

ICLG

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Chapter 28

Turkey



Şeref Can Arat



Umut Tuğa

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have contracts which place both design and construction obligations upon contractors? If so, please describe the types of contract. Please also describe any forms of design-only contract common in your jurisdiction. Do you have any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

The most commonly used standard types of contracts in Turkey are those that are drafted for construction work in the public sector. Annex 7 "Standard Contract for Construction Works" of the General Specifications for Construction Works is the leading example. It is drafted in accordance with Public Procurement Law No. 4734 and the Public Procurement Contracts Law No. 4735.

Law No. 4735 allows for different types of contracts such as:

- Turnkey – Lump Sum Public Procurement Contracts as regulated under Article 6-a;
- Unit Price Public Procurement Construction Contracts as regulated under Article 6-c; and
- Combined Public Procurement Construction Contracts which combine the aforementioned two and are regulated under Article 6-b.

Annex 7 may be modified to suit all contract types listed. Since these form contracts are issued for public tenders, the terms are typically non-negotiable subject to certain exceptions.

Other than these, unlike some jurisdictions, the use of standard forms such as JCT, NEC and ICE are exceptionally rare in the Turkish construction sector.

Whereas the use of FIDIC (International Federation of Consulting Engineers) forms in public and private sectors has incrementally increased within the last decade. This is particularly the case in the EU funded projects known as IPA (Instrument for Pre-accession Aid).

The most commonly used FIDIC forms (from the 1999 Edition of the FIDIC 'Rainbow Suit' of forms) in Turkey are:

a) The Red Book – Conditions of Contract for Construction, for Building and Engineering Works Designed by the employer, also known as the Construction Contract;

b) The Yellow Book – Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor, also known as the Plant and Design-Build Contract; and

c) The Silver Book – Conditions of Contract for Engineering, Procurement and Construction/Turn-key projects also known as the EPC/Turn-key Contract.

We have been involved in EPCM or management contracting arrangements in the Turkish construction industry, but these are not as commonly used.

1.2 Are there either any legally essential qualities needed to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations), or any specific requirements which need to be included in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Legally essential qualities needed to create a legally binding contract in Turkey are set out in the general provisions of the Turkish Code of Obligations (Law No. 6098) (hereinafter to be referred to as "TCO"). A legally binding contract should entail the reciprocal and matching (either explicit or implicit) declaration of intents of the contracting parties, pursuant to Article 1 of the TCO. This principle also applies to construction contracts.

There is no statutory requirement for construction contracts to be created in writing; with certain exceptions such as a frequently used type of construction contract where the contractor is reimbursed for his/her works via transfer of part of the ownership in the land. In this case, the contract validity is subject to being certified by a notary public. Construction contracts signed pursuant to the State Procurement Law and the Public Procurement Law are also subject to written form.

That being said, Article 200 of the Code of Civil Procedure (Law No.6100) (hereinafter referred to as "CCP"), stipulates that any legal transaction beyond 2,500 Turkish Lira must be proved by a deed. Considering that the above mentioned rights with regard to a construction contract will almost always be above such monetary threshold, it is strongly recommended that all construction contracts be drafted in written form.

1.3 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Letters of intent or other documents having similar effect (e.g.

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memorandums of understanding, heads of terms, etc.) are not explicitly regulated by Turkish Law even though, in practice, most commercial transactions are commenced with a document to such effect.

There are several issues or perspectives that need to be considered in such case. Legal practitioners in Turkey tend to identify the legal nature of texts within certain categories such as a contract, a pre-contract, an invitation, an offer, etc. For example, if the letter of intent contains the mutual declaration of intents on essential matters of the parties involved, under Turkish law such a document may be identified as a contract. Whereas, if the letter of intent entails one party's statement of intention in reference to the legal relationship to be established with the other parties, the absence of an explicit binding commitment, could be identified as an invitation to offer, hence be a legally non-binding document. On the other hand, a 'letter of intent', or any document of similar nature containing provisions of binding obligations, could be identified as a binding agreement.

Accordingly, it is crucial for parties to pay extra care to the drafting, content and structure of a letter of intent to effectively reach their desired outcome.

1.4 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Except in regard to insurances in relation to employee's social securities, there exists no statutory insurances in Turkey. In construction practice, the following insurances are usually provided for in construction contracts and maintained by the parties thereto:

a) All-Risk Insurance.

b) Employers' Liability Insurance which covers bodily injuries and death of workers.

c) Third Party Liability Insurance which covers any damage to third-party property or individuals caused during the execution of the works.

1.5 Are there any statutory requirements in relation to construction contracts in terms of: (a) general requirements; (b) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (c) tax (payment of income tax of employees); or (d) health and safety?

Certain legal requirements as regards to planning, design and construction are stipulated in regulations which may be drafted on the basis of the differing features of specific construction projects.

In addition to these, there are certain permits and licence requirements for construction projects; the most common are those pertaining to environmental impact assessment, and permits as regards construction, waste disposal and zoning.

As regards employees, Labour Law No. 4857 and its secondary legislation regulate the rights and obligations of employees. There are numerous mandatory rules generally protecting the rights of employees. These may be in relation to remuneration, health and safety, working hours, overtime work, entitlements arising therefrom, liabilities for work-related accidents, injuries or work-related illnesses.

1.6 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability is complete?

The default position of the TCC is that the employer must pay for the work on delivery. That being said, there is no limitation as to the parties right to contract otherwise. If the contract foresees another payment mechanism, where the employer undertakes to make payments in instalments, then the employer may retain part of the contract price provided that he/she is entitled to do so under the contract.

We should note that it is common practice, especially in large construction projects, to set forth in contracts a retention mechanism by which the employer retains an agreed percentage of milestone payments until provisional acceptance or even until final acceptance.

1.7 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such bonds and guarantees?

It is both permissible and common in our jurisdiction for there to be performance bonds to guarantee performance. The most common type of performance bonds provided by banks (also known as guarantee agreements) are irrevocable, unconditional and on-demand bonds. A restriction in regard to bonds is that bonds issued by or counter guaranteed by banks residing in Turkey have to be in the Turkish language.

Parent company guarantees are also seen in our jurisdiction, however, they are not as common as bank bonds. Parent company guarantees are particularly common among Turkish holding companies with subsidiaries operating in construction and energy sectors.

1.8 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that until they have been paid they retain title and the right to remove goods and materials supplied from the site?

A distinction should be made between the projects in which equipment is supplied from abroad within an incentive regime as is the case with most of the energy projects in Turkey and projects in which equipment is supplied locally. In the first case, title right in relation to imported goods and supplies should be transferred to the employer before customs procedures are finalised in order to enable the employer to take advantage of the related incentives. In the latter, it would only be possible to retain title up to the point that such goods and supplies become a part of the immovable.

Without specific provisions in your contract to that extent, removing goods and materials supplied from site would be subject to the employer's approval and thus extremely difficult.

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2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party? Does any such third party (e.g. an engineer or architect) have a duty to act impartially between contractor and employer? Is that duty absolute or is it only one which exists in certain situations? If so, please identify when the architect/engineer must act impartially.

It is common, particularly in large projects, for the contracts to be supervised on behalf of the employer by a third party. Scope of such third party's powers and obligations may vary depending on the specific contract terms. In the absence of explicit contract terms imposing impartiality, the engineer or architect does not have any such duty.

However, the Turkish construction sector utilised the FIDIC Red Book 87 Edition for a long time and became accustomed to the notion of impartiality of the engineer; effects of which can still be seen in today's contracts. This mindset provides useful in our negotiations on behalf of contractors when we require the inclusion of an explicit impartiality clause.

2.2 Are employers entitled to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

Pay-when-paid clauses create a condition precedent where the employer's obligation to make payment to the contractor is subject to realisation of the condition of the employer getting paid. Depending on the specific terms of each contract, it would be permissible to create a pay-when-paid clause, however, there may also be specific cases where it is inadmissible under Turkish law.

While there are occasional instances where pay-when-paid clauses are used in practice, it is certainly not very common due to the fact that contractors resist assuming the risk of delayed payments.

2.3 Are the parties permitted to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss suffered?

It is permissible under the Turkish law to agree in advance on liquidated damages. However, unlike common law, penalty clauses are also allowed under Turkish law.

Historically, use of penalty clauses has been more common in our jurisdiction when compared to use of liquidated damages. One of the reasons for this preference is that a penalty clause provides its beneficiary a much lesser burden of proof in comparison to liquidated damages. The only limitation on validity of a penalty clause (in addition to the general principles applicable to validity of contract clauses) is subject to such penalty amount being excessively high. However, this does not mean that the fixed amount of penalty cannot exceed the damage actually incurred. If the court decides that the penalty clause is excessively high, they could decide to adjust/decrease such amount. On the other hand, if the contract contains a liquidated damage clause, the contractor may dispute its applicability on the grounds that the liquidated damage amount is higher than the amount of damage actually incurred.

Unlike many other terms of a construction contract which may be drafted without the assistance of legal professionals, the drafting and structuring of these penalty and/or liquidated damages clauses require additional attention as the legal nature of these clauses may lead to an interpretation opposite to the actual wording that has been used.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be done under the contract? Is there any limit on that right?

A variation order constitutes a change within the scope of the contractor's obligation. This scope is usually determined in the contract as a result of the parties' mutual agreement at the very beginning of their interaction. If the contract does not contain any explicit provision entitling the employer to vary the works via a unilateral decision, then such variation would require an amendment of the contract, which would in return require the parties' mutual agreement.

Therefore, in order to avoid potential difficulties in obtaining the contractor's approval for each variation, contracts should be drafted in a manner to entitle the employer to issue variation orders.

3.2 Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?

In parallel to our reasoning provided under question 3.1 above, an omission would also necessitate amendment of the contract if the contract is silent on this issue. Therefore, in order to avoid potential difficulties in obtaining the contractor's approval for each omission, contracts should be drafted in a manner to entitle the employer to make omissions.

To the extent that the parties have agreed on the terms and conditions enabling a third party (e.g. the engineer or architect) to make omissions, this could be possible.

3.3 Are there terms which will/can be implied into a construction contract?

In contracts that are governed by the Turkish law, respective principles and provisions of the TCO that are applicable to construction contracts will be implied into the contract to the extent that the parties have not explicitly agreed otherwise.

3.4 If the contractor is delayed by two events, one the fault of the contractor and one the fault or risk of his employer, is the contractor entitled to: (a) an extension of time; or (b) the costs occasioned by that concurrent delay?

Concurrent delay has not been defined under Turkish law. In the absence of explicit terms under a contract in this regard, the legal principle that "no person should be enabled to take advantage from his/her own wrongdoing" and the provisions of the TCO with regard to contributory fault shall apply.

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Our general opinion in this regard which may differ based on the specifics of each case, is that the contractor would be entitled to an extension of time. With regard to additional costs, it would be a difficult task to differentiate among costs and the result would again be subject to the specifics of the case.

3.5 If the contractor has allowed in his programme a period of time (known as the float) to allow for his own delays but the employer uses up that period by, for example, a variation, is the contractor subsequently entitled to an extension of time if he is then delayed after this float is used up?

The concept of "float" is not defined under Turkish law and both academics and the judiciary have so far been distant from embracing this concept. Hence, from the Turkish law perspective, it would not be possible to specify exactly which party would own the float as it may differ depending on the specifics of each case, such as the related terms of the contract and other aspects of the factual background.

Accordingly, we recommend that parties address this issue in detail in their contracts.

3.6 Is there a limit in time beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and from what date does time start to run?

The limit in time beyond which the parties to a contract may no longer bring claims against each other are defined as statutes of limitations and there are several different limits varying with respect to different claims and situations.

Those statutes of limitations applicable to construction contracts are:

- 5 (five) years for monetary claims arising out of construction contracts (excluding claims arising from situations where the contractor does not fulfil its obligations completely or properly due to its gross negligence), starting from the date such claim is due and payable;
- 2 (two) years for defects in movable property which starts to run from the date of delivery;
- 5 (five) years for defects in the construction (i.e. the immovable property), which starts to run from the date of delivery; and
- 20 (twenty) years for defects in the construction attributable to the gross negligence of the contractor, which starts from the date of delivery of the construction, regardless of whether the construction is qualified as movable or immovable property.

3.7 Who normally bears the risk of unforeseen ground conditions?

This would depend on the the type of contract, more specifically the method of reimbursement agreed by the parties in the contract.

In contracts where payment is made based on fixed unit prices, the risk would naturally lie with the employer as the price would increase in parallel to the work performed.

However, in lump-sum contracts, the risk of unforeseen ground conditions would initially lie with the contractor who would perform the works, regardless of any increase in the amount at a lump sum fixed price.

Pursuant to Article 480/II of the TCO, where performance of the work was prevented or seriously hindered by extraordinary circumstances that were unforeseeable or excluded according to the conditions assumed by both parties, the court may at its discretion authorise an increase in the contract price. There are high court decisions that give effect to this clause in cases where the parties encounter an unforeseen ground condition.

Without prejudice to our explanations above, we would like to note that a contractor is considered to be a diligent merchant with experience in his field of business and thus will be held to a higher standard of duty of care. Therefore, applicability, if any, of Article 480/II would be determined according to the specifics of each case. In order to avoid lengthy arguments in court, we recommend that the risk of unforeseen ground conditions is explicitly dealt with in the contract.

3.8 Who usually bears the risk of a change in law affecting the completion of the works?

Parties should explicitly deal with this risk in the contract and this is the usual practice in our jurisdiction. More often it is the employer who assumes the risk of a change in law.

3.9 Who usually owns the intellectual property in relation to the design and operation of the property?

Pursuant to Article 2 of the Law on Intellectual and Artistic Works; "all kinds of technical and scientific photographic works, all kinds of maps, plans, projects, sketches, drawings, geographical or topographical models and similar works, all kinds of architectural and urban designs and projects, architectural models…" are regarded as literary and scientific works.

Such law defines the person who creates these works as the Author of such works. The Author (in our case the engineer or the architect) holds both the economic and moral rights over the works created. It should be noted that it is not legally permissible for the Author to waive or transfer any of his/her moral rights whereas there is no limitation as to the transfer of economic rights deriving from such works.

An important point is to identify whether the Author was, during the creation of works, employed by a third party (such as the employer) or was independent. According to the law, the works created by civil servants, employees and workers during the execution of their duties shall be exercised by the persons who employ or appoint them. However, if the Author was independent at the time of creation of the work then we recommend that a provision with regard to transfer of relevant intellectual property rights be included in the contract.

3.10 Is the contractor ever entitled to suspend works?

This is a common clause in major construction contracts in our jurisdiction and we strongly recommend this practice. Where the contract remains silent on the contractor's right to suspend works, the contractor may only be able to resort to the provision of the TCO stating that "a party to a bilateral (synallagmatic) contract may not demand performance until he has discharged or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date". A contractor may be able to benefit from this provision if the contract price is to be paid in instalments and not in a lump sum. It is advisable to contractors that the method, circumstances and conditions applicable to the suspension of works be drafted within the contract.

3.11 On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?

There are several reasons for termination of a construction contract under the Turkish law. Some of these reasons are attributable to the employer, some are attributable to the contractor and some are not attributable to either of the parties.

The reasons for termination can be categorised as: (a) impossibility of performance; (b) the employer's right to withdraw for its convenience; subject to payment of indemnity to the contractor; (c) the employer's right to terminate in the event of death or incapacity of the contractor; (d) the employer's right to withdraw upon contractor's failure to commence the work on time or in the event that the contractors delay is such that there is no prospect of timely completion; (e) the employer's right to withdraw upon contractors default; (f) the employer's right to withdraw in the event of defective work; (g) the employer's right to withdraw in the event that the agreed price estimate is exceeded by a disproportionate amount; (h) the contractor's right to withdraw in the event of employers default; (i) the contractor's right to withdraw where the contract price cannot be adjusted in the event that performance of a lump-sum contract is prevented or seriously hindered due to unforeseeable extraordinary circumstances; and (j) the contractor's right to withdraw in the event the employer hinders performance of the contract.

It must be noted that the foregoing reasons for terminating a contract are subject to certain conditions and the parties must pay utmost attention to the existence of these conditions to successfully terminate a contract. Moreover, parties must pay attention as to whether the termination of contract under the foregoing reasons will have retrospective (*ex tunc*) or prospective (*ex nunc*) effects upon the contractual relationship between the parties.

3.12 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the injured party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Although what constitutes *force majeure* and what *force majeure* entails is not defined under Turkish law, *force majeure* is frequently referred to in construction contracts. The concept of *force majeure* is usually discussed under the legal term "impossibility of performance" as per Articles 136 of the TCO. This article stipulates that "[a]n obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor". Furthermore, Article 138 defines a concept which may be roughly translated as "extreme difficulty in exercising obligations". This is applicable in circumstances where in addition to other conditions stipulated in the article, a previously unforeseeable extraordinary circumstance occurs that cannot be attributed to the debtor. In this eventuality, the debtor shall have the right to demand an amendment entailing an adjustment to the contract through a court proceeding. Should this not be an option, the debtor shall have the right to terminate the contract.

In addition to the foregoing, there is reference to "impossiblity of performance" in Article 485 which is particular to construction contracts. Pursuant to this article, should the completion of works become impossible due to an unexpected circumstance related to the employer, the contractor shall have the right to demand the price of the works completed and other costs. Should such impossibility occur due to the fault of the employer, the contractor may also demand to be indemnified.

3.13 Are parties which are not parties to the contract entitled to claim the benefit of any contract right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the original contracts in relation to defects in the building?

The rule in this regard is that parties which are not parties to a contract are not entitled to claim any benefit therefrom.

However, parties may always draft their contracts to permit such scenarios, to the extent that the drafting is performed in a manner to satisfy the concerns of both parties (e.g. the contractor's possible concern regarding extended guarantees, etc.) and in a manner that would not prejudice the validity of the contract.

On an additional note, if the contractor is also the designer of the work, then to the extent that the applicable conditions are met, the subsequent owner may also pursue the contractor in regard to the contractor's liabilities under the law.

3.14 Can one party (P1) to a construction contract which owes money to the other (P2) set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In the absence of an express term in a construction contract precluding the same, the law recognises and allows the set-off of mutual debts if both are due and payable under Article 139 and following articles of the TCO.

In the event that there exists a dispute as to the amounts that are due by one or both parties, then set-off can be requested but the discretion would be with the courts to set-off.

The TCO also provides a list of cases where such set-off would be subject to the creditor's consent, such as receivables in regard to the returning of already delivered goods or reimbursement in relation thereto.

3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?

The Contractor has, per Article 471 of the TCO, the obligation to exercise objective care. This entails the contractor being liable if his/her conduct falls below the standard to be expected of a prudent contractor undertaking similar works in accordance with the applicable professional and technical rules.

In the absence of an express term in a construction contract, the employer has no obligation in this regard.

3.16 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Where a term of a contract drafting leads to multiple interpretations, there is ambiguity or unclear language, the following principles are applied:

1. The contract is to be interpreted by investigating and taking into consideration the true intentions of the parties at the date of signing of the contract. Later actions of parties are only considered to the extent that they shed light on the intentions of the parties at the date of signing.

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2. The contract should be interpreted in light of the principle of good faith (Civil Code Article 2).
3. The contract should be interpreted within the perspective of law. That is:
   - Terms and conditions deviating from the complementary stipulations of the law should be interpreted in the narrow sense of the drafting.
   - In the event of doubt, the interpretation consistent of the complementary stipulations of the law should be favoured as deviations from the complementary stipulations need to be explicitly agreed.
   - If the parties have adopted an article from the law to their contracts, this term should be interpreted as in the law.
4. The interpretation that would uphold a term or condition of contract should be preferred.
5. Terms and conditions in regard to the waiver of a right under the contract should be interpreted in the narrow sense of the drafting.
6. In the event of doubt, the interpretation favouring the debtor should be preferred.
7. In the event of uncertainty or doubt, ambiguous terms should be construed against the party having drafted such term.

3.17 Are there any terms in a construction contract which are unenforceable?

Article 27 of the TCO stipulates that contracts which are contrary to public order, moral principles, mandatory provisions of the law and personal rights, or which provide for an impossibility are null and void.

The said Article further stipulates that the fact that part of the terms and conditions of a contract being null and void does not affect the remaining part of the contract. However, if such contract would not survive the severance of the defective terms, then the contract would be deemed null and void in its entirety.

3.18 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

In the absence of any contractual provisions imposing additional duties, under Turkish Law a designer or a contractor who carries out design as part of their scope of work is obliged to execute its works with objective care. Accordingly, a designer (or contractor) would be liable for damages resulting from defects in design if the designer's conduct falls below the standard to be expected of a prudent contractor undertaking similar works in accordance with the applicable professional and technical rules.

The liability of the designer is not subject to any limitation under the law, but in practice the liability of the designer/contractor is often limited to a percentage of the contract price.

There is no absolute guarantee of a designer, unless expressed in the contract.

4 Dispute Resolution

4.1 How are disputes generally resolved?

The most frequently used method of dispute resolution in Turkey is litigation before local courts.

There has been a legal background for domestic arbitration and international arbitration for a very long time, however, domestic arbitration is not as widely utilised as litigation.

International arbitration is however, becoming more and more popular, especially with the increase in number of foreign parties to contracts, foreign funding options and project financing options. In 2016, ICC announced that record figures were recorded for cases registered in ICC to which a Turkish party was involved.

4.2 Do you have adjudication processes in your jurisdiction? If so, please describe the general procedures.

Though there is neither a statutory adjudication envisaged nor detailed legal background for an adjudication process under Turkish law, freedom of contract allows parties to define an adjudication process under their contracts. The construction sector has become increasingly familiar with the adjudication process due to an increase in overseas projects as well as the E.U. funded IPA contracts. The adjudication process that is known relatively better in our jurisdiction is the one designed under FIDIC form contracts.

4.3 Do your construction contracts commonly have arbitration clauses? If so, please explain how arbitration works in your jurisdiction.

International arbitration is one of the most common alternative dispute resolution methods used for international projects in our jurisdiction where there are two basic laws regulating domestic and international arbitration. Relevant procedures detailed under Civil Procedure Law No. 6100 are applied when a dispute does not include a foreign element and the seat of arbitration is designated as Turkey. International Arbitration Law No. 4686 is applicable when the dispute includes a foreign element and the seat of arbitration is designated as Turkey.

Procedures settled under the aforementioned laws provide that when a valid arbitration agreement between parties is in place and a lawsuit has been filed in local courts by one of the parties in relation to a dispute arising from the contract in question, the defendant party shall be entitled to raise an objection of arbitration, in pursuant to which the lawsuit in question would be dismissed.

Rules dictated under the aforesaid laws are *ad hoc*. Furthermore, the structure of the aforementioned laws are similar to those of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ("Model Law"). Thus, under said laws, parties may choose the law and/or rules applicable to their arbitration procedure and furthermore they may appoint arbitrator(s). Parties submit their statement to the chosen arbitrator(s) within the time period set by the parties or determined by the arbitrator(s). Unless parties have agreed otherwise, the arbitration tribunal rules by majority vote. In turn, parties may challenge arbitral awards. They may file a lawsuit for annulment within 30 (thirty) days before the court located at the seat of arbitration. There are several grounds for this process which are designated under the aforementioned laws.

Furthermore, the Istanbul Arbitration Centre ("ISTAC") was recently established as an independent, neutral and impartial arbitration institution in accordance with the Istanbul Arbitration Centre Law No. 6570, published in the Official Gazette dated 29 November 2014. The aim of this Centre is to provide efficient dispute resolution services and to act as supervisor to arbitral proceedings for international and domestic parties. The ISTAC Arbitration and Mediation Rules were prepared by the Centre in accordance with modern institutional rules and these entered into force on October 26, 2015.

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4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles to enforcement.

Turkey is a party to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards ("the New York Convention"). Thus, in the case of a commercial dispute arising in connection to the contract under which the parties have agreed to resolve such dispute through arbitration, a final arbitral award rendered outside Turkey and within the territory of a state which is a party to the New York Convention will be recognised and enforced by Turkish courts. It will be subject to the criteria and the procedures set forth in the New York Convention and subject to the arbitrability of any such disputes under Turkish law, though there will not be a re-examination of the merits of the case. The applicant shall provide the following documents to the Turkish court:

a) the original or a duly certified copy of the arbitration agreement or the arbitration clause; and

b) the duly authenticated original award or a duly certified copy of the formal enforceable final arbitral award having binding force as an arbitration award.

These documents must be submitted to the Turkish court together with an official translation into Turkish which should be certified by a Turkish notary public or Consul General. In principle, the recognition and enforcement of an arbitral award may also be rejected at the request of the party against whom it is invoked. This is applicable if that party furnishes several issues set forth under Article V of the Convention and the International Private Law and Civil Procedure Law No. 5718 and the proof of such to the competent authority where recognition and enforcement is sought. In cases where an arbitration award is annulled, such arbitration award may not be enforced.

4.5 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction?

International Private Law and Civil Procedural Law No. 5718 ("Law No. 5718") regulate the recognition and enforcement of foreign court judgments. According to Law No. 5718, decisions regarding civil lawsuits rendered by foreign courts can be enforced by the courts of Turkey provided that:

(i) such decision is finalised according to the law of the state of the court;

(ii) there is reciprocity between the Republic of Turkey and the state where the judgment was rendered;

(iii) the judgment is rendered on matters not falling within the exclusive jurisdiction of the Turkish courts or, conditional upon being contested by the defendant, the judgment is not given by a state court which has been deemed as competent, even if there is no real relationship between the court and the subject or the parties of the lawsuit;

(iv) the court decree is not expressly contrary to public order; and

(v) the person against whom enforcement is requested has not objected to the enforcement before the Turkish Court on the grounds that such person was not duly summoned pursuant to the laws of that foreign state or to the court that has given the judgment, or was not represented before that court, or the court decree was rendered in said individual's absence.

All aforementioned conditions, except reciprocity, will also be applicable in the case of recognition of foreign court judgments.

4.6 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to reduce: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The civil courts of first instance in Turkey specialise in certain areas and are named after their fields of operation, such as commercial courts, labour courts, courts of intellectual and industrial property rights, maritime courts, land register courts, consumer courts, and family courts.

The majority of disputes regarding construction contracts are resolved by commercial courts.

When a party initiates a lawsuit via a petition, the court provides the respondent 2 (two) weeks for its response and then 2 (two) weeks for the parties rebuttal and rejoinder submissions. Extensions may be granted to the parties for these periods, to the extent that the requests are justified. Following this stage, the court conducts a preliminary investigation, an investigation and a hearing. Based on the nature and complexity of the case, the periods may be further prolonged with procedures for expert witness reports, witness statements, discovery, etc.

As a recent development, courts of cassation have been established and in principle the decisions of the first instance courts shall be reviewed in these courts. Following which, certain decisions can be subject to further step of appeal in the Court of Appeal.

Due to the fact that every lawsuit or proceeding varies as regards the level of complication and/or the details of each particular dispute, it is not possible to provide a set time frame for any of these procedures.

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- Istanbul Bilgi University – LL.M. (Dissertation subject: Contractor's Claims for Extension of Time and Additional Payment Under FIDIC Red Book (1999 Edition)).
- Bilkent University – Law School, LL.B.

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- Union of Turkish Bar Associations.
- International Bar Association.
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TUGA|ARAT

TUGA|ARAT Law Offices has been operating as a dedicated Energy & Construction Law Boutique Practice in Istanbul and Ankara, Turkey since 2014. Our primary focus is on serving the legal needs of international companies doing business in and through Turkey and Turkish companies doing business internationally.

Our core practice areas include construction and infrastructure, contracts and risk management, energy and resources, arbitration, commercial litigation and alternative dispute resolution, international commercial transactions, corporate, insolvency and corporate restructuring, insurance and project finance. Our client base reflects the diversity of participants in the construction, engineering and energy industries.

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