

# Construction 2022

Contributing editors  
Robert S Peckar and Michael S Zicherman



**Publisher**

Tom Barnes

tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall

claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent

adam.sargent@gettingthedealthrough.com

**Published by**

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021

No photocopying without a CLA licence.

First published 2008

Fifteenth edition

ISBN 978-1-83862-638-9

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



---

# Construction

## 2022

**Contributing editors****Robert S Peckar and Michael S Zicherman****Peckar & Abramson PC**

---

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Construction*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Iraq and Turkey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman of Peckar & Abramson PC, for their continued assistance with this volume.



London

June 2021

---

Reproduced with permission from Law Business Research Ltd

This article was first published in July 2021

For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

|  |           |   |            |
|--|-----------|---|------------|
| <b>Global overview</b>   | <b>3</b>  | <b>Mexico</b>   | <b>96</b>  |
| Robert S Peckar and Michael S Zicherman<br>Peckar & Abramson PC            |           | Roberto Hernández García and Juan Pablo Sandoval<br>Comad SC  |            |
| <b>Australia</b>   | <b>4</b>  | <b>Netherlands</b>  | <b>102</b> |
| Troy Lewis, Tarin Olsen and Grace Power<br>Holding Redlich                 |           | Jurriaan van der Stok, Ynze van der Tempel and Timo Huisman<br>Loyens & Loeff                               |            |
| <b>Austria</b>   | <b>12</b> | <b>New Zealand</b>  | <b>110</b> |
| Klaus Pfeiffer, Katharina Kitzberger and Daniela Witt-Döring<br>Weber & Co |           | Christina Bryant, Helen Macfarlane and Nick Gillies<br>Hesketh Henry  |            |
| <b>Brazil</b>  | <b>19</b> | <b>Qatar</b>  | <b>120</b> |
| Júlio César Bueno<br>Pinheiro Neto Advogados                               |           | Claudia el Hage<br>Al Marri & El Hage Law Office  |            |
| <b>Canada</b>  | <b>31</b> | <b>South Africa</b>   | <b>128</b> |
| Sharon Vogel and Bruce Reynolds<br>Singleton Urquhart Reynolds Vogel LLP   |           | Martin van der Schyf<br>Tiefenthaler Attorneys Inc  |            |
| <b>China</b>   | <b>37</b> | <b>Sweden</b>   | <b>136</b> |
| Zhou Jigao<br>JianLingChengDa Law Firm                                     |           | Jacob Hamilton, Axel Rynning, Richard Sahlberg and Per Vestman<br>Foyen Advokatfirma                        |            |
| <b>Denmark</b>   | <b>44</b> | <b>Switzerland</b>  | <b>143</b> |
| Kristian Skovgaard Larsen and Lars Heiko Matzen<br>DLA Piper               |           | Christian Eichenberger, André Kuhn and Regula Fellner<br>Walder Wyss Ltd                                    |            |
| <b>Germany</b>   | <b>53</b> | <b>Turkey</b>   | <b>150</b> |
| Stefan Osing<br>Heuking Kühn Lüer Wojtek                                   |           | Orcun Cetinkaya, Pelin Karan, Emre Dirik and Serra Kaya<br>Cetinkaya  |            |
| <b>Iraq</b>  | <b>60</b> | <b>United Arab Emirates</b>   | <b>158</b> |
| Hadeel A Hasan<br>Al Hadeel Al Hasan Law Firm                              |           | Mark Raymont, Jed Savager, Melissa McLaren, Luke Tapp, Rita Allan<br>and Christopher Neal<br>Pinsent Masons |            |
| <b>Ireland</b>   | <b>71</b> | <b>United Kingdom</b>   | <b>168</b> |
| Rhona Henry, Kimberley Masuda and Nicola Dunleavy<br>Matheson              |           | Kimberly Roberts<br>Bryan Cave Leighton Paisner LLP   |            |
| <b>Israel</b>  | <b>80</b> | <b>United States</b>  | <b>179</b> |
| Benjamin Sheffer and Lance Blumenthal<br>S Horowitz & Co                   |           | Michael S Zicherman and Robert S Peckar<br>Peckar & Abramson PC   |            |
| <b>Japan</b>   | <b>89</b> |   |            |
| Makoto Terazaki, Masahiro Yano and Mai Kato<br>Anderson Mōri & Tomotsune   |           |   |            |

# Turkey

Orcun Cetinkaya, Pelin Karan, Emre Dirik and Serra Kaya

CETINKAYA

## LOCAL MARKET

### Foreign pursuit of the local market

1 | If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

In order to operate in Turkey, a foreign designer or a contractor can set up different operations. There are three main options to set up an operation in Turkey, which are:

- first, foreign designers or contractors can establish a company. According to Foreign Direct Investment Law No. 4875, foreign investors can establish any type of company that is defined in the Turkish Commercial Code, such as joint-stock, limited liability, collective companies, cooperative associations and limited partnerships. The most common companies are the joint stock and limited liability companies in which the shareholders' liabilities are limited. They are only responsible for fulfilling the capital they have committed and only to the company;
- second, they can set up an operation by establishing a branch office. Branch offices that operate independently in a separate location with an affiliated centre can carry out their own commercial activities. To establish a branch office in Turkey, the company must appoint a Turkey-resident representative; and
- another way to set up an operation is to establish a liaison office. However, due to the fact that liaison offices cannot generate incomes and are strictly forbidden to carry out commercial activities, they can only perform some tasks such as quality and standard control of suppliers, research, information sharing, planning and supplier procurement in Turkey.

## REGULATION AND COMPLIANCE

### Licensing procedures

2 | Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

In cases where foreign designers and contractors establish a company, liaison office or a branch, there is no specific licence required. However, if any of the listed operations is not set up and a designer or a contractor decides to work as an individual rather than under the name of a company, he or she has to obtain a work permit. According to article 20 of the International Labour Force Law, university graduate individual foreign architects and foreign engineers can work in Turkey by obtaining a work permit. In order to obtain a work permit, a foreigner must apply to the Turkish Consulate in his or her hometown or to the Ministry of Family, Labour and Social Services in Turkey. After the approval of a work permit, foreign architects and engineers must apply to relevant

public professional organisations and be a member of the organisation (eg, foreign engineers must apply to the Union of Chambers of Turkish Engineers and Architects).

According to article 6 of the International Labour Force Law, it is forbidden for foreigners to work without a licence. If otherwise detected, administrative fines will be applied both to the employee and employer and foreign workers will be ostracised from the profession in Turkey.

### Competition

3 | Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

Turkey's Foreign Direct Investment Law No. 4875 is based on the principle of equal treatment. According to article 3 of this law, foreign investors are free to make investments in Turkey and they are subject to the same treatment as domestic investors unless otherwise stipulated by the international treaties and special provisions. The aim of this regulation is to provide the same rights and obligations and, therefore, the same treatment to local and international investors.

There is no general regulation regarding the participation of foreign bidders in public tenders. However, according to article 63, titled Regulations on Bidders of the Public Procurement Law, it can be considered that only domestic bidders will participate in tenders whose approximate costs are below the threshold at the discretion of the administration.

In addition, the administration can provide an advantage to the domestic contractors if the approximate costs of tender are not higher than the threshold and also, on service and construction tenders, domestic bidders may benefit from price advantages.

### Competition protections

4 | What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

The Law on Protection of Competition No. 4054 prevents agreements from restraining and distorting competition. According to article 4 of this law, it is clearly stated that bid rigging and anticompetitive behaviours are prohibited.

Bid rigging usually occurs at procurement contracts regarding construction projects. Bid rigging is where two or more competing parties collude to determine that they will not compete with each other for tenders. Examples of bid rigging include companies that put forward the lowest bid in order that a predetermined bidder will secure the contract or a company may withdraw from an auction that is in progress without a valid reason. The Law on Protection of Competition states an administrative fine for contradictory acts amounting to 10 per cent of the annual gross income of the project can be enforced in cases where bid rigging is proven.

Certain anticompetitive behaviours have been also regulated under the Turkish Criminal Code (TCC). Bid rigging also constitutes fraudulent behaviour in the tender process. According to article 235 of the TCC, bid rigging in public tenders is forbidden and those who do not act accordingly will be punished with imprisonment.

### Bribery

5 | If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Contracts that are the subject of a crime are not enforceable because they are against general public decency and public order. According to article 27 of the Turkish Code of Obligations (TCO): 'Any and all contracts against general decency, public order will be null and void.'

Sentences imposed for acts of bribery are regulated under the TCC. According to article 252 of TCC, both the bribes and the givers shall be punished. The sentence prescribed for this crime is imprisonment from four to 12 years. According to article 17 of the Public Procurement Law, bribery is stated as a prohibited act in tenders.

Since facilitating payments are considered as bribery in Turkish law, such payments are not allowed and will be punished as bribery.

### Reporting bribery

6 | Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

In Turkey, there is no specific regulation regarding the concept of whistleblowing. However, whistleblowing can be considered under the scope of the employee's duty of care and loyalty under the TCO. In the scope of employee's duty of care, employees must protect the employer's legal benefits relating to work and must prevent such acts which may harm the business financially and professionally. Accordingly, not reporting suspicious acts or bribery may be considered under that duty and be punished. In such an act, employers have the right to terminate labour contracts with valid reason; and if any damage has occurred, employers can request compensation. According to article 278 of the TCC, a person who does not notify the related authorities of a crime being committed shall be sentenced to imprisonment of up to one year. Therefore, if an employee notices that a public officer is taking a bribe, the employee has an obligation to report this. Likewise, according to article 252 of the TCC, if a public officer fails to report the crime, the public officer shall be sentenced to imprisonment of six months to two years.

### Political contributions

7 | Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

No. On the contrary, making a political contribution is not part of doing business in Turkey.

### Compliance

8 | Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

Yes. If a construction manager or other construction professional, acting as public entity's representative or agent, gets some benefits to perform or to not perform a task concerning official duties, then it will be subjected to article 252 of the TCC, the anti-bribery article and also, according to the Regulation on the Principles of Ethical Conduct and Application Procedure and Principles of Public Officials, unethical behaviours of public agents will be fined.

### Other international legal considerations

9 | Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

No. On the contrary, Turkey offers promising opportunities to attract foreign investors.

There are many incentives provided to foreign contractors in line with current growth targets in Turkey, some of which are listed below.

#### General investment incentives

Investors who invest 500,000 to 1 million Turkish lira can benefit from this incentive. Domestic and foreign investors do not pay customs duty for imported machinery and equipment and they are exempted VAT of 18 per cent.

#### Regional investment incentives

Investors wishing to invest in pre-determined regions are exempted from customs duty and VAT. Those regions are determined by the state.

#### Strategical investment incentives

Strategic investments increase Turkey's competitiveness in the international area regarding high import decency products. To benefit from this incentive, the amount of investment must exceed 50 million Turkish lira and the domestic production must be lower than the import. In addition to that, the investment must create VAT of 40 per cent and import value must exceed US\$50 million as of the last one year. In the scope of incentives, investors can benefit from VAT discounts, exemption of customs duty and tax exemptions.

#### Large-scale investment incentives

These investments aim to boost research and development in Turkey.

## CONTRACTS AND INSURANCE

### Construction contracts

10 | What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

As a rule, there is no standard contract form used for construction and design in Turkey and parties are free to choose the terms and conditions of the contract in line with the rule of freedom of contract. However, the terms and conditions included in public procurement contracts should be prepared in accordance with the terms of the General Declaration on Public Procurement.

Regarding the language, according to Law on Compulsory use of Turkish in Economic Enterprises No. 805, all and any kind of transactions,

correspondence, contracts and commercial books must be in Turkish. If there is any foreign element in the contractual relationship, then correspondence with the Turkish government and administrative forces must be in Turkish.

In addition to this, parties can conclude a jurisdiction agreement. In terms of international disputes, contractual debt relations are subject to the law explicitly chosen by the parties. However, article 25 of the Law of International Civil Procedure stated a mandatory rule on contracts concerning immovable, real estate and leasing that the applicable law must be the *lex rei sitae*. So, parties can choose a jurisdiction freely in construction contracts but only in matters of immovable, such as a reconstruction permit (zoning permit) or import regime where the local law will apply.

### Payment methods

**11 | How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?**

As per the principle of freedom of contract, parties can determine payment methods without any restrictions. However, typically, the parties are paid by progress payments once they complete each part of the project, which is determined during the signing of the contract.

Commonly, contractors receive an advanced payment for procurement costs prior to the commencement of the project. While the project continues, the contractor is paid by progress payments for each part it completes.

### Contractual matrix of international projects

**12 | What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?**

Generally, in Turkey, a construction contract is signed between the owner and contractor. In such contracts, the contractor's obligation is to construct a work and deliver, whereas the owner's obligation is to pay. A contractor can work with a subcontractor to hire more manpower or to perform works that required special ability. The contract between the contractor and subcontractor does not bind the owner, unless agreed otherwise.

Regarding the relationship between the owner and contractors, in small projects, the owner can contact the contractor directly but, in more complex projects, the owner contacts contractors through their representatives or engineers.

### PPP and PFI

**13 | Is there a formal statutory and regulatory framework for PPP and PFI contracts?**

In Turkish law, there is no legislation that regulates the procedures and principles of the PPP model to cover all sectors. Only certain sectors have a regulatory framework for PPPs and PFIs as listed below:

- the Regulation on the Execution of Procurement of Construction Works and General Declaration on Public Procurement;
- Law No. 3996 Procurement on the Certain Investments and Services under the BOT Law;
- Law No. 6428 Construction, Renovation and Purchase of Services by the Ministry of Health by way of the Public-Private Cooperation Model and Amendments to Certain Laws and Decrees with the Force of Law (BLT Law);
- Law No. 4046 on Privatisation Practices (Privatisation Law); and
- Law No.4 734 on Public Procurement Act.

### Joint ventures

**14 | Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?**

The joint ventures and consortiums are deemed as a different partnership under Turkish law.

Joint ventures are a partnership that two or more companies getting together to generate income and share the risks without forming a legal entity. They share risks and liabilities so that their liabilities are successive. All partners can be held liable if one of them fails to fulfil their obligations.

Alternatively, consortiums are partnerships where two or more companies cooperate to carry out specific work. All parties have their own and independent responsibilities and their liabilities are separate. Each partner will only be held liable for their own obligation to a third party. If one of them fails to fulfil their obligation, liability and responsibility of incomplete work cannot be allocated to other partners.

### Tort claims and indemnity

**15 | Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?**

Parties can be held responsible for all acts, errors and omissions arising from acting against the contract. According to article 112 of the Turkish Code of Obligations (TCO), parties should be indemnified if any material damages occurred in case of a breach of the other parties, unless they can prove no fault can be attributed to them.

Regarding rights of the owner against the contractor, article 473 of the TCO states that if it is understood that construction will be delayed and such delay is not attributable to the owner, then the owner has the right to terminate the contract. The owner can also have it repaired by a third party at the contractor's expense if the contractor has defects in construction.

On the other hand, according to article 52 of the TCO, in the case of contributory negligence, if the first party is negligent and this negligence has caused damage then compensation could be decreased or removed.

According to article 115 of the TCO, exemption of liability agreement cannot be made for construction contracts since construction works need special licences.

### Liability to third parties

**16 | Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?**

As a rule, owing to the relative nature of the contract, third parties cannot raise a claim because of the privity of contract. However, the liabilities of the contractors and the building owners are specifically regulated under Turkish law, as follows:

- according to article 12 of the Consumer Protection Law, the contractors will be liable for the defective works in property for five years from the date of the delivery; and
- conversely, according to article 69 of the TCO, the building owner, not the contractors, holds liable if any third party faces any material damages, and if the damage is caused by lack of maintenance or fault of construction or both.

Therefore, if the contractor sells the building, even if it will not be responsible as per article 69 of the TCO, it will be still responsible for the defect as per both article 12 and article 8 of the Consumer Protection Law.

## Insurance

**17** To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Construction Insurance agreements guarantee to pay certain damages arising from construction works in return for paid premiums. Mostly, risks that are not foreseeable and preventable, such as earthquakes, flood, landslide, fire, robbery, worksite accidents, sabotage and lack of attention, are covered in construction insurance agreements.

The scope of the insurance is determined by the parties according to the project and its risks. Each project has its own risks and capacity; therefore, the scope of insurance differs accordingly. Most common insurances are as follows:

- All-risk insurance: this covers all unforeseeable events such as fire, earthquake, flood, robbery, among others.
- Liability insurance: this ensures contractor's indemnity requests arise from the construction contract and also arise from contracts signed by the third parties.
- Third-party liability insurance: this insurance can be added to all-risk insurance and covers all damages caused by the employer's work that may harm third-party property or individuals.
- Environment insurance: this insurance will be formed by specific risks that constructor's work may cause, such as run-off of toxic liquids to adjacent lands from a chemical factory.
- Building completion insurance: this insures the contractor for the possible loss derived from the non-completion of the building within 12 months following the delivery date.

Contractors are responsible for all kinds of risks and deficiencies. As per Turkish law, contractors cannot sign an exemption of liability agreement regarding construction works that require a special licence.

## LABOUR AND CLOSURE OF OPERATIONS

### Labour requirements

**18** Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There is no specific regulation in Turkey regarding the requirement of employing a minimum amount of local labour in construction projects. However, since priority within the borders of Turkey is the employment of Turkish citizens, companies can employ foreigners up to one-fifth of the Turkish employees as per criteria that has been defined by the Ministry of Family, Labour and Social Services according to article 13 of the Regulation for the Implementation of the Law on the Work Permits of Foreigners. This means that if a company wants to employ a foreign worker, it must employ at least five Turkish citizens as a condition as per the Ministry of Family, Labour and Social Services.

### Local labour law

**19** If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

Regardless of the employee's nationality, there are some exceptions to the employer's contractual obligations that remain after the termination of the project.

First, employer's financial obligations remain until all the payments that the employee is entitled are paid.

Also, the obligation of the employer with respect to the personal data protection of employees remains. The employer must protect the employee's personal data lawfully and in good faith even after the contractual relationship ends.

### Labour and human rights

**20** What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

It is safe to conclude that foreign workers in Turkey enjoy a high degree of international protection for their rights. This protection is reinforced by article 90(5) of the Turkish Constitution as it states that the provision of international human rights treaties takes precedence over domestic laws.

In the domestic legislation, article 5 of the Turkish Labour Code No. 4857 prohibits discrimination in the employment relation based on language, race, colour, sex, disability, political thought, philosophical belief, religion, sect and similar grounds. While article 5 does not prohibit discrimination at the recruitment stage, article 10 of the Turkish Constitution provides this protection. In this respect, foreign construction workers cannot be discriminated against based on their race, nationality or any other grounds – this principle is referred to as the equal treatment principle in Turkish labour law and practice.

Consequently, foreign construction workers enjoy the same rights as local workers with regards to, inter alia, working hours, overtime work, paid and unpaid leave, severance pay, right to collective bargaining and the termination of their labour contract as per the relevant provisions of the Turkish Labour Code No. 4857.

As to the consequences of non-compliance with the law, it would depend on the type of treatment the workers have experienced and the severity of such treatment. While compensation claims may arise pursuant to the Turkish Code of Obligations, if any such ill-treatment reaches a certain severity threshold, the criminal justice system may get involved as per the Turkish Penal Code.

### Close of operations

**21** If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

There are no different legal obstacles for foreign contractors but they must fulfil the same obligations as any local contractor when closing its operations in Turkey.

Besides the foreign (or any) contractor's liabilities against the owner and procedures (eg, liquidation procedures), a termination notice should be given to employees and employment receivables should be paid. The obligations related to employment law, such as mass layoff criteria and social security legislation, should be fulfilled.

Apart from the employment or construction contracts, other contracts such as lease contracts, should either be terminated, settled or released with the contractual counterparty to avoid any future liability that may arise from the contracts.

Finally, outstanding monies, such as invoices, taxes and debts, owed to the creditors or to the state should be paid.

## PAYMENT

### Payment rights

22 | How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

To securely obtain the contractor's right to payment of its costs and fees from the owner, contractors generally start work on the basis of an advance payment.

In addition, the contractor may suspend work until payment is secured by the owner, unless otherwise agreed in the contract.

Also, the Turkish Civil Code grants contractors a right of legal lien to secure credits arising from the construction agreement. As a rule, the amount of receivables secured by the legal right of lien must be shown in the land registry. Registration may be rendered from the moment the contractor undertakes to provide the work or materials and must be performed within three months of the completion of the work undertaken. In order to be registered, the claim must be accepted by the owner or decided by the court. If an appropriate guarantee is shown by the owner, registration cannot be requested.

### 'Pay if paid' and 'pay when paid'

23 | Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

Under Turkish law, 'pay if paid' provisions are not regulated and are not explicitly prohibited. As a general approach, neither party can benefit from its own default or breach, according to the principle of good faith. Therefore, in such cases, if a contractor cannot collect payments under the general contract because of its own default or any error attributable to the contractor, then the contractor cannot rely on a 'pay if paid' clause unless otherwise agreed in the contract.

In addition to the above explanations, in a decision of the 15th Chamber of the Court of Cassation with file No. 2018/841 E., 2016/5713 K. dated 1 March 2018, the court has decided that there is no restriction on establishing a subcontracting contract containing 'pay if paid' provisions. However, in such a case, the subcontractor does not have to wait indefinitely and if the contractor does not collect the payment from the owner within a reasonable time, the subcontractor's receivables will be due.

### Contracting with government entities

24 | Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

The International Private and Procedure Law clearly sets forth that the foreign state is not granted immunity for judicial disputes arising from private law relations. Therefore, sovereign immunity cannot be asserted by a government agency as a defence to a contractor's claim for payment.

### Statutory payment protection

25 | Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Unless the terms of the cancellation of the project have not been stipulated in the contract, general rules of legislation will apply. As per article 485 of the Turkish Code of Obligations, where a project has been

interrupted or cancelled through circumstances caused by the owner, contractors may claim to be paid for any work that is completed until that point.

The Turkish Civil Code grants contractors to obtain their receivables with a right of legal lien. If contractors are not paid, they are protected by their right to register contractor's liens on the property on which they have performed work.

In addition to the above explanations, in a decision of the 15th Chamber of the Court of Cassation with file No. 2019/3163 E, 2020/1910 K, dated 29 June 2020, the court decided that the contractor has the right to claim to be paid for any work that is completed until the cancellation of the project and has the right to claim the cost of its materials kept by the owner.

## FORCE MAJEURE

### Force majeure and acts of God

26 | Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Even though Turkish law does not define 'force majeure' explicitly, the Court of Cassations' precedents have established a framework for force majeure events. According to the precedents, unless otherwise agreed in the contract by the parties, an event can be considered as force majeure in cases where:

- the occurrence of the event should not be attributable to the parties;
- the event should not be foreseen on the establishment date of the legal relationship; and
- the effects of the event should not be eliminated by the parties' effort.

Natural disasters, wars, general strikes and epidemic diseases may be given as an example of force majeure. Where a force majeure event occurs, it is accepted that the completion date may be extended to the same duration that passes during the force majeure event. Therefore, due to the extended period, the contractor cannot be deemed negligent, and the contract may not be terminated for a valid reason. As per article 136 of the Turkish Code of Obligations, if the fulfilment of the obligations becomes objectively impossible since the reasons are not attributable to the contractor, the contractor cannot be held responsible.

## DISPUTES

### Courts and tribunals

27 | Are there any specialised tribunals that are dedicated to resolving construction disputes?

In Turkey, there are no official or industry-sponsored specialised tribunals dedicated to settling construction disputes. The most common dispute resolution methods for construction disputes are mediation, arbitration and litigation.

### Dispute review boards

28 | Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

In Turkey, dispute review boards (DRBs) have several applications and are not mandatory. However, the parties can apply the dispute board mechanism with their consent.

As per article 38 of the Turkish Bankruptcy and Enforcement Law, documents to be treated as court decisions were listed. The DRBs are not specified in this list. Accordingly, it can be said that the decisions of DRBs are not considered as legally enforceable, final or binding. They may be generally considered advisory.

## Mediation

29 | Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

After the Law on Mediation in Civil Disputes entered into force as an alternative dispute resolution method in 2013, mediation has gained more popularity.

Since the ability of the parties can be actively involved in the process, the cost of mediation is lower than a lawsuit and the parties can get results in a shorter time, using mediation has become a frequently preferred method. Additionally, although a commercial dispute is subject to mandatory mediation, the settlement of the dispute through voluntary mediation is not prevented. The parties may always apply for voluntary mediation before mandatory mediation.

Mediators must be individuals who enrolled in the Mediators Registry. In voluntary mediation, the parties can choose mediators freely from the Mediators Registry unless agreed otherwise.

## Confidentiality in mediation

30 | Are statements made in mediation confidential?

The mediation mechanism in Turkey is strictly confidential as per article 4 of the Law on Mediation in Civil Disputes. It is standard practice to hold mediations on a confidential, without-prejudice basis. Parties are also prohibited from using the other party's material brought to the mediation meeting in subsequent court proceedings or arbitration.

Any information, opinion, claim, offer or document obtained through mediation proceedings cannot be disclosed to the public or submitted as evidence in court proceedings or in arbitration proceedings related to the same dispute.

The Law on Mediation in Civil Disputes also specifies the legal and criminal liability of a mediator. Where a mediator acts against confidentiality, it may be decided to dismiss the mediator from the registry. Additionally, a breach of the duty of confidentiality is subject to imprisonment up to six months where the legally protected interests of a person have been prejudiced as a result.

## Arbitration of private disputes

31 | What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

The preferred dispute resolution mechanism is arbitration for both domestic and international players in the construction industry.

First of all, the workload of the local courts in Turkey is quite high. For this reason, the litigation process takes many years in the local court and the long duration of the litigation process is likely to result in loss of rights. However, arbitration proceedings provide parties with the chance to resolve their dispute faster under the direction of an arbitration body with arbitrators specialised in construction disputes.

The lack of competent judges specialising in construction disputes in local courts is another important reason for applying for construction arbitration. Another advantage of the arbitration proceeding is the possibility to resolve the dispute, especially in matters that require expertise, by arbitrators in such matters freely selected by the parties. This situation not only speeds up the arbitration proceedings but also helps to make more accurate decisions. Besides, the procedural flexibility of arbitration allows the parties to adapt the arbitration procedure to their own needs.

## Governing law and arbitration providers

32 | If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

When determining an international arbitration tribunal outside Turkey, the International Chamber of Commerce (ICC), the London Court of International Arbitration, the American Arbitration Association, the United Nations Commission on International Trade Law and the International Centre for Dispute Resolution (ICDR) are the preferred arbitration institutions of parties since they were established to resolve disputes arising from contracts with commercial and financial interests. It can be said that the arbitration rules of the ICC and the International Court of Arbitration are often preferred, especially for cross-border transactions.

Parties may either agree on a particular specified arbitral institution and principles or, alternatively, may prefer to conduct an ad hoc arbitration following the rules established by the parties or pursuant to the UNCITRAL Arbitration Rules, which are among the mechanisms used in Turkey to settle construction disputes. Parties are free to choose the substantive law that will be applied to the merits of a dispute.

Further, the Istanbul Arbitration Centre (ISTAC) can be referred to by parties in local and international disputes.

## Dispute resolution with government entities

33 | May government agencies participate in private arbitration and be bound by the arbitrators' award?

Private disputes between government institutions and private persons may be subject to arbitration proceedings, and government agencies may participate in the proceedings as well as they may decide to resolve the disputes through private arbitration institutions such as the ISTAC, the ICC or the ICDR.

In principle, the arbitral awards have a binding effect on the parties and are enforced regardless of whether the parties are private entities or governmental institutions.

## Arbitral award

34 | Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) is the main legislation regarding the enforcement of arbitral awards in Turkey. In order to enforce a foreign arbitral award in Turkey under the New York Convention, any party must seek an enforcement decision from a Turkish court. The local court is not allowed to review or re-examine the merits of the case in accordance with the principle of revision au fond.

Although an arbitral award resolved in a contracting state will be enforceable under the New York Convention in Turkey, if the award is given in a non-party state of the New York Convention, the International Private and Procedural Law (IPPL) applies. While the obligation of the local courts to enforce the rules of the New York Convention remains, the terms and conditions laid down by the IPPL are still applied by the local courts.

Parties also may request cancellation from the local courts. The grounds for rejection laid down under the IPPL are quite close to the New York Convention. The reasons for setting the award aside are stated in numerous principal clauses.

## Limitation periods

- 35 | Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

In Turkey, as per article 146 of the Turkish Code of Obligations (TCO), the general limitation period is 10 years unless otherwise provided by law. However, article 147 of the TCO stipulates that claims arising from a contract of work, with the exception of the case where the contractor does not fulfil his or her obligations at all or properly at his or her gross fault, become time-barred after five years.

Regarding the lawsuits to be filed relating to defective structure, the special period of limitation is stated in article 478 of the TCO. According to this article, if the contractor delivers defective work, the limitation period for the litigation case to be filed regarding such defect will be five years for immovables, two years for movables and, if the contractor admits a gross fault, 20 years of the limitation period will be applied.

Regarding the preconditions, applying mandatory mediation is a legal prerequisite for commencing court proceedings. Pursuant to the Law on the Procedures of Initiation of Execution Proceedings Concerning Monetary Receivables Originating from Subscription Agreements, commercial disputes over certain monetary receivables and compensation claims are subject to mandatory mediation. Accordingly, any party that wishes to commence court proceedings with regard to a commercial payment claim must first apply to the mandatory mediation proceedings; otherwise, the case will be rejected because of the absence of a course of action.

## ENVIRONMENTAL REGULATION

### International environmental law

- 36 | Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

#### Stockholm Declaration of 1972

Despite the fact that Turkey delegates attended the United Nations Conference on the Human Environment in 1972, at which the Stockholm Declaration of 1972 was declared, Turkey is not a party of the Declaration of the United Nations Conference on the Human Environment and is not a member of the United Nations Environment Programme governing council.

### Local law

Although environmental protection is part of its Constitution, in order to preserve the environment and wildlife, Turkey has enacted lots of legislation such as the Environmental Law, the Forest Law, the Turkish Criminal Code (TCC), the Misdemeanour Law, the Law on Metropolitan Municipalities, the Law on Soil Preservation and Land Utilization, the Energy Efficiency Law, the Animal Protection Law, the Environmental Impact Assessment Regulation, the Regulation on Environmental Permits and Licences, the Regulation on Waste Management, the Regulation on Assessment and Management of Environmental Noise, the Regulation on Control of Water Pollution, the Excavation Soil, Construction and Demolition Waste Control Regulation, the Waste Management Regulation, the Regulation on Solid Waste, the Regulation on Hazardous Waste and the Regulation on the Control of Soil Pollution and Sites Contaminated by Point Source Pollution.

## Local environmental responsibility

- 37 | What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

The legal framework governing environmental law of Turkey is composed of the Law on the Environment No. 2871, which establishes civil and administrative liabilities for those who pollute the environment.

Moreover, intentional and negligent acts resulting in pollution are deemed criminal offences under the TCC.

From an environmental law perspective, the principal duty of the contractors and developers is to obtain necessary permits and licences. Depending on the nature of the business, an enterprise may need to obtain either just a permit or both a permit and a licence.

Depending on the type the commercial activity it is engaged in, an enterprise may need to prepare an environmental impact assessment report (EIAR), which will be submitted to the Ministry of Environment and Urbanization. The project may be initiated only upon the Ministry's affirmative decision on such a report. However, an EIAR is not necessary for all projects.

Further duties are enlisted under countless regulations, but one of the most extensive ones is the Regulation on Control of Excavation Soil, Construction and Ruin Wastes, which aims to minimise the waste and increase the volume of waste that is recycled.

## CROSS-BORDER ISSUES

### International treaties

- 38 | Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

According to latest numbers published on the Ministry of Trade's website, Turkey now is a party to 98 bilateral investment treaties (BITs). Although Turkey does not possess a model treaty clause on the definition of investment, the term investment is usually defined broadly on an asset basis. Hence, construction and infrastructure projects undertaken by foreign investors count for foreign investment and, therefore, enjoy protection generated by BITs.

### Tax treaties

- 39 | Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Yes. Since the building or construction sites are enlisted as permanent establishments, foreign company operating in Turkey will be taxed under the double taxation treaties. Turkey has ratified numerous treaties on the prevention of double taxation with a number of countries including: Albania, Algeria, Australia, Azerbaijan, Austria, Bahrain, Bangladesh, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Moldova, Mongolia, Montenegro, Morocco, the Netherlands, New Zealand, Northern Cyprus, Norway, Oman, Pakistan, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, South Africa, Singapore, Slovakia, Slovenia, Spain, Sudan, Syria, Sweden, Tajikistan, Thailand, Tunisia, Turkmenistan, Ukraine, the United Arab Emirates, the United Kingdom, the United States of America, Uzbekistan and Yemen.

## Currency controls

40 | Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

There is no principal currency control but the Presidential Decree on the Amendment of the Presidential Decree No. 32 defines the transactions in which and parties to which the usage of foreign currency is allowed. The impact of the decree is very broad in its scope, implementing an extensive ban on the employment of foreign currencies themselves and foreign currency indexed Turkish lira pricing in a wide array of contractual relationships. Banking and insurance transactions tax totals 0.2 per cent of the volume of the transaction is levied on foreign currency purchases.

## Removal of revenues, profits and investment

41 | Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

In principle, there is no restriction on the removal of revenues, profits or investments from Turkey; moreover Turkey's BITs guarantee free transfer of returns and profits.

## UPDATE AND TRENDS

### Emerging trends

42 | Are there any emerging trends or hot topics in construction regulation in your jurisdiction?

With the Regulation on the Amendment of the Zoning Regulation for Planned Areas (the Regulation), which was published in the Official Gazette on 23 January 2021, the following amendments have been made:

- Prior to the amendments being introduced by the Regulation, contradictions to plans, legislation or project plans in a building prevented substantial modifications or additional construction even in other independent sections of the building. However, now buildings that have an occupancy permit can be modified or rebuilt if there are any contradictions with the plans.
- Before the Regulation, common areas such as libraries in shopping centres were included in the floor plan. However, with the new Regulation, such common rooms cannot be included in the floor plans.
- Another regulation is that the height of the garden walls can no longer exceed 0.5 metres.

### Coronavirus

43 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Ministry of Environment and Urban Planning's General Directorate of Construction Works issued Circular No. 2020/9, dated 20 March 2020, that sets out measures to ensure the safety of employees and employers in construction and audit services in the public and private sectors. The Circular prohibits commonly used equipment and promotes personal equipment, social distancing and remote working. It imposes wearing protective materials such as gloves and masks for employees and also sets ventilation requirements for common areas.

Another important amendment is the Presidential Circular No. 2020/5, dated 2 April 2020, that regulates the impact of the covid-19 pandemic on Public Procurement Agreements. According to the Circular,

# CETINKAYA

## Orcun Cetinkaya

orcun.cetinkaya@cetinkaya.com

## Pelin Karan

pelin.karan@cetinkaya.com

## Emre Dirik

emre.dirik@cetinkaya.com

## Serra Kaya

serra.kaya@cetinkaya.com

Akat Mah Cebeci Cad  
No 24 Besiktas 34335  
Istanbul  
Turkey  
Tel: +90 212 351 31 40  
www.cetinkaya.com

contractors who claim that the project works can no longer be carried out temporarily or permanently, partially or completely can apply to the administration. If the administrative authority determines that the failure occurred beyond the control of the contractor, an extension of time may be granted to the contractor or the contract can be terminated.

## Other titles available in this series

|                               |   |   |  |
|-------------------------------|---|---|--|
| Acquisition Finance           | Distribution & Agency                         | Investment Treaty Arbitration             | Public M&A                             |
| Advertising & Marketing       | Domains & Domain Names                        | Islamic Finance & Markets                 | Public Procurement                     |
| Agribusiness                  | Dominance                                     | Joint Ventures                            | Public-Private Partnerships            |
| Air Transport                 | Drone Regulation                              | Labour & Employment                       | Rail Transport                         |
| Anti-Corruption Regulation    | e-Commerce                                    | Legal Privilege & Professional<br>Secrecy | Real Estate                            |
| Anti-Money Laundering         | Electricity Regulation                        | Licensing                                 | Real Estate M&A                        |
| Appeals                       | Energy Disputes                               | Life Sciences                             | Renewable Energy                       |
| Arbitration                   | Enforcement of Foreign<br>Judgments           | Litigation Funding                        | Restructuring & Insolvency             |
| Art Law                       | Environment & Climate<br>Regulation           | Loans & Secured Financing                 | Right of Publicity                     |
| Asset Recovery                | Equity Derivatives                            | Luxury & Fashion                          | Risk & Compliance Management           |
| Automotive                    | Executive Compensation &<br>Employee Benefits | M&A Litigation                            | Securities Finance                     |
| Aviation Finance & Leasing    | Financial Services Compliance                 | Mediation                                 | Securities Litigation                  |
| Aviation Liability            | Financial Services Litigation                 | Merger Control                            | Shareholder Activism &<br>Engagement   |
| Banking Regulation            | Fintech                                       | Mining                                    | Ship Finance                           |
| Business & Human Rights       | Foreign Investment Review                     | Oil Regulation                            | Shipbuilding                           |
| Cartel Regulation             | Franchise                                     | Partnerships                              | Shipping                               |
| Class Actions                 | Fund Management                               | Patents                                   | Sovereign Immunity                     |
| Cloud Computing               | Gaming  | Pensions & Retirement Plans               | Sports Law                             |
| Commercial Contracts          | Gas Regulation                                | Pharma & Medical Device<br>Regulation     | State Aid                              |
| Competition Compliance        | Government Investigations                     | Pharmaceutical Antitrust                  | Structured Finance &<br>Securitisation |
| Complex Commercial Litigation | Government Relations                          | Ports & Terminals                         | Tax Controversy                        |
| Construction                  | Healthcare Enforcement &<br>Litigation        | Private Antitrust Litigation              | Tax on Inbound Investment              |
| Copyright                     | Healthcare M&A                                | Private Banking & Wealth<br>Management    | Technology M&A                         |
| Corporate Governance          | High-Yield Debt                               | Private Client                            | Telecoms & Media                       |
| Corporate Immigration         | Initial Public Offerings                      | Private Equity                            | Trade & Customs                        |
| Corporate Reorganisations     | Insurance & Reinsurance                       | Private M&A                               | Trademarks                             |
| Cybersecurity                 | Insurance Litigation                          | Product Liability                         | Transfer Pricing                       |
| Data Protection & Privacy     | Intellectual Property & Antitrust             | Product Recall                            | Vertical Agreements                    |
| Debt Capital Markets          |   | Project Finance                           |  |
| Defence & Security            |   |   |  |
| Procurement                   |   |   |  |
| Dispute Resolution            |   |   |  |

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)