Çakmak Avukatlık Bürosu
Attorneys at Law

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In This Issue...

Ankara

Piyade Sokak, No. 18, Floor 3
06550 Çankaya, Ankara Turkey

Tel: + 90 312 442 4680
Fax: + 90 312 442 4690

Recent Changes in Legislation

New Regulation on Electricity Market Tariffs

The new Regulation on Electricity Market Tariffs was published in the Official Gazette on 22 August 2015 ("**New Regulation**") and will enter into force on 1 January 2016 repealing the existing Regulation on the same subject ("**Repealed Regulation**").[1]

The prominent novelties introduced with the New Regulation are as follows:

- The last resort tariff, which is the tariff applicable to eligible consumers who have not chosen a different supplier other than the authorized supplier in their region,was embedded into the retail sale tariff under the Repealed Regulation. It is defined as a new tariff category under the New Tariffs Regulation. With the introduction of this tariff, the retail sales tariff will be confined to sales to non-eligible consumers.

  Provisional Article 2 of the New Regulation stipulates that a communiqué regulating the last resort tariff will be issued within three months following expiry of the permitted cross-subsidy practice under Provisional Article 1 of the Electricity Market Law[2] as of 31 December 2015. Until the issuance of such a communiqué, the last resort tariff will be based on temporary prices to be approved by Energy Market Regulatory Authority ("**EMRA**").

- Instead of the term "subscriber groups" under the Repealed Regulation, the New Regulation uses the term "consumer groups". Through this new terminology, EMRA will be able to establish a distinction between the same subscriber groups on the basis of their consumption capabilities. For example, Article 12 of the New Regulation classifies the subscribers subject to the last resort tariff as the consumers with "high" and "low" consumptions, and applies different principles in respect of determination of the last resort tariff for each group.

- Pursuant to Article 9 of the New Regulation, distribution tariffs for each distribution region can now be determined separately.

- Article 19(3) of the New Regulation empowers EMRA to require revisions to tariff proposals, where it deems such proposal is not in conformity with the applicable legislation. In these cases, EMRA may implement such revisions on its own. This same article also requires legal entities subject to tariff regulations to announce regularly and publish their applicable tariffs on their websites.

Market Operation License for EPİAŞ

As previously reported in the Summer 2015 issue of our Newsletter; as part of the restructuring of electricity market operating activities in Turkey, the market operator role was taken over by the newly formed Energy Markets Operation Co. ("**EPİAŞ**") from the Electricity Market Financial Settlement Center ("**PMUM**"), a sub-division of the Turkish Electricity Transmission Corporation ("**TEİAŞ**").

EPİAŞ was incorporated and registered with the Trade Registry in March 2015. TEİAŞ and Borsa İstanbul each hold 30% of the share capital of EPİAŞ whereas the remaining 40% is owned by private companies. EPİAŞ has obtained a market operation license from the Turkish Energy Market Regulatory Authority ("**EMRA**"), effective from 1 September 2015, and started to operate the intra-day and the day-ahead markets for a period of 49 years by virtue of its market operation license.

Amendments to the Electricity Market Consumer Services Regulation

The Regulation Amending the Electricity Market Consumer Services Regulation ("**Regulation**"), draft of which was previously mentioned in in the Summer 2015 issue of our Newsletter, was published in the Official Gazette and entered into force on 16 September 2015 (save for two provisions, which will enter into force 1 March 2016 as explained below).

In general, the Regulation is in parallel with the draft which was announced by the Energy Market Regulatory Authority ("**EMRA**") previously. The main differences between the draft and the Regulation can be summarized as follows:

- According to the draft, distribution companies were no longer entitled to cut-off the electricity of eligible consumers for their outstanding debts. The Regulation still includes such provision; however, effective date of this provision is postponed to 1 March 2016.

- In the case of consumer's change of supplier, the new supplier is required to submit the form "Annex-3" document (a copy of which is attached to the Regulation), signed by the consumer and the new supplier, to the previously authorized supplier company before the portfolio change is realized on the market operation system. In case the new supplier fails to submit this form to the authorized supplier company in time, the sanctions envisaged under Article 16 of the Electricity Market Law will be imposed to the new supplier.

On the other hand, the major novelties brought by the Regulation vis-à-vis the announced draft can be summarized as follows:

- In cases where the meter of an eligible consumer does not conform to the regulations, the meter will be changed by TEİAŞ or the distribution company and this will not be an obstacle for the eligible consumer to choose its supplier freely.

- Eligible consumer lists are no longer required to be published by TEİAŞ or the distribution companies, as the case may be, and these companies are not required to keep the eligible consumers' records.

1 Published in the Official Gazette No. 24843 dated 11 August 2002.

2 Published in the Official Gazette No. 28603 dated 30 March 2013.

- The suppliers are required to (i) obtain the eligible consumer's signature to evidence that they have been informed of all commercial options and potential risks in writing before executing an agreement (as also envisaged in Article 23 of the current Electricity Market Consumer Services Regulation) and (ii) submit such evidentiary document bearing the eligible consumer's signature to EMRA, if and when requested.
- The grounds for rejection available to the existing supplier of a consumer in the case of consumer's change of its supplier (i.e., having an ongoing agreement with a consumer and/or consumer's failure to fulfil its obligations thereunder) do no longer exist.

Electricity Generation Facilities Acceptance Regulation

The Electricity Generation Facilities Acceptance Regulation ("**Generation Facilities Acceptance Regulation**") entered into force with its publication in the Official Gazette on 6 November 2015. With the introduction of this regulation, the acceptance procedures of electricity generation facilities that are connected to the interconnected electricity network with a voltage level of 1 kV or more will be governed under the Generation Facilities Acceptance Regulation, and these facilities will no longer be subject to the Electricity Facilities Acceptance Regulation[3] ("**Acceptance Regulation**"). On the other hand, the electricity facilities below the said 1 kV voltage level as well as the electricity transmission and distribution facilities will remain to be subject to the Acceptance Regulation.

Unlike the Acceptance Regulation, the Generation Facilities Acceptance Regulation does not include any provisions with respect to the final acceptance procedures. Rather, it provides a list of documents that should be completed within three years following the provisional acceptance date, while the Acceptance Regulation envisages detailed provisions regarding the final acceptance procedures and sets out that final acceptance will mainly be carried out within the relevant warranty periods. It should also be noted that Acceptance Regulation sets out a more precise list of documents required for the acceptance procedures when compared with the Generation Facilities Acceptance Regulation.

The Generation Facilities Acceptance Regulation provides a transition period, if the acceptance procedure of a facility has been initiated pursuant to the Acceptance Regulation. According to its Provisional Article 1, the Ministry of Energy and Natural Resources has the discretion to continue implementing the Acceptance Regulation for such on-going acceptance procedures for a period of six months following the entry into force of the Generation Facilities Acceptance Regulation. Further, the Ministry is authorized to extend this period for another six months.

Articles

Arbitration Clauses Incorporated by Reference

Av. Ayşem Yeliz Esmersoy, Stj. Av. İlke Işın Süer

Introduction

Arbitration is a matter of contract, the validity of which is strictly dependent on the consent of the parties involved. One of the principal conditions on the validity is that the arbitration agreement must be in writing. The agreement of the parties to settle their disputes through arbitration can take the form of a separate agreement or of a clause integrated into the text of the contract. For the sake of practicality and convenience, parties in some instances decide on referring to other contracts previously or simultaneously signed between the same or different parties or rather decide on making references to predetermined arbitration rules of trade associations or other institutions. Arbitration agreements incorporated by reference to separate contracts or predetermined rules raises the following questions:

- Whether incorporation of the arbitration agreement through a reference in the contractual terms between the parties is sufficient for the existence of a valid arbitration agreement, and if so,
- Whether there are certain requirements pertaining to the form, or substance of the reference for it to be effective and binding.

Validity of Arbitration Agreements in International Rules

Article II paragraph 2 of the New York Convention[4] has attracted attention to the question whether a reference to a standard document can constitute a valid arbitration agreement:

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

Article II

1. *Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

2. *The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. (…)*

3 Published in the Official Gazette No. 22280, dated 7 May 1995.

4 United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Arbitral Awards, 10 June, 1958.

Although asserting the requirement of a written agreement, the New York Convention does not offer any solution for arbitration agreements incorporated by reference. The recommendations of UNCITRAL pertaining to paragraph 2 of Article II of the New York Convention suggest that the situations mentioned under the article should not be interpreted as an exhaustive list and that the term "agreement in writing" can take many other forms.[5] The UNCITRAL Model Law adopted to assist states in their effort to modernize their legislation on international arbitration, serves as an example and has indeed been implemented in the texts of many national arbitration statutes.[6] The most recent form of Article 7 of the UNCITRAL Model Law presents two options that states can take into consideration when legislating on the form of the arbitration agreement. While defining arbitration agreements as well as explaining their form, the first option of Article 7 paragraph 6 contains specific regulation regarding the issue of references:

Option I

Article 7. Definition and form of arbitration agreement

6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make the clause part of the contract.

The second option of Article 7 leaves form requirements entirely outside of its scope and merely emphasizes the consent of the parties and their agreement to submit their dispute to arbitration:

Option II

Article 7. Definition and form of arbitration agreement

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The French Example - What is it really about?

An often cited case in international literature on this subject is the French case *Bomar Oil*.[7] The case involved the sale of crude oil from a Tunisian oil company to a company incorporated in the Netherlands Antilles. The sale was concluded through the exchange of telexes and reference was made to the general conditions of a standard contract comprising an arbitration clause that prescribed for ICC arbitration in the event a dispute arose. This commercial relationship finally ended in a motion to set aside the arbitral award with the claim that there never was an arbitration agreement between the parties. After a very long procedural back and forth between the courts dealing with the question whether or not the arbitral tribunal must be set aside, the *Cour de Cassation* rendered a crucial decision emphasizing the actual and real consent of the parties, without limiting itself with a restrictive interpretation of the requirements put forward in the New York Convention. The Court clearly adopted the consensual approach and held that "*… in the field of international arbitration, an arbitration clause, if not mentioned in the main contract, may be validly stipulated by written reference to a document which contains it, for instance general conditions or a standard contract, when the party against which the clause invoked was aware of the contents of this document at the moment of concluding the contract and when it has, albeit, tacitly, accepted the incorporation of the document in the contract.*"[8]

In Turkey

The Turkish International Arbitration Law No. 4686 is based on the UNCITRAL Model Law and contains specific wording regarding the issue of arbitration agreements incorporated by reference under Article 4 paragraph 2:

"…The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract."

The very last sentence of the article sets forth that the reference needs to be in a certain form, so as to *make the clause part of the contract*. This vague wording necessitates the examination of court rulings in order to determine whether the form of the reference needs to be of a certain nature. As mentioned above, whether references are accepted as pointing towards the existence of an arbitration agreement between the parties is a widely discussed matter involving opposing views. The general trend observed in rulings of the Turkish High Court of Appeal is that the incorporation of arbitration agreements by reference is an accepted procedure under Turkish law. There are rulings even predating the adoption of Law No. 4686, holding that the

5 United Nations Commission on International Trade Law, Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 July, 2006.

6 United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006.

7 *Bomar Oil v. Enterprise Tunisienne d'Avtivités Pétrolières*, decision of the French Cour de Cassation, 11 October 1989, cited in Emmanuel Gaillard, John Savage (Eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, The Hague, 1999.

8 Cass. le civ., Nov. 9, 1993, *Bomar Oil N.V. v. Enterprise Tunisienne d'Avtivités Pétrolières (E.T.A.P.)*, cited in Emmanuel Gaillard, John Savage (Eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, The Hague, 1999.

reference to a federation's standard contracts and rules prescribing arbitration for the settlement of disputes is valid and binding upon the parties.[9] The Court held that the reference made in the main contract to Federation of Oils, Seeds and Fats Associations Ltd ("**FOSFA**") rules containing an arbitration clause constitutes a valid and binding arbitration agreement in accordance with Article 2 of the New York Convention.

Some legal scholars argue that Law No. 4686 explicitly allows arbitration agreements to be effective by way of reference, provided that the reference is so as to integrate the clause into the main agreement.[10] This calls into question whether a merely general reference is acceptable or whether the reference must be somehow more explicit in taking specific account of the arbitration clause contained in the separate document that is being referred to. One of the opposing views suggests that in principle a general reference, which is not capable of expressing the clear and undoubted intention of the parties, does not encompass an arbitration clause contained in the terms referred to, as such rules usually relate to rules of a substantive law character.[11] However, in one of its other judgments the High Court of Appeal merely sets forth that a reference to separate terms is sufficient for concluding that the arbitration clause therein is valid and binding, without engaging in a thorough examination of the nature and form of the reference.[12]

Across Europe

Examining legislation of other states on the issue, implies a certain trend in international arbitration practice. All of these examples carry elements offered in the UNCITRAL Model Law and make explicit reference to the issue of incorporation by reference.

Article 1031 paragraph 3 of the German Code of Civil Procedure regulates the form of the arbitration agreement and sets forth that:

"Where an agreement that is in compliance with the requirements as to form set out in subsection (1) or (2) makes reference to a document containing an arbitration clause, this establishes an arbitration agreement wherever the reference is made such that this clause is included as a component part of the agreement."

In relation to the issue of references, **Section 6 of the 1996 English Arbitration Act** contains the definition of an arbitration agreement and states under paragraph 2:

"The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement of the reference is such as to make that clause part of the agreement."

A more liberal approach can be observed under **Article 1021 of the Code of Civil Procedure of the Netherlands** on the form of arbitration agreements, which states:

"The arbitration agreement must be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party. The arbitration agreement may be proven also by electronic means…"

The New York Convention allows the application of more favorable rules found under domestic laws. States are free to adopt a more liberal approach, and deal with the matter of incorporation by references in their preferred ways.

Conclusion

International literature, legislation and practice reveal that reference to separate documents is an effective means to incorporate arbitration agreements. Such practice can be necessitated by the nature of complex transactions and largescale projects involving numerous contracts and rules. The key test in determining the validity of an arbitration agreement will be that of actual and real consent. One should bear in mind that courts may take account of surrounding factors such as prudence and experience of businessmen involved, custom in the industry or the nature of the business relationship of the parties when determining real intent. When referring to standard contracts or separate documents parties should opt for terms indicating their awareness that the reference is encompassing the arbitration clause contained in such separate documents, which would offer a greater degree of convenience in demonstrating their mutual consent.

9 Decision of the 19th Civil Chamber of the High Court of Appeal dated 8.5.1997 with File No. 1996/9619 and Decision No. 1997/4669.

10 Prof. Dr. Turgut Kalpsüz, Türkiye'de Milletlerarası Tahkim, Genişletilmiş İkinci Baskı, Ankara, 2010.

11 Cemal Şanlı, Konişmentonun Devri, Alacağın Temliki ve "Perdeyi Kaldırma Teorisi" Uygulamasında Sözleşmede Yer Alan Tahkim Şartının Konismentoyu Devralan, Alcağı Temellük Eden ve Perdenin Arkasında Kalan Bakımınadn Geçerliliği Sorunu, 2002; accessible at: http://www.journals.istanbul.edu.tr/iumhmohb/article/viewFile/1019002964/1019002562.

12 Decision of the 11th Civil Chamber of the High Court of Appeal dated 13.6.2005 with File No. 2004/9458 and Decision No. 2005/6114.

The Interplay between the Suretyship and Other Securities Securing the Same Debt

Av. Erdem Başgül, Stj. Av. Mehmet Emir Göka

A suretyship contract (*kefalet sözleşmesi*) between a surety and a creditor provides a personal security for the creditor, as the surety vouches that the debtor will perform his obligations under the contract with the creditor.

Based on the detailed and complex provisions attributed to the surety contracts under the Turkish Code of Obligations, No. 6098[13] ("**TCO**"), the suretyship contracts embody certain unique legal mechanisms. This article aims at setting out the legal framework surrounding the interplay between the suretyship and other securities securing the same debt.

Foreclosure Plea

Pursuant to Article 585 and 586 of the TCO, if the same debt is secured by both a suretyship contract and a pledge provided by a third party, the surety may be entitled to assert a specific defense right called "plea of foreclosure of pledges" (*rehnin paraya çevrilmesi def'i*) (the "**Foreclosure Plea**") whereby the surety may refrain from making a payment to the creditor for the debtor's due debts on the account of the existence of such pledge(s). The Foreclosure Plea, subject to the satisfaction of other conditions under the TCO, entitles the surety to dismiss the creditor's payment claims if the creditor has not initially pursued to collect his receivables out of the proceeds of the pledges.

While there are many legal discussions in relation to this concept, we would like to concentrate on two matters; namely the impacts of (i) pledge type; and (ii) Article 45 of Enforcement and Bankruptcy Law; No. 2004[14] ("**EBL**") on the Foreclosure Plea.

The impact of pledge type on the Foreclosure Plea

The applicability of this plea is basically determined on the basis of whether the suretyship is structured as simple surety (*adi kefalet*) or several surety (*müteselsil kefalet*). As can be observed below, the scope of the Foreclosure Plea is more limited in several suretyship structures in comparison with the simple suretyship contracts.

Under a simple suretyship structure, in principle, the creditor is entitled to pursue its due receivables from the surety after resorting to the debtor.[15] On the other hand, the creditor may directly resort to the several surety without resorting to the debtor first.[16] Therefore, the several sureties are more vulnerable against the creditor's demands when compared with the simple sureties.[17]

Pursuant to Article 585(2) of the TCO, if the debt is secured by a pledge that was established prior to or simultaneously with the simple suretyship contract, the surety can require the creditor to initially satisfy his receivable from such pledge(s), unless the debtor has been declared bankrupt or obtained a concordatum notice. Please note that the simple surety would be entitled to exercise this plea regardless of the type of the pledge.

On the other hand, under a several surety structure, the Foreclosure Plea has a more limited applicability. Pursuant to Article 586(2) of the TCO, the several sureties cannot assert the Foreclosure Plea unless the relevant receivable is secured by either of the following securities: (i) movable pledge that is perfected with delivery; or (ii) receivable pledge.[18]

Accordingly, with the existence of certain types of pledges (e.g., mortgage) the several sureties will not be entitled to benefit from the Foreclosure Plea. However, the scope of pledges enabling the surety to assert the Foreclosure Plea is not entirely clear under the TCO. This said, legal scholars and court decisions shed some light on the following securities that are commonly observed in project financing transactions:

- **Commercial Enterprise Pledge:** According to the prominent view in the Turkish legal doctrine[19], if the relevant security requires a statutory registration procedure then several sureties cannot assert the Foreclosure Plea as, in the existence of such registration procedure, it would be more difficult for the creditor to collect its receivables as a result of the foreclosure procedures. The commercial enterprise pledge, on the other hand, requires registration with the trade registry. Furthermore, there is no need for delivery of the movables secured under the commercial enterprise pledge and thus it cannot be qualified as a movable pledge that is established upon delivery. Therefore these views suggest that the several sureties may not be entitled to assert the Foreclosure Plea if the relevant debt is also secured by way of commercial enterprise pledge.

13 Published in the Official Gazette No. 27836 dated 4 February 2011.

14 Published in the Official Gazette No. 2128 dated 19 June 1932.

15 However, pursuant to Article 585 of the TCO, the creditor can resort directly to the simple surety if (i) the debtor is declared bankrupt, or (ii) the debtor obtains a concordatum notice, or (iii) the creditor obtains a conclusive insolvency certificate (*kesin aciz belgesi*) in relation to the debtor, or (iv) it becomes substantially difficult for the creditor to initiate execution proceedings in Turkey.

16 However, pursuant to Article 586 of the TCO, the creditor can directly resort to the several surety only if the principal debtor (i) has defaulted on his debts payments and has been issued with payment notices, or (ii) is insolvent.

17 Pursuant to Article 7 of the Turkish Commercial Code, No. 6102, if the suretyship is provided within the scope of a commercial transaction, such suretyship is presumed to be a several suretyship contract.

18 That being said, Article 586(2) of the TCO also provides that the several surety will not be entitled to assert the foreclosure plea in the event of the following: (i) the court decides in advance that the receivable will not be covered entirely by way of the foreclosure of pledges, or (ii) the debtor has been declared bankrupt, or (iii) obtained a concordatum notice.

19 Özen, Burak *Kefalet Sözleşmesi*. İstanbul, 2014. p. 324, 325.

- **Share Pledge:** According to some legal scholars, the provisions pertaining to movable pledges established upon delivery will also be applicable in respect of the perfection of the share pledges[20]. Under this approach, if the relevant receivable is secured by way of a share pledge, the several sureties should be able to assert the Foreclosure Pledge against the creditor.

- **Bank Account Pledge:** Depending on how the bank account pledge is structured (i.e., whether it enables the borrower to utilize the pledged bank account during the maturity of the loan or not), the court precedents[21] and legal scholars[22] accept that the bank account pledges are qualified either as (i) movable pledge that is established upon delivery; or (ii) receivable pledge. As noted above, such type of securities enable the surety to exploit the Foreclosure Plea under Article 586(2) of the TCO.

- **Assignment of Receivables:** The "pledge of receivables" and assignment of receivables are accepted to be separate concepts under Turkish law[23] and therefore it is not possible to argue that an assignment of receivables contract concluded for security purposes can automatically fall within the scope of 586(2) of the TCO. As an extension of this approach, such assignment of receivables contracts, which can be qualified as a personal security, may not be perceived as a security for the purposes of Article 586 (2) of the TCO given that this Article refers to *securities in rem*; i.e., the securities that can also be enforced against third parties.

The impact of Article 45 of the Enforcement and Bankruptcy Law

As outlined in Section 1.a of this article, subject to the conditions under the TCO, certain sureties are entitled to assert the Foreclosure Plea.

On the other hand, Article 45 of EBL requires the creditor to firstly foreclose the pledges in enforcement proceedings before commencing enforcement proceedings against the debtor's personal assets.

On the basis of the EBL's Article 45, certain scholars[24] argue that sureties can always object to the payment request of the creditor in the event that such creditor does not initially seek to foreclose the pledges, even if the conditions under the TCO that enables assertion of the Foreclosure Plea are not in place.

However, it is accepted by other legal scholars[25] that Article 45 of the EBL would not be applicable to the surety contracts; as, otherwise the cases under the TCO where the surety is not entitled to assert the Foreclosure Plea (e.g., such as existence of mortgage in a several surety structure) would be ineffective. In a similar manner, the Court of Appeal decided that Article 45 of the EBL is not applicable to suretyship contracts.[26]

The issue of subrogation among the surety and the pledgor

Article 596(1) of the TCO provides that the surety subrogates the rights of the creditor to the extent he pays the underlying debt. Following this subrogation, the surety would be entitled to recourse towards the debtor in relation to the amount that it has paid to the creditor. Please also note that, according to Article 596(2) of the TCO, surety's subrogation of the creditor's rights includes the pledges that are established prior to or simultaneously with the suretyship. Accordingly, on the mere basis of Article 596(1), the surety, subsequent to the subrogation, should be able to foreclose the pledges that have been provided by a third party in favor of creditor.

On the other hand, pursuant to Article 127 of the TCO, a pledgor who provides security on an asset (which the pledgor owns or has a limited right *in rem* on) in favor of a third party for such party's debt, subrogates the rights of the creditor if and to the extent that it makes a payment to the creditor for such debt.

Therefore, when a receivable secured by both a surety and a third party pledgor is paid by one such party, it is not clear as to whether Article 127 or 596(1) of the TCO should be applicable in respect of subrogation of the creditor's rights. This question is clarified under Article 596(4) of the TCO on the following basis[27]:

- **If the pledgor provides pledge in favor of the creditor prior to the suretyship contract:** In this case, if the creditor collects his receivables from the surety, the surety would surrogate the creditor's rights over the pledge, and thus would be able to foreclose the pledge on the account of his right to recourse towards the debtor. On the other hand, in the same scenario, if the creditor satisfies its receivables out of the proceeds of the pledge, the pledgor may not be able seek recourse towards the surety.

20 Göksoy, Can. *Anonim Ortaklıkta Payın Rehni*. Ankara, 2001. p.68, 69.

21 See Assembly of Civil Chambers of Court of Appeal, E. 2005/11-20, K. 2005/34 dated 09 February 2005 and 11th Civil Chamber of Court of Appeal, E. 2002/9647 K. 2003/2110 dated 10 March 2003.

22 Yasaman, Hamdi. *Banka Hukuku ile İlgili Makaleler, Hukuki Mütalaalar, Bilirkişi Raporları*. İstanbul, 2005. p. 225, 226. Also please see: Reisoğlu, Seza. *Bankacılık Kanunu Şerhi*. Ankara, 2007. p. 867. and Kaplan, İbrahim. *Banka Sözleşmeleri Hukuku Cilt 1*. Ankara, 1996. p. 45. and Şenözen, Ebru; Özbilen, Arif; Savaş, Burcu. *Alacak Rehninin Teminat Altına Alınan Alacak ve Rehin Yükü Bakımından Kapsamı*. İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, Year 4, No 8, Autumn 2005/2. p. 233-237.

23 Sirmen, Lale. *Alacak Rehni*. Ankara, 1990. p. 9.

24 Özen, Burak. *Kefalet Sözleşmesi*. İstanbul, 2014. p. 299. and Gümüş, Mustafa Alper. *Borçlar Hukuku Özel Hükümler Cilt 2*. İstanbul, 2010. p. 575.

25 Budak, Ali Cem. "Yeni Borçlar Kanunu'na Göre Önce Rehne Başvurma Kuralına Kefalet Halinde Uygulanan İstisnalar, Önce Rehne Başvurma Kuralı ve Rehnin Paraya Çevrilmesi Defi." *Prof. Dr. Ejder Yılmaz'a Armağan Cilt 1*. Ankara, 2014. p. 636, 637.

26 See 12th Civil Chamber of Court of Appeal, E. 2008/5728, K. 2008/8495, dated 22 April 2008 and Assembly of Civil Chambers of Court of Appeal, E. 1972/215, K. 1972/841, dated 14 October 1972.

27 Please also note that the surety and the pledgor can contractually agree to alter the above legal mechanism.

- **If the pledge is established after the suretyship contract:** In this scenario, if the creditor satisfies its receivables out of the proceeds of the pledge, the pledgor may be able to seek recourse towards the surety.

As can be seen, the TCO protects the interests of the surety or the third party pledgor that vouches for the debtor with the knowledge that such debtor also has another security (in the form of pledge or surety), who may have refrained from doing so in the absence of the other security.

Conclusion

The existence of a suretyship contract may have considerable implications on other securities in a security package due to the above-mentioned provisions envisaged under the TCO. For this reason, it is of vital importance for both the lenders and sponsors to evaluate the risks and possible mitigating factors if a suretyship contract is to be included in the security packages in financing transactions.

Other Recent Developments

EMRA Decision regarding TRT Contribution Surpassed by Majority Vote

Pursuant to Article 4(c) of the Revenues of Turkish Radio-Television Institution Law No. 3093, electricity supply companies were requested to charge an additional 2% of the electricity sale price, excluding transmission, distribution and retail sale service fees to the consumers, based on the net price excluding value added tax, other taxes, funds, shares and similar deductions. This additional charge is transferred to the Turkish Radio-Television Institution ("**TRT**") as a contribution ("**TRT Contribution**").

Based on Energy Market Regulatory Authority ("**EMRA**") decisions dated 28 October 2010 and 1 February ("**EMRA Decision**"), loss and leakage fees were not included in the electricity sale price which is taken as the base price for calculation of the TRT Contribution.

TRT General Directorate filed a cancellation lawsuit before Council of State ("***Danıştay***") against the EMRA Decision, claiming that TRT Law does not exclude the loss and leakage fees, and that they should be within the scope of the electricity sale price which is taken as the base price for calculation of the TRT Contribution, and EMRA is not authorized to exclude such fees with its decision.

Danıştay suspended implementation of the EMRA Decision by its decision (file number 2011/665) on 26 October 2011 and recently rendered a decision on the merits of the same file number on 24 February 2015. In its decision, Danıştay stated that the EMRA Decision is in compliance with the law because (i) EMRA has the authority to determine the tariffs to be implemented by the license holders in the electricity market and can use this authority within the limits brought by the legislation; (ii) the electricity sale price definition under the TRT is not clear and there is no doubt that EMRA has the authority to determine the coverage of the electricity sale price definition. Therefore, the decision of EMRA has been made within the scope of EMRA's power and it is in compliance with the law.

New Form of the Electricity Retail Sale Contracts

Energy Market Regulatory Authority ("**EMRA**") has recently changed the form of the retail sale contracts between authorized retail sale companies and non-eligible consumers with its decision no. 5716-1, and annulled the Communiqué Concerning Electricity Market Retail Sale Contracts. This change was published in the Official Gazette on 25 August 2015 and became effective on the same date.

The new form, in line with the current trends in consumer protection, increases the remedies which must be exhausted by the authorized retail sale companies before terminating the retail sale contracts or cutting off the electricity supply. Among many other provisions that it brought in that regard, the new form provides that in case a consumer does not comply with his payment requirements after cut off of supply, the relevant authorized retail sale company must send a written notification and grant a 15-day period to the consumer for due payment or submission of a valid undertaking for payment before terminating his retail sale contract. This provision shows that retail sale contracts can be saved even at that stage. The provision, which states that the electricity supply under a retail sale contract cannot be cut off due to the debts of the relevant consumer under another contract, is another example to the changes that are brought by the new form.

New Regulation on Technical Evaluation of Wind Power Plant Applications

The Regulation on Technical Evaluation of Electricity Generation Applications Based on Wind Power (the "**New Regulation**") was published in the Official Gazette on 20 October 2015, and entered into force on the same date. The New Regulation repealed the former regulation[28] dated 9 November 2008 on the same subject (the "**Repealed Regulation**").

28 Published in the Official Gazette No. 27049 dated 9 November 2008.

The New Regulation aims at setting out the framework for the General Directorate of Renewable Energy's (the "**Directorate**") technical evaluation pertaining to wind power plant applications. Such evaluation includes technical assessment of preliminary generation license and unlicensed electricity generation application; modifications to coordinates and turbine type; and capacity increases. In this respect the main scope of the New Regulation is parallel with the Repealed Regulation. Yet, the New Regulation incorporates legislative changes in respect of wind farm projects that have been introduced subsequent to the publication of the Repealed Regulation back in 2008; such as technical assessment aspects of preliminary licensing process and unlicensed electricity generation activities.

Furthermore, when compared with the Repealed Regulation, the New Regulation provides a more detailed list in respect of the circumstances that would lead to the rejection of technical applications filed with the Directorate. This list includes, among others, inconsistency of data on turbine coordinates between the information provided in the application to the Directorate and information submitted during the wind measurement procedures; and conformity of the project site coordinates with the areas which are precluded in terms of wind power plant purposes.

Draft Regulation on the Implementation of the Provisional Article 18 of the Electricity Market Law

On 19 October 2015, the Energy Market Regulatory Authority ("**EMRA**") published the "Draft Regulation Regarding the Implementation of the Provisional Article 18 of the Electricity Market Law" (the "**Draft Regulation**") on its website for public views and comments.

The Draft Regulation is based on Provisional Article 18 of the Electricity Market Law No. 6446[29] (the "**Law**"), which authorizes EMRA to set out different rules for distribution regions where technical and non-technical losses and leakages are higher than the country average. Please also note that the Draft Regulation is envisaged to enter into force following the expiry of national tariff implementation stipulated under Provisional Article 1 of the Law (i.e., as of 1 January 2016).

Some of the material provisions of the Draft Regulation are as follows:

- Until 31 December 2020, the Draft Regulation is envisaged to be applicable to (i) the "high-loss companies" which are defined under the Draft Regulation as the distribution companies, the technical and non-technical loss ratio of which exceed both the arithmetic and weighted averages of the country's technical and non-technical loss ratio; and (ii) the authorized supply companies commissioned in the distribution region where such high-loss companies are operating. After 31 December 2020, however, the application of the Draft Regulation to these companies will be subject to the following conditions: (i) the technical and non-technical loss ratio must be more than twice of the weighted average of the country's technical and non-technical loss; and (ii) the technical and non-technical loss ratio must be than 20%.
- The authorized supply companies commissioned in the regions where the high loss companies are operating will shoulder only 25% of the penalties to be imposed to the authorized supply companies due to failure in providing accurate price and cost estimations to EMRA for determination of the retail sale prices.
- The calculation method of the targeted loss ratios of the high loss companies will differ from the method used for other distribution companies. However, the Draft Regulation is silent on the particulars of the calculation method.
- High loss companies' fees for usage of the distribution network will be calculated on the basis of connection power, whereas such fees are determined for other distribution companies on the account of relevant costs incurred for the distribution companies' operations pursuant to Article 9(2) of the Electricity Market Tariffs Regulation[30].
- Certain provisions under the Regulation on the Quality Standards Related to the Electricity Distribution and Retail Sale[31] will not be applicable to the high loss companies in respect of the provinces where the technical and non-technical losses are above 60%. Such exemption will include provisions regarding the practices concerning the supply continuity, compensation obligation for failure to comply with commercial quality practices and compliance with technical quality criteria.

Working Draft on Storage Obligations in the Natural Gas Market

The working draft related to the secondary legislation on the "Storage Obligations of the Import License Holders and Legal Entities Conducting Natural Gas Sale to the Distribution Companies and Eligible Consumers" (the "**Working Draft**") was published on the Energy Market Regulatory Authority's ("**EMRA**") website on 22 October 2015 for public views and comments.

The Working Draft introduces comprehensive provisions as to how the relevant storage obligations of the suppliers in the natural gas market (i.e., the importer and wholesale companies as well as production companies holding wholesale license) will be prepared. The Working Draft is expected to enter into force on 1 January 2016.

29 Published in the Official Gazette No. 28603 dated 30 March 2013.

30 Published in the Official Gazette No. 29453 dated 28 August 2015.

31 Published in the Official Gazette No. 28504 dated 21 December 2012.

The prominent novelties introduced under the Working Draft can be listed as follows:

- The Natural Gas Market Law No. 4646[32] (the "**Law**") and the Natural Market Licensing Regulation[33] (the "**Licensing Regulation**") require the import license holders to store 10% of their annual import within a 5-year period after the issuance of the relevant import license. While the Working Draft reiterates the same principle for companies importing natural gas through pipelines, it seems to make a distinction for the liquidated natural gas ("**LNG**") importers (other than spot LNG importers) so that such importers will be deemed to have satisfied their storage obligations by way of obtaining storage services from the LNG storage facilities. In other words, the Working Draft seems to imply that the LNG importers would not be required comply with the 10% storage obligation. In the event that the storage capacities allocated for the relevant suppliers are not sufficient to meet suppliers' storage obligations, storage shall be made by way of either allocation of their idle capacities and/or through injection and additional gasification methods.
- Suppliers cannot demand a capacity from the underground storage companies exceeding their storage obligations.
- Underground storage facilities must provide priority to importer companies in respect of capacity reservation to the extent of their respective storage requirements. After the importer companies, the wholesale and spot LNG license holders which sell natural gas to distribution companies will enjoy a second degree of priority.
- Importers of natural gas through pipelines can use the LNG storage facilities for the purpose of meeting their storage obligations until the underground storage capacity reaches a level enabling the importers to meet their storage obligations. In other words, such importers have an option to fulfill their storage obligations by way of either the underground or LNG storage facilities.
- Until the storage capacity reaches a level enabling the importers to meet their storage obligations, (i) the suppliers selling natural gas to eligible consumers will not have storage obligations; (ii) wholesale and spot LNG import license holders selling natural gas to distribution companies will be required to store 2% of the annual natural gas to be sold to the distribution companies.

32 Published in the Official Gazette No. 24390 dated 2 May 2001.

33 Published in the Official Gazette No. 24869 dated 7 September 2002.

Recent and Upcoming Conferences & Events

- 14 October 2015, Istanbul: **All Energy Turkey 2015 Conference** organized by Istanbul Restate.
- 22-23 October 2015, Ankara: **2nd Annual Turkey Hospital Expansion Summit** organized by Noppen. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, moderated a panel on the financing of Health PPP Projects.
- 2-3 November 2015, Istanbul: **Basra Oil, Gas & Infrastructure Conference 2015** organized by Basra Governorate and Basra Council.
- 4-5 November 2015, Ankara: **4th Turkish Wind Energy Congress** organized by Turkish Wind Energy Association.
- 4-6 November 2015, Ankara: **8th International Energy Congress and Fair/EIF 2015** organized by Global Energy Association and with the support of the Ministry of Energy and Natural Resources.
- 11-12 November 2015, Istanbul: **Bonds, Loans & Sukuk Turkey Conference** organized by Global Finance Conferences. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, moderated the panel "Public-Private Partnerships (PPPs) to Finance Turkish Infrastructure: How are they structured and who are the investors".
- 11-12 November 2015, Istanbul: **17th Annual CIS & Turkey Oil and Gas Transportation Congress** organized by the Energy Exchange.
- 13-16 November 2015, Antalya: **G20 Summit** under the presidency of Turkey.
- 19 November 2015, London: **Globalizing the PPP model, A Case Study of the Opportunities and Challenges in Turkey** organized by White & Case LLP London Office. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, participated as panelist.
- 25-26 November 2015, Ankara: **4th Annual PPP in Turkey Forum** organized by E.E.L. Events. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, moderated the panel "Funding of Turkish PPP projects".
- 10 December 2015, Istanbul: **IPFA Turkey, Istanbul: How to Enhance Islamic Finance & the Role of Istanbul as a Financial Hub** hosted by Ziraat Participation Bank.
- 9-11 February 2016, Istanbul: **2nd Annual PPP Airport Investments Summit** organized by the Directorate General of State Airports Authority of Turkey. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, will moderate a panel on the Istanbul New Airport Project.
- 30-31 March 2016, Istanbul: **4th Annual Airport Development & Expansion Summit** organized by Noppen. Av. Dr. Çağdaş Evrim Ergün, partner of Çakmak Avukatlık Bürosu, will moderate a panel on the Istanbul New Airport Project.

Çakmak Avukatlık Bürosu
Piyade Sokak No. 18, Floor 3
06550 Çankaya, Ankara Turkey

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