity in projects and construction since 2002, along with an increased use of more complex legal framework and financing structures, especially through project finance and public-private partnerships (PPPs) and, for the past year, Turkish construction companies in public and private sectors have started and finished several large-scale projects related to both residential and commercial sectors. Nevertheless, the beginning of a slump in construction activities in Turkey deepened in 2019, with the industry contracting by a decrease of 8 per cent in real terms, following a decline of already 2.1 per cent in 2018.

This trend however does not reflect the situation for PPPs. Here, Turkey's internationally renowned status in the construction industry was confirmed in recent years by the construction and approval of large projects that focus on the development of the domestic infrastructure. According to the World Bank, Turkey ranks third globally in PPP projects.⁵ Furthermore, the symbolic year 2023, to mark the 100th anniversary of the modern Turkish Republic, has given rise to a large number of ambitious infrastructure projects in air and water transportation and infrastructure in general.

Between 1986 and 2018, the number of PPP projects in Turkey reached 242 with a contract value of US\$139.8 billion in total. Airport projects capture the largest share by far, followed by projects in the energy industry. Of these projects, 220 are already in operation and, as of the end of 2019, 22 projects were still in the construction phase or had reached financial closure.

The latest project that attracted much public attention was the construction of the Istanbul airport with a total investment of US\$14.9 billion. The construction itself is designed in several phases, of which the first phase was officially completed on 29 October 2018 – coinciding with the 95th anniversary of the Turkish Republic. In the current phase of development, 90 million passengers a year are planned to be handled at the airport, with a potential capacity to serve 200 million after the completion of all phases.

The Kanal Istanbul Project, another 'mega project' – as it is often referred to in Turkey – which was suspended after a currency crisis in 2018, returned to the government's agenda in December 2019. Kanal Istanbul is meant to be an artificial sea-level waterway connecting the Black Sea to the Sea of Marmara. The lane is expected to ease shipping traffic on the Bosphorus and prevent accidents. The project is estimated to cost US\$15 billion. The tender process started recently with five companies bidding for the planning of the reconstruction of the historic Odabaşı and Dursunköy bridges.

The public criticism in light of PPP financed projects because of the lengthy guarantees given by the government, however, is continuously rising. The consequences of such criticism can be seen in the Mid-Term Fiscal Plan (2019-2021) of the Strategy and Budget Presidency of the presidency of the Republic of Turkey, where it is prescribed that projects for which no bidding process started yet or where the project has already been awarded but no further

4 Türkiye IMSAD, Association of Turkish Construction Material Producers, Sectoral Report, February 2020.

5 <https://www.invest.gov.tr/en/sectors/pages/infrastructure.aspx>

actions were taken, shall be suspended in order to reduce public spending. The same objective is not repeated in the 2019 programme of the Turkish presidency, but the programme states that PPP projects that predominantly ensure cost efficiency shall be realised. It is expected that the goal of cost efficiency will be the key criterion for future awarding.

Other ongoing projects involve the construction of bridges, one of them being the Çanakkale Bosphorus project. Upon its anticipated completion date in 2023, this bridge will deprive the Akashio Bridge based in Japan of its record to be the world's longest suspension bridge. Closely connected to the construction of bridges is the construction of highways to access the bridges, such as the Gebze-Orhangazi-Izmir highway with a total investment value of US\$7.96 billion. Turkey's population growth of one million every year accompanied by a rapid urbanisation process and rising mobility are the logical consequence of the increasing demand for efficient travelling, and is the reason that highways make six out of 32 ongoing projects through PPPs.

The construction of city hospitals, which are either solely build by the private sector or through PPPs, became popular among investors throughout the past few years with the goal of offering a full health service by building a large medical campus and concentrating all departments in one place. However, even though most of the ongoing projects through PPPs are dedicated to city hospitals, the concept does not find much support in the Turkish population. The distance of the hospitals from the city centre and the forced transfer of all hospitals to one campus are subject to criticism and, at the same time, Turkey's government is working to protect itself and investors from the soaring costs of several hospital mega projects, including some left unfinished, after a currency crisis in 2018.

Regarding the sectoral distribution of the projects, Turkey shows a large need for power plants. The government together with the private sector signed up for 91 projects in this field from 1986 to 2018.

Most recent, the covid-19 pandemic, along with the ongoing currency crisis and high unemployment, is expected to have a negative impact on Turkey's economy, which could have an adverse impact on construction spending.

There are still factors that could prop up the projects and construction industry after the covid-19 pandemic, notably the government's focus on developing transport, residential and energy infrastructure. However, the industry is expected to recover in 2021 and the output value is expected to increase at an annual average rate of 5 per cent during the period of 2021-2024, with new investments in manufacturing plants and the government focusing on developing the country's infrastructure.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

The conservative approach of Turkey to provide all public services by governmental institutions drastically changed over the past decade. Owing to governmental decisions and deficits in the national budget, privatisation in Turkey became more popular, although its first applications were way back in 1986. Back then, the projects focused primarily on the energy and healthcare sector, whereas today mega projects for transport and infrastructure are more common in terms of construction projects. As of today, Turkey is one of the leading countries to work with PPPs, using them in all kind of situations.

PPPs, as a hybrid form of contracting, allow a balanced sharing of risks between private investors and the government, which makes it attractive for both parties to get involved in

such projects. Turkey established a number of models to realise PPPs. Most PPP projects follow the models of build-operate-transfer (BOT) and transfer of operating rights (TOR), with both accounting for 45 per cent of PPP contracts. Build-lease-transfer (BLT) are the standard type of model for healthcare projects and make 8 per cent of PPP projects, followed by the build-operate (BO) model with 2 per cent (this model is almost exclusively used for energy projects).

The parties of construction projects in general can organise themselves as joint ventures, forming a business partnership or consortia, depending on the agreed risk distribution.

ii Documentation

The required documentation under Turkish law can be split in project and operating agreements on the one hand and financing agreements on the other. The exact documentation depends on several factors, including the type of project or, more importantly, whether the parties of the project are from the private or public sector.

Within private construction projects, it is typical that one main contractor in its function as the project manager will be held solely responsible for the execution of the project on a turnkey basis. He or she shall ensure the link between the owner of the project and other subcontractors. The subcontractor agreements may consist of operating, service and maintenance, design and technical agreements – all of them are required to comply with the main contract.

If any public authority is involved, the process of public bidding will involve additional tender documents by the private party, outlining technical issues, costs and risk analysis.

For BOT agreements, the large number of the contracting parties will require many additional documents in which the relations between all parties are explained.

iii Delivery methods and standard forms

Because of the freedom of contract, parties to construction projects are free to use standard forms of contract or tailored contract forms as a result of independent negotiations.

For private construction projects, it is quite common that the project owner will prepare a specific contract for the project in question. Big companies in the position of the project owner will usually provide a contract for the special type of work to be done. These contracts are very detailed and most often include details irrelevant for the relevant project but still no amendments will be permitted. Therefore, severability clauses in Turkish construction projects are popular; however, standard clauses are likely to be copied from contract forms published by the International Federation of Consulting Engineers (FIDIC).

In terms of public procurement and PPPs, standardised contracts are used by default for construction works falling under the scope of the Public Procurement Act (PPA) and the Public Procurement Contracts Act (PPCA) in public projects.

Within the scope of international projects, FIDIC standard contract forms are also widely used. But more often parties will use EFCA forms as a consequence of demands by the Association of Turkish Consulting Engineers and Architects (ATCEA).

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Owing to the nature of construction projects and their high level of investment, the potential risks are often higher than in other sectors.

Risk factors can be seen in every stage of a project, including legal, financial, market, political, environmental or technical risks. For construction projects that do not follow a fixed price, market fluctuations are of particular interest as material and production costs may significantly rise. The involvement of various parties can create complications and thus it is common to include several penalty clauses to cover delays or other failures into contracts. Another option the project owner makes use of is the passing of any kind of risks to the EPC contractor, who may pass them to his subcontractors, for example, by including back-to-back provisions or predicating any approval of works from the owner's prior approval.

For PPP contracts, a great risk lays in the length of the contracts. PPP projects typically include the providing of public services, which the government realises with the support of private financiers. Whereas the government, in providing public services, must not be driven by profit, this is often the main goal for private investors. Investment in infrastructure is only profitable where the services are widely used by the population.

Many private partners in PPPs will establish a special purpose vehicle (SPV) only for the purpose of realising the project in question. The public partner will then enter into a contract with the SPV. This SPV will provide all the finances for the project and therefore will absorb the main financial risks. Investor liability will be limited to the capital transferred to the SPV and the loan taken for the project finance will not be recognised in the financial statements. In Turkey, these SPVs will usually be seen in the form of local joint ventures or single purpose partnerships.

ii Limitation of liability

Following the principles of freedom of contract in Turkish law, the parties are free to agree on any form of liability provisions they want to. The law itself does not intervene or set actual figures. However, provisions about the complete exclusion of liability will not be enforceable by law if the damage occurs because of violations of the public order, due to wilful misconduct or gross negligence by the breaching party. Private construction projects nevertheless make use of caps on the liability as construction projects usually have a high cost impact, whereby such limitation will only be enforceable if they did not occur through a violation of the public order, due to wilful misconduct or gross negligence. In terms of delay damages, typically a daily rate of 0.5 per cent of the total contract price applies. Even if the parties did not agree on a cap, Article 182/3 of the Turkish Code of Obligations will allow the judge, *ex officio* or through party's request, to use his or her judicial discretion to cap a damage payment legally arisen when he or she finds this disproportional.

Another common limitation of liability widely used by project owners refer to occupational health and safety regulations. Still struggling many accidents at work along with illegal employment, Turkey implemented new regulations regarding the physical and social security of employees. To act in compliance with such regulations, the vast majority of construction contracts include clauses where the owner limits his or her liability by passing all legal liabilities concerning employees to the contractor, who will indemnify the owner against employee claims. The owner usually reserves the right to audit the compliance of the contractor with regulations coupled with the right to terminate if a breach is detected.

Any further exclusions, including the exclusion of indirect or consequential losses, losses of business or profits are depend on the parties' free negotiations.

For PPPs, any amendments in legal regulations that are of a general nature but in fact will only effect that one construction project, are not enforceable if they have a direct cost

impact and an extension of contractors' financial liability. In this case, parties may include contractual clauses granting the contractor the right to claim extra costs and damages, including loss of profit.

In terms of *force majeure* clauses, the parties are free to decide whether they want to limit liability in the event of *force majeure* or if only some events shall be categorised as *force majeure*. A construction agreement that remains silent about *force majeure* clauses is extremely rare in Turkey. In some cases, some events are not categorised as *force majeure*, but are capable of destroying a party's business. If the occurrence of that event is beyond a party's control and was not foreseeable by him or her, the claiming of performance by the other party may be an abuse of rights and, typically, the court will rule for an amendment of the relevant provisions or the avoidance of contract where an amendment is not reasonable. In general, all provisions are measured and limited by Article 2 of the Turkish Civil Code establishing the obligation to act in good faith.

The turbulence in the exchange rates over the past few years raises the question of whether a sharp rise is an event of *force majeure*. Rulings of the Turkish Court of Appeals in several cases outline a trend towards the evaluation of the events that led to a sharp exchange rate rising. If the concrete event was not foreseeable to the parties, it will be categorised as *force majeure*.

iii Political risks

Over the past few decades, Turkey has had to face several political events that led to a destabilisation of its economy, which, in turn, affected the construction industry. The last major event – the failed coup attempt in 2016 – affected the popularity of construction projects; however, the number of foreigners buying property in Turkey increased because of currency fluctuations.

As particular events, such as war or civil or military disturbances, are always a political risk, parties will usually eliminate these risks by incorporation of *force majeure* clauses into their contracts.

Property rights are recognised in the Constitution for both nationals and foreigners. The reciprocity requirement for property acquisition by foreigners in Turkey, as codified in Article 35 of the Land Registry Law No. 2644, has been cancelled by Law No. 6302, which entered into force on 18 May 2012. No reciprocity in terms of mutual rights in Turkey and the host country for property acquisition is required any more. This amendment especially met the rising requests from citizens of the Middle East countries. The purchase of immovable property is prohibited for Syrian nationals and citizens of Greece, Georgia, Azerbaijan, Bulgaria, Iran and Iraq cannot acquire immovable property from their border provinces. In case of expropriation, the Turkish law grants compensation regardless of the nationality of the principal.

Foreign investors are free to convert and repatriate their Turkish lira profits. By amending Decree Number 32 on Protection of Value of Turkish Currency entered into force on 13 September 2018, the Turkish government restricted the use of foreign currency denominated or indexed payments for certain type of contracts. It is important to note that such restrictions only apply to contracts between Turkish residents. Work and construction agreements are within the scope of the restriction but for contracts where one part is a foreign party, with some exceptions, no restrictions in the use of foreign currency will apply. The same freedom of contracting in foreign currency applies for public institutions, except for the sale or lease of immovable property.

V SECURITY AND COLLATERAL

Several methods to secure the investment are used by funders. In real estate or projects assets, mortgages are the most common method of security, whereas pledges are widely used for movables. Also pledges on bank accounts, shares or commercial enterprises for large-scale projects are possible.

Under the Turkish Civil Code, in order for a mortgage security to be valid, a registration at the Land Registry Office at its location is required. The perfection of a mortgage therefore will require a mortgage agreement between the mortgagor and mortgagee. Following the general rule, a mortgage must be registered in Turkish lira.

Regarding pledges, 'blanket' pledges over assets are prohibited. All assets must be listed and pledged separately. Receivables can be assigned freely as long as a written assignment agreement exists between the pledgor and pledgee, and the receivables are determinable and assignable. Even though it is recommended, the debtor does not have to be informed about such assignment.

While the assignment of receivables is allowed as security over rights set in contracts, other rights cannot be separated from their obligations – thereby establishing not only rights but also obligations.

In terms of priority, the parties can set a contractual priority where they can agree on a ranking of debts or exclude certain securities. Some contractual rankings may not be compatible with the law, and the ranking established in the law will supersede any agreements made between the parties. Especially in case of bankruptcy of the debtor, the articles of the Turkish Execution and Bankruptcy Law are mandatory, meaning that any expenses of the insolvency administrator and other administrative activities are paid primarily. After such payment, generally secured securities will be satisfied first.

Structural priorities are not regulated in Turkish law, however the principle of *lex posterior derogat legi priori* is applicable *mutatis mutandis* for securities as far as compatible with the articles of the law set above.

Provisions concerning step-in rights for funders are not only permitted but also common practice for most funding agreements.

VI BONDS AND INSURANCE

Construction contracts in Turkey operate with a variety of guarantees. Most common is the use of performance bonds, where the contractor provides a guarantee by assuring the beneficiary to effect payment on default of his or her obligations. Such performance bond is usually secured by a bank guarantee, which will allow the beneficiary to receive the maximum amount of which was set in the contract afore. Accordingly, the bank guarantee has an on demand nature, is unconditional and irrevocable and obliges the guarantor bank to pay the beneficiary without requesting any proof of breach of the contract.

Relatively new, the use of surety bonds during public tenders issued by insurance companies located in Turkey emerged as a result of the amendment of Article 4 of the Public Tender Law in 2017.

The implementation of surety bonds is a way of collateral intended to facilitate the procedures for submitting required bank guarantees by debtors. Owing to a fluctuation in the economy, debtors faced rejections when requesting guarantees by banks, which avoid opening non-cash loans. However, surety bonds follow the same structure as bank guarantees and if issued as non-conditional, grant the same level of legal protection as bank guarantees.

The insuring company, such as banks, guarantees payment in favour of the beneficiary on default of insured party's obligations against an advance payment of an insurance premium by the insured party.

For PPP projects, the inclusion of a construction insurance is common. Such insurance is designed as all-inclusive, covering manpower, performed works, physical losses and the like. For large-scale projects, the government operates with debt assumption by assuming the project company's foreign debts. Debt assumption by the government, however, is only available for BOT and BLT projects, requiring a certain minimum investment amount.

Parent company guarantees are not specifically regulated but may be requested by the project owner.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

In general and pursuant to Article 329 and Article 602 of the Turkish Commercial Code, joint stock companies and limited liability companies are liable for their debts only by their assets owned as a legal entity. It is not possible to impose an attachment on a shareholder's shares because of a debt of the company as a legal entity.

Any bankruptcy and insolvency proceedings are mainly subject to the Enforcement and Bankruptcy Law No. 2004. In case of bankruptcy of the contractor, project lenders can use several legal structures to enforce their securities in front of courts.

Pursuant to Article 45 of the Enforcement and Bankruptcy Law, if a creditor has a security over the assets of the debtor such as mortgage, movable pledge, share pledge or bank account pledge, the creditor has to initiate special execution proceedings against the debtor first – called enforcement by foreclosure of collateral. In cases where the security is not enough to cover the debt, the creditor may then initiate other execution proceedings, depending on the importance of the documents that he or she owns. According to the legal documents and objection possibilities given to the debtor, two different types for execution proceedings are conceivable.

If the official registry document, also known as an agreement table outlining the degree of mortgages, contains an unconditional acknowledgment of debt, then the creditor may want to initiate the more secure execution proceeding. The execution order, a notice stating that the asset will be sold unless the debtor is able to pay the debt in 30 days or can submit a decision for adjournment of execution, will be sent to the debtor.

If the agreement table does not contain an unconditional acknowledgment of debt, the creditor can still initiate the standard execution proceeding against the debtor, where the debtor will receive a payment order, saying that the asset will be sold unless the debtor can pay the debt in 30 days or objects to the notice of payment due within seven days. Hereby, the objection shall take place before the execution office. In the case of an objection by the debtor to the execution proceeding, to continue such proceeding the creditor must initiate a lawsuit in front of the commercial courts. For unsecured debts, creditors may initiate an execution proceeding against the insolvent contractor accompanied by a request of payment of creditors monetary claims. The case will be passed to an insolvency administrator, who has the legal power to decide on further steps, such as the continuance of performance according to project creditors contract with the contractor.

Another method consists of the request for a restructuring of debts. Under Turkish law, the main types of restructuring are concord restructuring (insolvency) and amicable restructuring. A debtor not able to pay his debts on due date or under the risk of non-payment

on due date, may request insolvency to benefit from the insolvency provisions or to avoid a possible bankruptcy. The insolvency can also be initiated by eligible creditors with a reasoned petition. The insolvency plan restructuring can be implemented in three different ways: the ordinary insolvency; the insolvency in bankruptcy; and the insolvency through asset abandonment. The key aim is to present a probable success through an insolvency plan, with no intention to cause any damage or loss to the creditors. For this, the debtor is in obligation to present a feasible composition plan regarding the restructuring of his or her debts and payments. This plan is up to the approval of the court and the majority of the creditors, postpones the bankruptcy for a period of one year, prevents the creditors to otherwise execute debt collection during the temporary relief period and suspends any ongoing proceedings of debt collection.

In cases where the commercial court does not approve the insolvency plan or cancels the insolvency plan period, it will immediately decide on the bankruptcy of the debtor due to the report of the insolvency plan commissar. Creditors can also apply to the court for the termination of the insolvency plan restructuring if the debtor is suspected to have acted in bad faith by approving the restructuring proposal or if the debtor does not comply with the provisions of the insolvency plan.

Amicable restructuring is applicable for corporations and cooperatives. If a company is not able to pay its debts or its receivables are not enough to recover its debts or if the company is under the risk of facing these steps, such company may apply to a commercial court in order to request the amicable restructuring. If the restructuring project is successful, the debtor will continue to operate. Where the debtor breaches the conditions of the amicable restructuring, he or she can still try to negotiate with creditors in order to have an amendment, which must be approved by the court. If such agreement cannot be reached, a creditor may apply to the court for the termination of the restructuring. If the breach and therefore the application is confirmed by the court, it will decide on bankruptcy.

Outside of the context of a bankruptcy proceeding and the restructuring of debts, Turkish Enforcement and Bankruptcy Law No. 2004 allows other ways for creditors to liquidate their security interest. The prerequisite is that the project company must be in breach of its contractual obligations. Rather than a general seizure of the assets, the liquidation of assets provided as security shall be considered primarily. Any debts will be paid in Turkish lira but will follow the exchange rate applicable on the collection date. In order to prevent creditors to claim their ownership on the assets, the *lex commissariat* rule is applicable under Article 873/2 of the Turkish Civil Code and the only way to recover the security in form of mortgages will be through public sale.

After all procedure costs and expenses of the Bankruptcy Office are satisfied, pledged and mortgaged assets are part of the bankruptcy estate and lenders with a perfected pledge or mortgage will move into the position of preferred creditors and will be satisfied primarily. Under receivables that are secured but not pledged or mortgaged, employees requests will be satisfied first. In 2018, as per Law No. 7101 amending the Law No. 6183 on Procedures for Collection of Public Receivables, receivables secured with pledges shall have priority over public receivables arising from rights *in rem*.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

The exact regulations and legislation to be applied will depend on the nature of the project. For a contractor to be part of construction activities, a certificate of authorisation under the Building and Construction Law from the Ministry of Environment and Urban Development is mandatory. This certificate is the preliminary stage to apply for a construction permit for buildings that require such. The construction permit will be issued by the relevant municipalities, following several procedures mainly stated in the Zoning Law No. 3194.

Environmental regulations, mostly covered in the regulations of the Environmental Law No. 2872, build a key part of construction regulations. An often-considered regulation is the Environmental Impact Assessment (EIA) exclusive for construction projects and for the facilities and buildings named therein in order to determine the effects of the projects on the environment.

Regarding laws on labour, the government undertook several measures to ensure workers welfare and rights. Some of them include the payment of benefits granted by law, social security registration and payments and laws requiring specific precautions for more dangerous works. Usually, subcontractors must register and pay for their own employees, but the Social Security Institution can claim due payments from both the contractor and subcontractor in case of non-payment. The laws do not distinguish between the employment of local or foreign workers in the stage of selection; however, for every foreign employee, the contractor must employ minimum five employees with Turkish citizenship.

ii Equator Principles

Turkish banks are not yet signatories to the Equator Principles; however, owing to the reinsurance of Turkish banks at other banks for large-scale projects, some of them refer to the Equator Principles.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

Turkey is one of the top countries using PPPs in project finance and construction contracts. The most involved sectors are infrastructure, healthcare and energy. Rather than a common legal framework for PPP projects, specific laws were passed depending on the type of PPP model chosen. To name some of them, the very first law passed in this area was related to the use of PPPs for health facilities, today matured with the Law No. 6428 on the Construction and Renovation and Purchase of Services by the Ministry of Health by way of the PPP Model and Amendment of Certain Laws and Decrees with the Force of Law (2013). Other legislation is provided by Law No. 3096 on the Authorization of Enterprises other than Turkish Electricity Authority for Power Generation, Transmission, Distribution and Trading (1984) and Law No. 3996 on the Realization of Certain Investments and Services through BOT Model (1994).

To attract investors and meet their profit expectations, the Turkish government started to give guarantees to investors for the operation of BOT projects. This guarantee ensures the compensation of losses and even calculated profits via public funds. For highway or airport projects (e.g., the new airport in Istanbul), these guarantees often consist of a contractually

agreed minimum number, which determines how many passengers are expected to use the service daily. If on average the specified number is not met, the Turkish government will pay the investor the expected daily profit regardless of the discrepancy.

There is increasing public opposition to this method because of the high cost. The losses of private financiers are compensated through public funds and include taxes from people who will never make use of that service. Because of increasing criticism, it remains unclear if this method will be used for further projects.

Further, during the investment period, most PPP projects are exempted from VAT, stamp tax and legal fees for some transactions.

ii Public procurement

The terms and conditions for public procurement procedures are regulated in the PPA, Law No. 4734 and the PPCA, Law No. 4735. The main principles to be applied in tendering procedures are transparency, competition, equal treatment, reliability, confidentiality, public supervision, and fulfilment of needs appropriately, promptly, and the efficient use of resources and are codified in Article 5 of the Law No. 4734. In general, three types of tendering procedures are applicable under Article 18 of Law No.4734. These are the open, restricted or negotiated procedures. Whereas restricted procedure is subject to an invitation following the pre-qualification by the contracting authority mostly for projects that require a certain expertise; and open procedure allows all tenderers to submit their tenders and take part in the bid. Negotiated procedures will only apply where no tender is submitted in open or restricted procedure.

If PPPs follow the open procedure, a single stage tendering and bidding will apply. International contractors are also invited to take part in such bidding, but tenders may sometimes request additional securities or the incorporation of a SPV in Turkey. The awarding will be made in accordance to the notified requirements. In procurements, tender security shall be given in the amount determined by the tenderer, not being less than 3 per cent of the tender price of the procurement. If stated in the relevant documents, consultancy services may be an exception to the requirement of security. The values accepted as tender security are usually Turkish lira or guarantee letters, however, also guarantee letters arranged by foreign banks permitted to operate in Turkey are accepted as tender security.

An application against tenders will be reviewed by the relevant authority at first stage but will not suspend the tender procedure. Only upon the decision confirming the illegality of the transaction, the complaint will succeed in the form that the tender will be cancelled.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

In addition to what has been said already regarding the involvement of international parties, Turkey has passed several laws and regulations in order to attract foreign investors. The main issues are regulated in the Foreign Direct Investments Law No. 4875. According to this, equal treatment shall be granted including that foreign direct investments shall not be expropriated nor nationalised unless there is a public interest and then only against a proper compensation. Foreign investors can directly invest in Turkey by incorporating companies, opening branches or acquiring shares in Turkish companies without having to obtain prior authorisation or approval. Investors only need to notify the Ministry of Treasury and Finance through an online platform called Electronic Incentive Application and Foreign Investment Information System (E-TUYS) of the investment type, capital of investment

and the shareholding structure and inform the Ministry on a yearly basis in terms of their investment activities. However, few exceptions to the non-requirement of permission apply for some sectors.

Turkey is a party to more than 80 bilateral investment treaties (BIT) currently in force along with more than 80 double taxation treaties for providing a business friendly environment to foreign investors.

Since the publication of the The Regulation on the Amendments to the Regulation on the Implementation of the Turkish Citizenship Law in the Official Gazette dated 19 September 2018, Turkey also provides the possibility of acquiring the Turkish Citizenship by , for example, purchasing real estate worth at least US\$250,000 without selling it for at least three years, investing at least US\$500,000 in firm capital, having created jobs for at least 50 people or buying at least US\$500,000 worth of real estate investment fund share or venture capital investment fund share without selling it for at least three years.

i Removal of profits and investment

International investors can make money transfers abroad in any currency. Turkish law does not foresee any restrictions on project companies establishing and maintaining foreign currency accounts in Turkey. Both local and foreign investors will benefit from the same investment incentives including tax discounts, allocation of investment lands, insurance premiums, and employer's share support.

XI DISPUTE RESOLUTION

i Special jurisdiction

Turkey did not implement any specific courts or tribunals for the handling of project finance transactions or construction contracts but such issues will rather be dealt in national courts or in arbitration. If no cross-border element is involved in the transaction or contract, the parties are usually bind to the application of Turkish legislation in front of Turkish courts.

ii Arbitration and ADR

The trend to use arbitration for resolving disputes is very high, especially for large scale projects, contracts using the FIDIC standard forms and PPP contracts concluded with international parties. For this reason, jurisdiction in Turkey is drafted rather arbitration-friendly.

In cases where an arbitration model clause is not included in the contract, usually in respect of national transactions, the parties will refer to the national courts in terms of litigation. Owing to the last amendments in Turkish Civil Procedure Law No. 6100 (CPL), commercial disputes pertaining to monetary receivables are referred to a compulsory mediation procedure before passing them on to the commercial courts of first instance; otherwise, the case will be dismissed on procedural grounds without further examination of its merits. Because of this, mediation became more common and parties sometimes refer to mediation voluntarily.

The validity of arbitration clauses for national arbitration procedures are regulated in the CPL, and for disputes having a cross-border element in the Turkish International Arbitration Law No. 4686 (IAL), whereas both laws mainly refer to the regulations of UNCITRAL Model Law on International Commercial Arbitration.

To meet the rising requests for arbitration, the Istanbul Arbitration Centre (ISTAC) was established in 2015. As of January 2018, PPP form contracts determine ISTAC as the

standard arbitration centre if parties decided on arbitration for dispute resolution. Foreign parties may prefer to apply the rules of the International Centre for Settlement of Investment Disputes, to which convention Turkey is a party to and which right is usually granted in BITs.

Even if arbitration is widely spread, in practice, Turkish contractors will first try to resolve the dispute with pre-arbitration procedures such as expert determination, dispute adjudication board or mediation than directly calling the agreed arbitration centre. For that, often multistage provisions are implemented in construction contracts.

Article 408 CPL and Article 1 of IAL prescribe some limits on the arbitrability of disputes, namely disputes in terms of rights *in rem* on immovable properties located in Turkey and disputes not dependent on parties' own will (e.g., disputes over family issues). Construction contracts usually do not fall under the scope of these restrictions, nevertheless disputes concerning the cancellation or registration of title deed are not subject to arbitration either.

The enforcement of arbitral awards is determined by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) with Turkey being a party to that convention. For states that are not parties to the New York Convention, the enforcement can be realised with reference to relevant regulations in the Turkish International Civil and Procedure Law No. 5718.

A foreign arbitral award can be enforced under the New York Convention with the application of the claimant party to the national courts in order to receive an enforcement decision. In such a decision, only procedural errors can be challenged, the national court cannot perform a substantive examination. However, the enforcement of arbitral awards might be rejected where the enforcement will lead to a breach of Turkish public policy.

XII OUTLOOK AND CONCLUSIONS

Infrastructure projects and construction are an important driving force for the Turkish economy. The reserved national budget for projects is rising and the government puts a lot of effort to maintain the growth in this sector and continuously implements new regulations to attract more investors. With the search for new investors, especially in PPP projects to improve its infrastructure, Turkey has become a global player in this sector over the years.

The Kanal Istanbul project has a huge budget of approximately US\$15 billion and an ambitious plan to complete in less than a decade. The project includes settlements along the canal banks, which will create a new city of about 500,000 people at least. It is expected that a new market for further investments, such as new urban renewal projects, substructure and infrastructure works around the canal, will be created and this area will potentially become the new target for big investors.

The Turkish market is particularly tough for contractors as it is one of the most competitive in the world. According to the *Engineering News-Record* ranking of the 250 biggest international contractors, only China has more contracting firms. Although the Turkish market has proved to be a tough one to crack for contractors, the services for international consultancies are in much greater demand because in comparison to the Engineering News-Record list for contractors that is full of Turkish firms, the same tables produced for architects and engineering consultancies have hardly any.

It is anticipated that by 2023 Turkey will have spent more than US\$700 billion on several new infrastructure projects, which, it is expected, will help the construction industry to increase by several points each year. Estimates are that this sector could contribute up to US\$2 trillion to the country's GDP.

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Reşat Gökhan Basan is the founder and managing partner at Basan Attorney Partnership. He has both law and finance degrees, and an LLM degree in European law.

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She has recently been working as the in-house lawyer for one of Basan's clients, where she advises on clients' legal risks and liabilities and is responsible for contract drafting, reviewing and negotiation.

Güllü received her law degree and *magister juris* from the Ruprecht Karl University of Heidelberg, Germany in 2018. She is also a graduate of Ankara University and received her diploma of equivalence in 2019.

Appendix 2

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