Energy Disputes

Contributing editors
William D Wood, Neil Q Miller, Lauren Hunt Brogdon and Holly Stebbing

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Energy Disputes 2017

Contributing editors

William D Wood, Neil Q Miller, Lauren Hunt Brogdon and Holly Stebbing

Norton Rose Fulbright

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2016
Second edition
ISSN 2397-737X

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Turkey

Mesut Çakmak, Ayşe Eda Biçer and Erdem Başgül

Çakmak Avukatlık Bürosu

General

1 Describe the areas of energy development in the country.

Turkey has experienced rapidly and steadily growing demand in the energy sector. Domestic resources currently only meet around 25 per cent of its energy needs, which adds to the country's import dependency. Turkey is trying to reduce this high level of dependency by promoting the use of indigenous sources such as lignite and renewable energy sources and nuclear energy.

Turkey has a large potential for renewable energy and aims to generate 30 per cent of its electricity need from renewables by 2023. A recent major development on this front is the legislation concerning the renewable energy resource areas (RERA), which came into force on 9 October 2016. In such pre-determined areas, the Ministry of Energy and Natural Resources (the MENR) conducts a RERA connection capacity allocation tender and the winning bidder develops the RERA in collaboration with the MENR. The first RERA tender was announced for the Karapınar I Project on 20 October 2016, which involves the construction of a solar power plant with an installed capacity of 1,000MW.

Turkey also aims to establish its own nuclear power capacity in order to diversify the electricity mix of the country. While Akkuyu Nuclear Power Plant is currently under construction, negotiations and preparations regarding two further power plants located in Sinop and İğneada are ongoing. Turkey's goal is to establish a nuclear capacity on the basis of two nuclear power plants in Mersin/Akkuyu and Sinop that would account for 10 per cent of the country's electricity supply by 2023.

In addition, the government has recently made efforts to incentivise domestic coal. With an amendment made on 4 June 2016 to the Electricity Market Law No. 6446 (the Electricity Market Law), TETAŞ, the state-owned electricity wholesale company, has been empowered to hold tenders for the procurement of electric power primarily from domestic coal-fired power plants in case of shortages in the electric power required to meet the supply obligations of TETAŞ. Further, a Council of Ministers Decree dated 2 August 2016 introduced an additional financial obligation of US$15 per tonne for coal imports to be used in power plants to encourage projects on local coal reserves.

2 Describe the government's role in the ownership and development of energy resources. Outline the current energy policy.

Pursuant to article 168 of the Constitution of the Republic of Turkey, the state is the owner of all energy resources and has the right to explore, exploit, research and operate them. The state may transfer such right to private individuals and entities for a temporary period of time through licences or agreements.

There are certain laws regarding the transfer of the exploration, exploitation, research and operation rights for oil, gas and other hydrocarbons and renewable energy sources and, in practice, the government issues various licences and signs agreements for the transfer of these rights.

State-owned companies play an important role in the development of energy resources in Turkey. The Turkish Petroleum Corporation (TPAO) has a dominant role in onshore and offshore exploration and exploitation activities. The total domestic production of crude oil was 18 million barrels in 2015, of which approximately 55 per cent was produced by TPAO; and the total domestic production of gas was 339 million cubic metres in 2015, of which approximately 51 per cent was produced by TPAO while the rest was produced by private entities ('Crude oil and natural gas sector report', May 2016, TPAO).

Commercial/civil law – substantive

3 Describe any industry-standard form contracts used in the energy sector in your jurisdiction.

Form agreements are generally used in making contracts with public entities having regulatory duties or powers. Prominent examples of such agreements in the electricity market are as follows:

- EPİAŞ (the electricity market operator): market participation agreement, intraday and day ahead market participation agreements (note that the agreements related to assignment of the EPİAŞ receivables are also made on the basis of a standard form agreement);
- TEİAŞ (the state-owned transmission operator): connection agreement, system usage agreement; and
- Takasbank (the central settlement bank): participation agreement.

In addition, some state entities use form agreements in their affairs. For instance BOTAŞ, the state-owned natural gas utility, uses a form interruptible gas supply contract in some cases.

It should be noted that the government does not use form agreements for the transfer of energy resource exploration or operation rights. The transfer of such rights are carried out through licensing, concession agreements, privatisation or private law agreements depending on the type of resources and the right to be transferred.

4 What rules govern contractual interpretation in (non-consumer) contracts in general? Do these rules apply to energy contracts?

Contractual interpretation rules are generally regulated under article 19 of the Turkish Code of Obligations No. 6098 (Turkish Code of Obligations), which provides that the contracts must be interpreted according to the real and mutual intention of the parties. In addition, several contractual interpretation rules have been developed by legal literature and court precedents such as the following:

- interpretation to the advantage of the party undertaking an obligation should be preferred;
- interpretation to the disadvantage of the party who prepared the contract should be preferred;
- wishes and intentions of the parties at the time of the contract should be considered;
- the relevant provision should be examined alongside the rest of the provisions in the contract;
- provisions excluding rights should be interpreted strictly;
- the contract should be interpreted according to the meaning that a reasonable and honest person would give to it in the circumstances; and
- interpretation that does not comply with a provision of a law, as a substitute legal source, should not be favoured.

These rules apply in both administrative law and private law contracts, including those signed within the energy sectors.

5 Describe any commonly recognised industry standards for establishing liability.

Article 18 of the Turkish Commercial Code No. 6102 defines the principles of prudent merchant in general, according to which every merchant is required to act as a prudent businessman in all of its commercial activities. This is an objective standard (ie, every merchant is expected to show the care that would be expected from any cautious and visionary merchant operating in the same field of business). Note particularly that electricity and natural gas market legislation specifically stipulate that such market players have a duty to act as a reasonable and prudent operator in their respective activities.

In addition, article 2 of the Turkish Civil Code No. 4721 (the Turkish Civil Code) sets forth the rule on the (objective) good faith principle. Although this article does not provide a definition of the principle, it sets out the boundaries surrounding the exercise and performance of all rights and obligations by stipulating that every person is bound to exercise his or her rights and fulfil his or her obligations according to this good faith principle. Therefore, rights and obligations must be exercised or performed in a way that an honest, trustworthy and reasonable person, who acts in accordance with the trust of the other party, would have exercised or performed such rights or obligations under similar circumstances. In this regard, good faith constitutes a set of rules that is generally recognised and expected from every person, as it is presumed that such rules satisfy the needs of social and business life. In addition, good faith principle forbids manifest abuse of rights. Although rights contain interests that are protected and can be enforced by law, if exercise of a right amounts to a manifest abuse of such right, the right holder cannot be entitled to the benefit that it expected to achieve by way of exercise of its right in a manner that is contrary to the good faith principle. Legal scholars and judicial precedents acknowledge certain exercises of rights as manifest abuse of a right including but not limited to where such exercise will result in illegitimate benefits or hindrance of other parties' interests.

Finally, article 115 of the Turkish Code of Obligations provides that any agreement made in advance purporting to exclude or limit liability for fraud, wilful misconduct or gross negligence is void. See question 8 for details of this provision.

6 Are concepts of force majeure, commercial impracticability or frustration, or other concepts that would excuse performance during periods of commodity price or supply volatility recognised in your jurisdiction?

In the Turkish legal framework, 'pacta sunt servanda' or the rule of 'obligations shall be honoured' constitutes the main principle of Turkish contract law, pursuant to article 2 of the Turkish Code of Obligations. However, the concept of 'rebus sic stantibus' acts as the exception to this principle. If the terms of the contract do not align with the parties' will, because of unexpected circumstances, the imprévision theory comes into force. This principle has found itself a formal scope of application in Turkish law, as the concept was introduced in article 138 of the Turkish Code of Obligations. The principle can be explained as the 'collapse of the underlying basis of the transaction', which leads to either adaptation of the contract by the court — to the extent of the parties' will — or eventually termination of the contract. This principle is applicable to contracts signed in the energy sectors as well.

The concept of force majeure is also recognised under Turkish law, but is not clearly defined in legislation in general. However, as an exception, energy legislation defines force majeure events. According to licensing regulations of electricity, natural gas and petrol markets, for an event to be acknowledged as force majeure, such event must impede the affected party's performance of its obligations under the relevant legislation and be unavoidable, inevitable and unforeseeable even if the affected party has exercised due care and diligence and has taken all precautions.

The Electricity Market Licensing Regulation provides certain examples of force majeure events which include natural disaster, epidemic, war, public uprising, acts of terrorism, sabotage, strike and lockout. Upon the licence holder's application in writing to Energy Market Regulatory Authority (EMRA) indicating the starting date and extent of the force majeure event, its effects to its obligations under the legislation, and if possible, its cure period, EMRA may decide the postponement or suspension of the licence holder's obligations to the extent these are affected from the force majeure event. Further, where it is foreseen that performance of such obligations is not possible, other than transmission and distribution activities in natural gas and electricity markets, EMRA may decide that such obligations will not be applicable to such licence holder.

7 What are the rules on claims of nuisance to obstruct energy development? May operators be subject to nuisance and negligence claims from third parties?

Under Turkish law third parties with a legitimate interest can make nuisance and negligence claims mainly through filing compensation lawsuits before civil courts or filing cancellation lawsuits against relevant administrative acts (such as permits or licences) before administrative courts. The initiation of a lawsuit alone does not provide a justification to prevent the development of an energy project. In order for a lawsuit to adversely affect a project, the court must have either rendered an injunction relief decision suspending the implementation of the relevant administrative act, or cancelled it; and the relevant administrative act must be one of the critical acts in the absence of which the project cannot continue.

8 How may parties limit remedies by agreement?

In accordance with articles 26 and 27 of the Turkish Code of Obligations, parties may limit remedies by agreement in light of the freedom of contract principle, provided that such limitation does not violate compulsory provisions of law, ethics, public policy and personal rights. However, it should also be noted that any agreement made in advance purporting to exclude or limit liability for fraud or gross negligence is void according to article 115 of the Turkish Code of Obligations. Pursuant to article 116 of the Turkish Code of Obligations, liability arising from the gross negligence or intentional misconduct can be limited either partially or entirely. Pursuant to articles 115 and 116, services that are performed under authorisation from a relevant authority and requiring special skills, limitation of liability arising from either slight or gross negligence or intentional misconduct on the part of the party itself or its agents shall be null and void. Additionally, any limitation of liability arising from the operation of dangerous businesses (as set forth in article 71 of the Turkish Code of Obligations) may not be enforceable.

9 Is strict liability applicable for damage resulting from any activities in the energy sector?

There are two main strict liabilities under Turkish law that may be applicable in the energy sector: the employer's strict liability, which is regulated under article 66 of the Turkish Code of Obligations, and the strict liability of the construction owner, which is regulated under article 69 of the Turkish Code of Obligations. The employer can avoid liability by proving that he or she showed due care in the employment decision, inspection of the work, selection of the tools and organisation of the work, according to objective standards. The construction owner's strict liability cannot be eliminated; but the construction owner can seek recourse to the person who caused the damage. In addition, pursuant to article 71 of the Turkish Code of Obligations, both the owner and operator are severally responsible for liabilities arising from dangerous businesses, including certain energy projects.

Turkey is a party to the Paris Convention on Third Party Liability in the Field of Nuclear Energy dated 29 July 1960, and therefore its provisions would be applicable regarding the liability of nuclear power plant operators in Turkey.

Commercial/civil law – procedural

10 How do courts in your jurisdiction resolve competing clauses in multiple contracts relating to a single transaction, lease, licence or concession, with respect to choice of forum, choice of law or mode of dispute resolution?

In certain project documents, as we see in major energy projects in practice, such competing clauses are governed pursuant to the 'coordination of disputes protocols' whereby the parties clarify the application of competing clauses such as choice of forum, choice of law or mode of dispute resolution. This protocol includes, among others, provisions in the form of guidance to the parties as to how to coordinate initiation of disputes that may relate to multiple parties and contracts. Here, the relevant judge or arbitrator is expected to determine his or her own jurisdiction in respect of the relevant project agreement before him or

her (and thus the limits of his or her jurisdiction regarding the other project agreements) on the basis of the rules set out in such 'coordination of disputes protocol'. To the best of our knowledge, the validity and enforceability of such protocols have not yet been tested before the Turkish courts.

In the absence of such protocol, the specific provisions provided in each of the agreements would be separately applicable for disputes arising out of each relevant agreement or document. In such case, the expectation would be that the judge should look at the project agreements other than the project agreement before him or her to ascertain his or her limits of jurisdiction in respect of the other relevant project agreements. Although it may be more time consuming, this should mainly achieve the same result that is aimed at by way of a 'coordination of disputes protocol'.

11 Are stepped and split dispute clauses common? Are they enforceable under the law of your jurisdiction?

Stepped dispute clauses are permissible under Turkish law and common in practice in the Turkish energy market. Although there is no specific provision in the legislation dealing with such clauses, the parties can provide a stepped dispute clause in their contracts due to the freedom of contract principle of Turkish law. Stepped clauses are commonly used in the contracts to allow a claim to be resolved in the fastest and most cost-effective way. Typically, stepped clauses involve an internal resolution process through amicable settlement, followed by a stage of alternative dispute resolution such as the involvement of an expert; and the resolution by arbitration or court jurisdiction as the step of last resort.

In order for an arbitration clause or agreement to be valid under Turkish law, the parties' intention to submit disputes to arbitration must be clear and unconditional, and the jurisdiction of local courts must not have been provided as an alternative to arbitration. Split dispute clauses permitting parties to go to arbitration for some disputes and to courts for some others arising from the same contract may not be valid and enforceable under Turkish law if the distinction between these two categories of disputes are not sufficiently clear. This issue is not yet tested before Turkish courts. However, even if there is a distinction between the categories of disputes, given that a dispute may relate to both categories in practice, the validity and enforceability of split dispute clauses may be questionable as a matter of Turkish law.

12 How is expert evidence used in your courts? What are the rules on engagement and use of experts?

Under Turkish law, parties to a lawsuit can request the judges to appoint an expert, or the judges themselves may appoint experts to prepare a report on issues that require technical and specific knowledge outside the legal issues. Notwithstanding this clear definition, in practice Turkish courts commonly appointed experts in relation to legal issues alongside other issues and referred to such reports as legal ground for their decisions for the legal issues involved as well. In order to prevent such improper practice of expert evidence, the Experts Law No. 6754, which was published in the Official Gazette No. 29898 dated 24 November 2016, reiterated that only experts that have been registered with the experts' registry by documenting their expertise in an area outside of law can be appointed as experts by the courts.

Apart from such court-appointed experts, the parties to the lawsuit can also obtain opinions from experts and can submit their reports to the court as evidence. In accordance with article 282 of the Civil Procedural Law No. 6100, expert reports are accepted as discretionary evidence. In disputes involving energy matters, it is common in practice for courts to appoint experts and for the parties to obtain their own independent expert opinions as well.

13 What interim and emergency relief may a court in your jurisdiction grant for energy disputes?

There are no energy-specific interim and emergency relief provisions under Turkish law, and therefore the general provisions governing such relief and measures are also applicable for energy disputes. Interim relief is available both under Turkish administrative law and civil law. An injunction relief may be requested by any person with legitimate interest from administrative courts to suspend the implementation of an administrative act. The courts are required to render an injunction relief if both the following conditions are met: the administrative act is clearly contrary to law, and an irreparable damage would occur if the implementation of the relevant administrative act is not suspended. A precautionary measure may be requested from civil courts either during a pending lawsuit or as an independent lawsuit. Precautionary measures may be granted by the courts if there is a risk that a delay may cause considerable damage, or any change in the existing conditions may obstruct or make impossible the usage of a right if the precautionary measure request is not accepted.

14 What is the enforcement process for foreign judgments and foreign arbitral awards in energy disputes in your jurisdiction?

There are no energy-specific enforcement rules under Turkish law, and therefore, the general enforcement rules are also applicable to energy disputes. Pursuant to the Turkish International Private Law and Procedural Law No. 5718 (the Turkish International Private Law and Procedural Law), for the enforcement of judgments rendered by foreign courts and finalised in accordance with the laws of the concerned states, an enforcement decision has to be given by a Turkish court. In order for a foreign judgment to be enforced in Turkey, the conditions stipulated under the Turkish International Private Law and Procedural Law must be met:

- there must exist reciprocity with the state in which the relevant judgment is given;
- the judgment must not be contrary to public policy rules of Turkey; and
- the right to defence of the parties must not have been violated during the trial process before the relevant foreign court.

The enforcement procedures of foreign arbitration awards will be subject to the Turkish International Private Law and Procedural Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in June 1958 (the New York Convention). It should be noted that in accordance with article 90 of the Turkish Constitution, international treaties such as the New York Convention have the same effect as a Turkish domestic law. Turkey has, however, declared the first reservation and limited the applicability of the New York Convention to awards made in other contracting states according to the principle of reciprocity. Therefore, the enforcement of an arbitral award in Turkey shall be subject to the New York Convention only if it is rendered in a state that is a party to the New York Convention. The New York Convention satisfied the reciprocity requirement with respect to all states that are party to it so that no further application of the reciprocity test is required for those states. The enforcement of foreign arbitration awards that are outside the scope of the New York Convention is subject to certain conditions under the Turkish International Private and Procedural Law, which are similar to the conditions for enforcement of foreign court judgments as explained above. In addition, in light of article 15 of the International Arbitration Law No. 4686 (the International Arbitration Law), arbitral awards can be challenged before the relevant first instance court. In such case, the court would examine the file from the point of the cancellation grounds provided in the International Arbitration Law, which are very similar to the enforcement conditions of the New York Convention.

15 Are there any arbitration institutions that specifically administer energy disputes in your jurisdiction?

There is no arbitration institution specific to the energy disputes in Turkey.

On a general note, Turkey is a party to the Energy Charter Treaty and foreign investors making an investment in Turkey may submit disputes to arbitration pursuant to this treaty.

16 Is there any general preference for litigation over arbitration or vice versa in the energy sector in your jurisdiction?

Arbitration is usually preferred to local courts in large-scale energy contracts. It is primarily chosen by the parties for the purposes of shortening the duration of the dispute resolution process, being able to submit the dispute to arbitrators who are qualified experts of the areas related to the specific dispute, and providing a relatively neutral dispute resolution process, especially in international transactions and within the scope of contracts signed with an administrative party.

17 Are statements made in settlement discussions (including mediation) confidential, discoverable or without prejudice?

Attorney's Act No. 1136 provides a settlement option under the supervision of attorneys who may invite parties of a dispute to settlement before filing a lawsuit or before the first hearing in the cases where a lawsuit is already filed. In case the counterparty accepts this invitation and the parties reach a settlement, settlement minutes must be signed by the attorneys and their clients. Such minutes will be in force of a final court judgment on the matter subject to the dispute.

The Law on Mediation for Civil Disputes No. 6325 offers mediation as an alternative option for dispute resolution. Pursuant to this law, confidentiality is one of the main principles, and the documents and information submitted during the mediation process, including but not limited to acknowledgement of any factual matters or claims, cannot be used as evidence before courts or arbitral tribunals. The only exceptions to this rule are any requirements by law to disclose these or the necessity of their disclosure for implementation of the settlement agreement. The individuals who violate the confidentiality rule under this Law and cause the relevant party to suffer any damage may be sentenced to prison for up to six months. The parties and mediators may sign a settlement agreement to set out the details of their agreement. The enforceability of such agreement requires an enforceability annotation to be received from the relevant court. The agreement will have the force of a court judgment after receiving such annotation. Therefore, the information stated under the settlement agreement may be required to be disclosed by the parties for enforcement purposes.

18 Are there any data protection, trade secret or other privacy issues for the purposes of e-disclosure/e-discovery in a proceeding?

The Turkish Parliament enacted in March 2016 the Law No. 6698 on Protection of Personal Data, which had been on its agenda since 2012 to establish a centralised data protection framework. In addition to this Law, there are various laws including provisions applicable to data protection and privacy such as some articles of the Constitution of the Republic of Turkey regarding the privacy of private life and freedom of communication, provision of the Turkish Criminal Code No. 5237 (the Turkish Criminal Code) regarding blocking and impairing the system, destroying or altering the data; and provision of the Turkish Civil Code regarding the protection of personality against violations.

In addition, Turkey is a party to the European Council Agreement on Cyber Crime, the United Nations Universal Declaration of Human Rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms. Turkey has also signed and ratified the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Convention No. 108).

19 What are the rules in your jurisdiction regarding attorney–client privilege and work product privileges?

In accordance with the Attorney's Act, attorneys are obliged not to disclose any information acquired from or in respect of their clients as a consequence of their representation without the client's permission. Furthermore, attorneys have the right to avoid testifying regarding any information acquired as a consequence of the representation of any client even if the client permits the testifying.

Turkish law does not provide specific provisions regarding the nature of work products of attorneys or whom such products belong to. In the absence of specific provisions, these work products should be assessed within the context of the general intellectual property legislation. Furthermore, parties can set forth additional contractual obligations regarding the work product privileges.

20 Must some energy disputes, as a matter of jurisdiction, first be heard before an administrative agency?

There is no specific administrative review for energy disputes required to be initiated before filing a lawsuit.

However, the applicable legislation provides an option to apply to the EMRA for the settlement of certain disputes. For example, in accordance with the Electricity Market Licensing Regulation, distribution and transmission licence holders can apply to EMRA for resolution of disputes arising from connection and system usage agreements.

Additionally, as a general rule in Turkish administrative review procedure, plaintiffs can first apply to the administrative authority ranking higher to the one that has rendered the subject administrative act (or to the administrative authority rendering the subject administrative act if there is no higher ranking authority) for annulment, cancellation, revision or re-issuance of the respective act before filing of a lawsuit for the same.

Regulatory

21 Identify the principal agencies that regulate the energy sector and briefly describe their general jurisdiction.

Administrative authorities regulating the energy sectors in Turkey are as follows:

- EMRA is an independent regulatory authority responsible for the regulation and supervision of the oil and gas markets (ie, midstream and downstream segments) and the electricity market.
- MENR determines and implements national energy policy objectives. In addition, it ensures coordination between related public bodies and private entities; and supervises all exploration, development, production and distribution activities in respect of energy and natural resources.
- The General Directorate of Petroleum Affairs evaluates applications and issues licences for exploration, extraction and operation of oil and gas sources and grants licences for these activities.
- The General Directorate of Mining Affairs evaluates applications and issues licences for exploration and operation of mines.
- The Turkish Atomic Energy Authority is responsible for regulation, supervision and guidance regarding the areas concerned with atomic energy together with EMRA.

22 Do new entrants to the market have rights to access infrastructure? If so, may the regulator intervene to facilitate access?

Both the Electricity Market Law and the Natural Gas Market Law No. 4646 require distribution and transmission network operators to provide access to the network on the same terms and conditions to all system users without discrimination, other than the incentives provided for the renewable energy facilities explained below. Similarly, under the Oil Market Law No. 5015, licensed storage and transmission companies must carry out all storage and transmission requests, save for capacity limitations, without discrimination among applicants. Furthermore the owners of oil refineries are obliged to provide all distribution companies requesting to purchase oil from them with at least the same conditions they provide to their own distribution companies.

Without prejudice to the generality of the above, certain priorities are provided for facilities based on renewable energy resources. The Electricity Market Licensing Regulation requires both TEİAŞ (as the operator of the transmission network) and the distribution licence holders to give priority to those facilities generating electricity from renewable energy resources in terms of their connection to the transmission or distribution systems.

EMRA may intervene in the case of a breach of these requirements by TEİAŞ or distribution companies, and impose administrative fines and other sanctions to ensure fair access of all market players to the transmission and distribution networks.

23 What is the mechanism for judicial review of decisions relating to the sector taken by administrative agencies and other public bodies? Are non-judicial procedures to challenge the decisions of the energy regulator available?

Decisions and actions of all regulatory authorities can be challenged before administrative courts pursuant to Administrative Procedure Law No. 2577. Furthermore, pursuant to the Ombudsman Law No. 6328, claims regarding administrative decisions and actions can be submitted to the Ombudsman Authority for resolution as well. The decisions of the Ombudsman Authority are not binding on the administration or courts; however, in practice, the administration tends to comply with them considering the fact that the courts are also likely to comply with them in the case of a cancellation lawsuit filed against the same administrative act.

As explained above, it is also possible for the plaintiff to apply first to the administrative authority that ranks higher than the one that has

Update and trends

Priority for local energy resources
The Minister of Energy and Natural Resources, Berat Albayrak, has announced a new energy strategy in which local energy resources will receive precedence in energy investments. This new strategy will be based on security of energy supply, alternative energy resources, resource variety, integration of local and renewable energy resources into the economy, sustainability, deregulation of the energy sector, and energy efficiency. In this regard, the contribution of renewable energy in energy supplies and the variety in resource countries for petroleum and natural gas will be increased. The MENR aims to decrease Turkey's natural gas dependency on a single resource country (ie, Russia) to a maximum of 50 per cent by 2019.

Renewable energy resource areas (RERA)
Pursuant to the recently introduced legislation concerning the renewable energy resource areas (RERA) on pre-determined areas, the MENR conducts a RERA connection capacity allocation tender and the winning bidder develops the RERA in collaboration with the MENR. The first RERA tender was announced for the Karapınar I project on 20 October 2016, which involves the construction of a solar power plant with an installed capacity of 1,000MW.

Local coal incentives
The MENR aims to utilise the majority of local lignite and coal reserves for electrical energy production until 2023. The goal is to increase local coal's share in the country's electrical energy production portfolio until 2019. In this pursuit, the MENR has intensified studies on further utilisation of lignite fields for privatisation tenders in the near future. With a recent amendment made on 4 June 2016 to the Electricity Market Law, TETAŞ, the state-owned electricity wholesale company, has been empowered to hold tenders for the procurement of electric power primarily from domestic coal-fired power plants in case of shortages in the electric power required to meet the supply obligations of TETAŞ. Further, a Council of Ministers Decree dated 2 August 2016 introduced an additional financial obligation of US$15 per ton for coal imports to be used in power plants to encourage projects on local coal reserves.

Developments in nuclear energy
Interest in nuclear energy in Turkey has increased recently, bringing several nuclear power plant projects along. An Environmental Impact Assessment (EIA) affirmative decision from the Ministry of Environment and Urbanisation and a three-year preliminary license from EMRA were obtained for the Akkuyu nuclear power plant and the ground was broken for its marine structures. The aim is to have the plant's first unit be operational by 2022. The seismological cataloging studies under feasibility studies are ongoing for the Sinop nuclear power plant. All in all, the Minister has proclaimed that studies for a third plant are expected to commence before 2023.

rendered the subject administrative decision (or to the administrative authority rendering the subject administrative decision if there is no higher rankling authority) for annulment, cancellation, revision or re-issuance of the respective decision before filing a lawsuit for the same.

24 What is the legal and regulatory position on hydraulic fracturing in your jurisdiction?

The Petroleum Law No. 6491 and its Implementation Regulation permit certain unconventional research and exploration activities as part of the policy to benefit from all domestic resources. The hydraulic fracturing method, which is used for shale gas research activities, falls within the scope of these unconventional research and exploration activities.

The General Directorate of Petroleum Affairs issued more than 40 licences for exploration of shale gas.

The petroleum right holders who have the right to perform hydraulic fracturing must submit an additional form to the General Directorate of Petroleum Affairs. Such form must include all information regarding the results of the activity in terms of water, soil, air and other environmental pollution.

25 Describe any statutory or regulatory protection for indigenous groups.

Turkish law does not provide for a specific statutory or regulatory protection for indigenous groups; however, as explained in question 7, Turkish law permits individuals and legal entities to challenge all administrative acts, such as permits or licences of an energy project, if such administrative act violates the legitimate interests of such individual or legal entity. Such individuals and legal entities can also file compensation lawsuits against the relevant public authorities or private investors for the compensation of their damages arising from the relevant project.

26 Describe any legal or regulatory barriers to entry for foreign companies looking to participate in energy development in your jurisdiction.

Turkish Foreign Investments Law No. 4875 (the Foreign Investments Law) provides that foreign investors are to be granted no less favourable treatment than that accorded to local investors. In addition, the Foreign Investments Law reiterates the constitutional principle that expropriation and nationalisation is only permitted if required for the public good and only in return for adequate compensation. In order to provide additional comfort to foreign investors, the Foreign Investments Law ensures that recourse to local and international arbitration and alternative dispute resolution mechanisms would be available for foreign investors. Foreign investors making an investment in Turkey may submit disputes to arbitration pursuant to a bilateral investment treaty or the Energy Charter Treaty.

In respect of the scope of the provided coverage, the Foreign Investments Law provides a broad definition of foreign investment. Any contribution from outside of Turkey of funds in convertible currency, corporate securities (except foreign sovereign bonds), machinery and equipment, or industrial and intellectual property rights constitutes foreign investment. In addition, 'any rights generated in Turkey and relating to dividends, sales proceeds, receivables or other investment rights with monetary value, as well as assets with an economical value such as rights relating to exploration and extraction of natural resources' are included within the definition of foreign investment.

27 What criminal, health and safety, and environmental liability do companies in the energy sector most commonly face, and what are the associated penalties?

Pursuant to Environmental Law No. 2872 and the Turkish Civil Code, in case of environmental pollution, the polluter and the property owner shall be subject to certain administrative fines in addition to their obligation to take preventive measures and eventually clean up the pollution. Pursuant to the Turkish Criminal Code, a person who intentionally or negligently causes pollution of soil, water or air is either imprisoned or punished with a monetary penalty, or both. Occupational Health and Safety Law No. 6331 also sets forth certain responsibilities for the employers such as to appoint an occupational safety expert, workplace doctor and other health personnel from among their employees; and to make a risk assessment directly or have it made by others for its workplace to determine the precautions required for the maintenance of occupational health and safety and the protective equipment to be used for such purposes. Failure to comply with these requirements may result in administrative fines or the shutting down of the works.

A very common risk associated with the Turkish power sector, as in other major energy and infrastructure sector projects, is the risk of legal challenge against permits, licences and any other administrative actions related to their projects. Under Turkish law, any person (individual or legal entity) who has a legitimate actual interest in the cancellation of an administrative action is entitled to file a cancellation lawsuit against such action before administrative courts. 'Legitimate actual interest' is interpreted widely by administrative courts, and therefore any third party (individuals, communities, environmental groups, non-profit governmental organisations or other third parties)

whose interests have been claimed to be violated due to an administrative decision may request its cancellation before an administrative court. Licences (including electricity licences), environmental permits, land rights and expropriations, construction permits, etc, are among the administrative actions that may be subject to such cancellation lawsuits. Non-governmental organisations (eg, environmental groups) and professional associations (eg, chamber of architects, environmental engineers) have been quite active in recent years to challenge power projects based on environmental grounds or violation of planning rules.

Other

28 Describe any actual or anticipated sovereign boundary disputes involving your jurisdiction that could affect the energy sector.

We are not aware of any current sovereign boundary dispute involving Turkey that could affect the energy sector.

29 Is your jurisdiction party to the Energy Charter Treaty or any other energy treaty?

Turkey is a party to the Energy Charter Treaty since 1994, which became effective in Turkey in 2000. Turkey has also joined the Energy Community, which aims to extend the European Union internal energy market to south-eastern Europe and beyond, with observer status in 2006.

30 Describe any available measures for protecting investors in the energy industry in your jurisdiction.

Turkey has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), which permits investment disputes between a state and an investor to be submitted to the Settlement of Investment Disputes Center in Washington. Furthermore, Turkey has also signed bilateral investment treaties with more than 80 countries around the world, all of which allows the investors of such countries to submit their investment disputes to arbitration in various forums, such as ICSID and International Chamber of Commerce.

31 Describe any legal standards or best practices regarding cybersecurity relevant to the energy industry in your jurisdiction, including those related to the applicable standard of care.

The Electricity Market Licence Regulation, the Natural Gas Market Licence Regulation and the Petroleum Market Licence Regulation require licence holders to operate their institutional information and industrial control systems in accordance with the ISO/IEC 27001 information security management system standards and obtain the relevant certifications from an institution accredited by the Turkish Accreditation Agency. With regard to operations within the electricity market, this obligation covers the licence holders of generation, transmission, supply, market operation and distribution services. While in the natural gas market, transmission and distribution licence holders must hold such certificate; this requirement only applies to refinery licence holders in the petroleum market.

Çakmak Avukatlık Bürosu
Attorneys at Law

Mesut Çakmak **m.cakmak@cakmak.av.tr**
Ayşe Eda Biçer **e.bicer@cakmak.av.tr**
Erdem Başgül **e.basgul@cakmak.av.tr**

Piyade Sokak
Portakal Çiçeği Apt No: 18 C Blok Kat: 3
06550 Çankaya, Ankara
Turkey

Tel: +90 312 442 4680
Fax: +90 312 442 4690
www.cakmak.av.tr

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Energy Disputes
ISSN 2397-737X

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law