

Public-Private Partnerships

Contributing editors

Ivan E Mattei and Armando Rivera Jacobo



2019

GETTING THE DEAL THROUGH

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DEAL THROUGH 

Public-Private Partnerships 2019

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Ivan E Mattei and Armando Rivera Jacobo
Debevoise & Plimpton LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

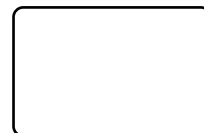


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Preface

Public-Private Partnerships 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Public-Private Partnerships*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Greece.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Ivan E Mattei and Armando Rivera Jacobo of Debevoise & Plimpton LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
September 2018

TURKEY

Senem Denкташ, Nihat Aral and Ahmet Zafer Yılmaz

Herguner Bilgen Ozeke Attorney Partnership

General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

Being the home to many large PPP projects that are among the highest valued PPP projects in the world (eg, the third airport of Istanbul, the third bridge of Bosphorus and the Eurasia highway tunnel project), Turkey has, over time, developed many different PPP models and projects in different sectors such as the following:

- build-operate-transfer (BOT) model for infrastructure projects such as highways, airports and electricity generation facilities;
- build-lease-transfer (BLT) model for healthcare projects (and education facilities, under a separate piece of legislation yet to be implemented);
- transfer of operating rights (TOR) for ports and airports; and
- build-operate (BO) model for thermal electrical energy generation facilities.

In addition to the above-mentioned PPP models, Turkey has also implemented certain PPP projects by partnership or agreement at government level, through use of intergovernmental agreements (IGAs) and host-government agreements (HGA). The IGA-HGA models have been used for energy projects including nuclear power plants and oil pipelines.

The most commonly used models in Turkish PPP projects (particularly greenfield projects) are the BOT and BLT models, which are the basis for the answers to the questions set out below.

2 What categories of public infrastructure are subject to PPP transactions in your jurisdiction?

In Turkey, the PPP model has most actively been used in the transportation (especially highways and airports), healthcare and energy sectors. After the enactment of the new energy legislation (and reserving the special status of the nuclear power plant and pipeline projects), the PPP model has no longer been practicable in the energy sector in Turkey.

Drinking and utility water systems and treatment plants, geothermal and waste water facilities and heating facilities, national parks, etc (municipality projects) are normally projects falling under the jurisdiction of municipalities and metropolitan municipalities, and these projects may also be carried out under the BOT model together with the applicable municipality legislation. However, given the total number of municipalities in Turkey, we can say that volume-wise the BOT model is not generally used in municipal projects compared with transportation or healthcare projects that have been initiated at a national level.

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

The legislative framework dealing with various models and sectors in Turkey is consolidated under a single umbrella law. All PPP models, except for the IGA-HGA model, are codified in separate legislative pieces, the most important of which can be listed as follows:

- Law No. 3996 on the Procurement of Certain Investments and Services under the BOT Law;

- Law No. 6428 on the Construction, Renovation and Purchase of Services by the Ministry of Health by way of the Public-Private Cooperation Model and Amendments to Certain Laws and Decrees with the Force of Law (BLT Law); and
- Law No. 4046 on Privatisation Practices (Privatisation Law).

4 Is there a centralised PPP authority or may each agency carry out its own programme?

There is no single PPP procuring authority in Turkey but each government party in charge of provision of certain services or infrastructure has a division allocated to the PPP-related works. Note that the Turkish High Planning Council has played an important role in PPP projects, including:

- strategising and giving the preliminary approval of projects;
- determining the tender procedure in BOT projects;
- assisting the Council of Ministers (with the transition period to the presidential system in Turkey although the concept of council of ministers continues, duties of the council of ministers have been transferred to the president or the presidency) in determining of economic, social and cultural targets; and
- deciding policies and adopting high-level decisions in respect to Turkish domestic and foreign economic activities.

Following the recent changes to Turkey's constitution, changes may be introduced in terms of the decision-making process for PPP projects. With the transition period to the presidential system, the role of the Turkish President in implementing PPP projects has also significantly increased. According to Circular No. 2018/3 published in the Official Gazette on 2 August 2018, the duties of the High Planning Council have also been transferred to the President.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

Projects implemented in Turkey in whole or in part, in which the governments of different countries are involved, have IGAs procured by the government at the national or international level. Other than this, Turkish PPP projects can be classified as projects procured at the national and municipal levels. The most common PPP projects in the fields of transportation, energy, healthcare, etc are carried out at the national level, and involve the direct participation of the state (eg, the Ministry of Health for healthcare projects and the General Directorate of Infrastructure Investments of the Ministry of Transportation and Infrastructure for highways and tunnels, etc), or that of relevant governmental bodies (the General Directorate of Highways for highways and bridges, the General Directorate of State Airports Authority for airports, etc).

6 How is the private party in a PPP remunerated in your jurisdiction?

The response depends on the model being used in a specific project. In PPP projects using the BLT model, the private party receives availability payments directly from the Ministry of Health for making available the healthcare facilities and service payments for ancillary services provided by the private party.

In theory, BOT projects may involve toll fees collected by the private party, contribution fees paid by the government party, or a combination of both of these mechanisms. In practice, however, BOT projects implemented in transportation sectors in Turkey only involve toll fees subject to volume guarantees. In addition, in airport BOT projects, passenger service fees determined under the PPP agreement are also allocated to the private party. In general, subsidies granted by the government party are also available in airport sector PPP projects. As such, guarantees amounting to a certain number of passengers in a given contract year are key subsidies in the Turkish context. If the actual number of passengers using the airport falls below the guaranteed number within the relevant year, the government party provides some incentives accordingly. Equally, revenue guarantees are commonly seen in this sector. The latter typically works both ways: if the actual revenues in relation to the relevant year are below the guaranteed total revenue for the relevant year, the government party will pay the difference. Conversely, if the private partner generates more than the guaranteed revenue amount, the surplus revenue will be shared with the government party.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

To share revenue or usage risk, the government may provide demand and volume guarantees to projects implemented under the BOT model. In fact, numerous highway and airport PPP projects have benefited and continue to benefit from demand and volume guarantees.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

In Turkey, availability payments are predominantly applicable to healthcare PPP projects. As the contracting entity in these projects is the Ministry of Health, that is, the state itself, the availability payments must be included in the annual budgetary law.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

There is no statutory cap as to the rate of return to be generated within the operation term of the project.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Restrictions on transfer of ownership interests vary depending on the project and model used, and are announced as part of the tender specifications at the initial stage of the respective projects.

Share transfers triggering change of control, and in certain projects all share transfers, in the project company are subject to prior consent of the government party in most of the PPP agreements under Turkish law. In BLT projects, the project company should obtain prior approval of the administration in the event of wishing to terminate its contracts with engineering, procurement and construction (EPC) and operations and maintenance (OM) companies. Notwithstanding, share transfer restrictions for EPC and OM contractors are not set out under project agreements.

Procurement process

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

The procedures applicable to the procurement process depend on the type of PPP method used for each project. These procedures include the preliminary approval of the High Planning Council (with the recent transfer of the High Planning Council's duties to the Turkish President, the preliminary approval of the President is required), upon which the relevant government party carries out the implementation of the procurement process. Procurement procedures available under the relevant PPP laws include closed bidding among all bidders, closed bidding among predetermined bidders and open bidding and bargaining.

In BOT projects, the tender is awarded to the bid that involves the shortest operation period among the candidates that meet the technical requirements. In BLT projects, on the other hand, the tender is awarded

to the bid that provides the maximum amount of benefit while mitigating the costs as much as possible. Procurement procedures in both models are set out in detail in the relevant laws and regulations.

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

All procurement and tendering procedures in all types of PPP models under Turkish law are legally required to be implemented and carried out on a non-discriminatory and objective basis. This is one of the main principles applicable to all PPP models. All bidders are subject to the same terms and conditions. However, to make minor amendments to the tender principles or procedures is possible; it is a constitutional and legal obligation to ensure such amendments are applicable to each bidder in a non-discriminatory manner.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

Except projects based on the IGA-HGA model, unsolicited proposals cannot be considered in PPP transactions. Projects based on the BOT or BLT models, for example, were initiated by the High Planning Council (initiated by the Turkish President (see question 4)), and tendered accordingly. However, tender specifications may include pre-qualification, which may, therefore, involve less participants, but would still be based on the statutory tendering rules, and consequently would not be considered as an unsolicited proposal. If there is a specific need in a particular field, the private entities may bring the matter to the attention of the relevant authorities in order to trigger the statutory process.

14 Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?

No.

15 Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?

It is usually common that the tendering stage and the PPP agreements include financing commitments and impose the financing obligation on the private party. Starting from the initial tendering stage, each step of the procurement process necessitates submission of an acceptable form of guarantee (mostly a bank letter of guarantee, sometimes cash collateral, treasury bills, etc) by the bidder and ultimately when a bidder (or a qualified bidder) becomes the contracting party. The guarantee amount is normally set and announced during the tendering stages and corresponds to a certain percentage of the investment amount or bid amount. At each step during the tendering process, the previously submitted form of guarantee would need to be replaced with a new one that satisfies the criteria for an acceptable form and amount of guarantee for the next step. The PPP agreements also include obligations as to the submission of guarantees at each separate phase of the contractual relationship. In the event the private party fails to fulfil its financial commitments relating to the relevant stage, the government party is contractually entitled to terminate the agreement (or disqualify the bidder from the tendering process) and liquidate the guarantee submitted by the bidder or the contracting private party.

16 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

During the initial phase, healthcare projects implemented under the BLT model, and generally in airport projects under the BOT model, the government party normally asked for its (in-house or sometimes out-of-house) counsel to provide a legal opinion on the enforceability of the PPP agreement. Legal opinion as to the enforceability of the PPP agreements in highway projects is provided by the project companies' legal counsel.

17 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

Under Turkish law, foreign investors are subject to the same treatment as local investors. Normally, in PPP healthcare, airport or road and tunnel-related transportation sectors, there is no foreign shareholding restriction. However, there are a limited number of exceptions to this principle, which include restrictions on foreign control or ownership in a limited number of regulated sectors (port operations being an example where the PPP model can be used owing to cabotage law, since port operations also include operation of sea-going vessels in Turkish waters), and certain approval or notification requirements in others (eg, energy).

Design and construction in greenfield PPP projects

18 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

No. There is no statutory mandate of any form of contract or any specific governing law for design and construction activities. However, in order to ensure a back-to-back interface between the relevant PPP agreement and the construction agreement, in practice, many sectors and models have a tendency for the construction agreements to be governed by Turkish law too, mirroring the governing law of the relevant project agreement or the implementation contract of the project.

Turkish law is the governing law in PPP agreements.

19 Does local law impose liability for design defects and, if so, on what terms?

The private party and its contractor alike have joint and several liabilities subject to different legal defence rights for the works. In any case, liabilities of a private party with regard to the contracting party always remain intact. Liability periods for defects according to the Turkish Code of Obligations No. 6098 (TCO) are:

- five years as of the date of delivery in respect of an immovable property; and
- 20 years as of the date of delivery irrespective of the nature of the property in case of gross default of the contractor.

Under Turkish law, the owner is obliged to conduct an inspection of the construction upon delivery of the construction by the contractor, and in the event the owner determines any defect, such defects should be reported by the owner in due course. If it is determined that the contractor is liable for the defect in the construction, the owner can exercise either of the following rights:

- rescind the contract (the owner can exercise this right if the works are performed on the owner's immovable property and if the removal of works will cause considerable damage and be very costly);
- request a discount proportionate to the defect; and
- request repair work from the contract free of charge. However, there is no specific provision as to design defects under Turkish law.

PPP agreements may also include detailed clauses as to the liability for defects and the allocation of liability between the designer and contractor.

20 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

The TCO sets forth the warranties of contractors. These can be listed as follows:

- to complete works on time without any defects;
- to deliver the works without defects; and
- to take-into-account the interests of the owner in a prudent manner.

Further, the parties can agree upon additional warranties contractually. Accordingly, the TCO contractors should carry out their works with due care and start and finish the works on time. In principle,

the contractor should carry out the works directly with its employees under its supervision and control. The contractor can also subcontract the works if they do not require specialisation of the contractor owing to the specific nature of the works. The contractor also warrants providing the required equipment to carry out the construction works. Additionally, in the event that materials for the works are procured by the contractor, the contractor is liable for any defects of such, as is the seller of such material.

Under Turkish law, warranty periods can be freely determined between the parties based on the principle of freedom of contract. In cases where the warranty period has not been set under the contract, statutory defect limitation periods will apply. Accordingly, in case of a breach of contract arising from a defect (whether patent or latent), the limitation period is as stated in question 19.

21 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

The concept of 'liquidated damages' has no equivalent under the Turkish law. However, the TCO defines 'penalty clauses' under Turkish law. The concept of 'penalty' under Turkish law stands somewhere between common law's 'liquidated damages' and 'penalty' concepts and is a legally acknowledged and enforceable concept. The types of penalty clauses under Turkish law are as follows:

- A penalty that can be claimed instead of performance: where a penalty has been stipulated for non-performance or imperfect performance, the non-breaching party can, unless otherwise agreed, only demand either the performance of the contract or the payment of the penalty.
- A penalty that can be claimed in addition to performance: where the penalty is agreed for non-performance at the time or at the place agreed between the parties, the non-breaching party is entitled to claim both performance and penalty.
- A penalty for contract withdrawal: the withdrawal penalty entitles each party to withdraw from the contract by paying a determined amount.

Penalties can also be classified into two categories based on their calculation method:

- a one-time payment (stated as a lump sum amount or calculated based on a formula); or
- an amount that is multiplied by each day, week, etc that the delay or violation continues.

The defaulting party must pay the penalty envisaged under the contract for its failure, even if such a failure does not cause any damage to the other contracting party. These penalties are not punitive in nature, but are merely intended to relieve the non-defaulting party from the burden of proving the actual damages suffered.

The parties are free to determine the amount of penalty clause. The judge may reduce the unreasonable or excessive penalty clause by discretion. However, 'merchants' (eg, companies) cannot ask a court to make an adjustment of the unreasonable penalty clause.

22 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

Under Turkish law, liability cannot be limited prior to the occurrence of the damages as follows:

- in case of wilful misconduct or gross negligence; or
- if the works or services provided under the agreement can only be carried out provided within the scope of a licence or authorisation provided by the government.

23 May a contractor suspend performance for non-payment?

According to the TCO, in synallagmatic contracts where both contracting parties assume mutual obligations to each other, and unless there is a contractual or logical sequence of timing of performance, in case one of the parties does not perform its obligations, the other party may suspend performance of its obligation until the performance of other party's obligation is secured. In this respect, the contractor may suspend performance for non-payment.

24 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

'Pay if paid' clauses are not regulated or expressly prohibited under Turkish laws. By virtue of the freedom of contract principle, subject to mandatory provisions of Turkish law, such clauses are used in Turkish practice. Equity and good faith principles are the most important concepts which may affect the enforceability of pay if paid clauses. Under Turkish law, neither party can benefit from its own default or breach. Therefore, if a party cannot receive payments under an initial agreement because of its own default or any error attributable to it, then such a party cannot rely on a pay if paid clause because this mechanism would be assessed against the principle of good faith. However, each case should be assessed separately based on its specifics.

25 Are 'equivalent project relief' clauses enforceable under local law?

Equivalent project relief clauses are enforceable to the extent that such clauses do not conflict with the general principles of Turkish law but, note, they have not been tested before the courts yet.

26 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

The government party can usually expand the scope of work under the PPP agreement, provided the costs of additional works do not exceed a certain percentage of the original investment costs, and the private party is compensated for such additional works. This is usually achieved by extending the operation period, or increasing tariffs or availability payments, in line with detailed mechanisms under the PPP agreement.

27 Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

Under Turkish law, a party may request the competent court to adapt a contract owing to extraordinarily adverse circumstances, or if this is not possible, to terminate the contract, if:

- the occurrence of extraordinary events altered the equilibrium of the contract fundamentally, to the extent that requesting performance is against the principle of good faith;
- alteration has happened after contract execution;
- events were unforeseeable during the time of contract execution;
- events were not caused by the party making the request; and
- the obligations of the party making the request have not been performed, or have been performed while reserving the right to make this request.

However, such requests are rarely approved, concerning extraordinary cases, and particularly sophisticated contracting parties and prudent merchants are not always seen as eligible to implement such an option. To the best of our knowledge, this option has not yet been granted in Turkish PPP practice to date.

28 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

Contractors are entitled to enforce statutory lien laws subject to the following conditions:

- the debt in question should be due, mature and unpaid (or unsatisfied);
- the creditor holds the property subject to a statutory lien with the consent of the debtor;
- the property subject to a statutory lien is in connection with the subject of debt; and
- the debtor is the owner of the property subject to a statutory lien.

Based on the foregoing, contractors will apply statutory lien laws for the works conducted under a PPP agreement.

29 Are there any other material provisions related to design and construction work that PPP agreements must address?

To our knowledge, there is no unified approach as to such provisions under Turkish law. However, design responsibility, design and construction approval process (ie, temporary and final acceptance procedures, time limits set out for certain tasks regarding design and construction,

conditions for time extension and cost increase) should be set forth under PPP agreements.

Operation and maintenance

30 Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

In terms of performance monitoring, BOT contracts usually make a reference to international standards and or technical and financial specifications and requirements announced at the tendering stage, whereas BLT contracts include very detailed schedules with respect to performance requirements in addition to mechanisms for the calculation of failure points in case of a poor performance during operations.

31 Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

Liquidated damages are normally more applicable during the investment (or construction) stage in most models. In BLT projects, in case of underperformance, deductions can be made from both service payments and availability payments (both subject to certain caps) depending on the private party's shortfalls while providing the respective services or making the facilities available. Deductions are made based on the detailed calculation mechanism set out under the respective performance criteria and detailed schedules attached to the project agreements.

BOT contracts usually include penalty clauses against the private party's non-compliance (see question 21).

32 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

The BOT Law and the BLT Law both require that the facilities be returned to the government party at the end of the project term 'free of any liabilities, encumbrances and in good, working and serviceable condition'.

Risk allocation

33 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

Concerning the risk of delays in financial closing pursuant to the BOT Law and the BLT Law, the risk is assumed by the private party and bears the liability of failing to do so. Generally, a certain period of time for achieving financial closing is set forth under the PPP agreements. In the event the private party fails to achieve financial closing in such a period, the government parties will have the right to terminate the agreement (and confiscate the bank letters of credits (or substitute guarantees) submitted by the private party. Similarly, for the risk of delays in commercial closing, the private party bears the risk of the commercial closing. In both cases, delays that are caused or otherwise attributable to the government party should be reserved, since in such situations the private party's liability will be reduced or otherwise eliminated to the extent the delay is attributable to the government party.

34 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

Under most BOT contracts, the risk of delay in obtaining the necessary permits is within the scope of 'risk events', and may result in the extension of the investment and or operation period, increase in tariffs, and subject to specific conditions, termination, depending on whether the failure to obtain the permits pertains to a default or the wrong-doing of the private party.

BLT contracts also specify that in case of failure to obtain the construction-related licences required for the project owing to the government parties' fault, the private party may claim for compensation of its costs, including financial costs.

Additionally, most PPP agreements include clauses whereby the government party undertakes to provide support for the private party to obtain the relevant licences. In any case, it is the private party's responsibility to make the relevant applications in a due and timely manner.

35 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

In Turkish PPP practice, force majeure is usually defined in PPP agreements using well-established criteria, and an open-ended list of examples of force majeure events is preferred over an exhaustive list of specific events.

In line with the general principles of Turkish law, the main consequence of a force majeure event is relief from liability arising from non-performance caused by such an event. PPP agreements set out additional consequences for force majeure events, such as the extension of the investment and/or operation period, tariff increases, continuation of availability payments and, subject to specific conditions, termination in case of long force majeure.

36 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

Only certain BOT contracts used in highway PPP projects govern the consequences of actions or decisions of third parties affecting the project, which are expressed to be within the scope of 'risk events', and may result in the extension of the investment and/or operation period, increase in tariffs, and subject to specific conditions, termination. Whereas, in BLT projects, completion of the project and due application of the PPP agreement is under the obligation of the private party and third-party actions are not excused. Generally, the private party and the government party are under obligation to compensate only direct damages.

37 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

In certain highway BOT projects, the PPP agreement states that the government party may suspend the construction works (in which case the operation period is extended) or take over the highway (in which case the toll fees are transferred to the private party and volume guarantees are still applicable), owing to national security concerns. If the suspension takes more than a specified period, the agreement may be terminated, in which case the private party is compensated for its equity investments.

PPP agreements concerning airport projects and earlier highway projects usually do not include any specific provisions relating to a change in the law, and give the same treatment to changes in law as any increase in investment costs. Notwithstanding, more recent highway PPP agreements treat changes in law as a 'risk event', which may result in the extension of the investment and/or operation period, tariff increases, continuation of availability payments and, subject to specific conditions, termination.

In healthcare BLT projects, the PPP agreement defines a change in the law as:

- discriminatory changes of law that increase the costs above a certain threshold;
- changes of law that cause a reduction in service payments that increase the costs above a certain threshold; and
- changes of law that require additional works for completed project phases.

If the parties fail to reach an agreement on the outcome of such changes in law, either party may trigger a referral of the case to dispute resolution.

In BLT projects, nationalisation of the projects results in the private party being compensated for senior debt, the used portion of the equity and third-party costs.

38 What events entitle the private party to extensions of time to perform its obligations?

Force majeure events, risk events and the government party's request for additional work may result in the extension of the investment and/or operation period. These events are detailed in PPP agreements, rather than being set out at the statutory level.

39 What events entitle the private party to additional compensation?

Events that may lead to additional compensation are listed in PPP agreements. Although in Turkish practice, extension of the operation period is preferred over additional compensation, with certain exceptions in cases of the government party's request for additional work.

40 How is compensation calculated and paid?

In terms of calculating the compensation to be paid to the private party by the government party, Turkish PPP practice is mostly based on a financing-based compensation method in line with international practice while some other methods are also available such as the book-value compensation method. The government parties may evaluate the pros and cons of each of these methods based on the particularities of each PPP sector before the issuance of the draft PPP agreements. These methods are set out in PPP agreements, not at the statutory level.

41 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

Turkish PPP agreements often include provisions that require the private party to insure material project risks and use the insurance proceeds for reconstruction, subject to the supervision of the government party.

Under PPP agreements in BLT projects, risks can be qualified as uninsurable if:

- such insurance is not available within the market; or
- the insurance policy premium to cover the relevant risk is not affordable for the private party and companies doing business in a similar field based on commercially reasonable terms in the market.

When a risk becomes uninsurable, the government party bears such a risk provided that the private party complied with the terms set out under the relevant insurance schedule of the PPP agreement, whereas in BOT projects, uninsurable risks are not specifically addressed.

Default and termination

42 What remedies are available to the government party for breach by the private party?

The available remedies can be listed as follows:

- termination of the PPP agreement;
- hand-over of the facility to the government party free of charge (either compensating the used portion of the equity or not);
- compensation of the direct damages by the private party; and
- replacing the subcontractor or, lacking a private party's involvement, conducting works on its own or assigning third parties at the private party's cost.

43 On what grounds may the PPP agreement be terminated?

The PPP agreement may be terminated owing to force majeure events, the government party's or the private party's default, and in certain BOT projects, owing to 'risk events', which include actions of third parties affecting the project; public-sector entities' failure to grant the permits, licences, etc.

44 Is there a possibility of termination for convenience?

Under Turkish BLT agreements, voluntary termination by either party is available, subject to the other party's agreement, the lack of which will trigger 'unjust termination'. However, voluntary termination has not been an option in BOT and TOR projects to date.

45 If the PPP agreement is terminated, is compensation available?

There is no unified approach in Turkish PPP practice concerning termination compensation mechanisms. Typically, Turkish PPP agreements set out distinct provisions in this respect and/or refer to general rules of law. The degree of clarity and detail included in Turkish PPP agreements concerning compensation regimes applicable to early termination of PPP agreements varies depending on the specific sector. Healthcare PPP agreements include detailed mechanisms where

compensation varies depending on the termination for convenience or default by the government party or by the private party, whereas PPP agreements used in the airport sector mostly refer to general rules of law. Highway PPP agreements, on the other hand, adopt a mixed approach and regulate certain aspects of termination compensation in detail (such as the payments to be made to lenders) while referring to general rules of law for some other parts (such as the calculation of additional damages that may be claimed by the private party if it is the non-defaulting party).

Financing

46 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

Main government subventions applicable to PPP projects are:

- treasury investment guarantees;
- the debt assumption mechanism; and
- traffic and volume guarantees.

Treasury investment guarantees may be provided to BOT, BO and TOR projects, and may be issued by the Turkish President upon the treasury's opinion and the proposal of the relevant minister overseeing the sector under which the respective PPP project is implemented. For a treasury investment guarantee to be applicable, the government party must have a separate legal personality other than that of the state or government.

Debt assumption for certain BOT and BLT projects can be provided by:

- the Ministry of Treasury and Finance; or
- the relevant government party, if the relevant project is carried out under BOT Law.

The Turkish President is authorised to decide on the Treasury's debt assumption of external financing provided for investments and services, provided that:

- the investment and services are carried out:
 - by government parties that are subject to the general budget as well as by privately budgeted government parties by means of the BOT model (in accordance with the BOT Law) and that are set to have a minimum investment amount of 1 billion Turkish liras; or
 - by the Ministry of Health and the Ministry of National Education by means of the BLT model that are set to have a minimum investment amount of 500 million Turkish liras; and
- the PPP agreement contains a provision regarding the takeover of the facility by the government party following termination of the agreement prior to its term;
- the Ministry of Finance and Treasury has approved debt assumption prior to the announcement of tender specifications and the execution of the project agreement; and
- the debt assumption limit set out in the annual budget law is not exceeded.

The debt assumed by the Ministry of Treasury and Finance is limited to 85 per cent of the entire loan for the relevant project if the PPP agreement is terminated owing to the fault of the private party, but the entire loan amount if the PPP agreement is terminated because of a reason not attributable to the private party.

Also, the BOT Law enables the relevant government party to provide debt assumption. If debt assumption is provided by a privately budgeted administration, the Turkish President decides on the assumption of those liabilities upon the proposal of the relevant ministry with which the government party is affiliated.

Project demand and volume guarantees are also available for PPP projects implemented under the BOT Law, as well as other PPP models in more limited cases (such as the capacity guarantee for BLT projects regarding the volume services provided under healthcare projects).

Lately, the Turkish government has been less inclined to provide treasury investment guarantees or debt assumption (and, in practice, debt assumptions have never been provided for BLT projects), but volume guarantees are widely used in PPP projects, particularly in the highway and airport sectors.

47 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Although only referenced in the BLT Law, direct agreements are executed between lenders and the government party for both BOT and BLT projects in practice. These regulate several issues between lenders and the government party, including step-in rights of the lenders, consent of the government party to the security established over the private party's receivables from the government party, termination of the PPP agreement by the government party, etc.

48 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

Except for the BLT Law, none of the pieces of legislation governing the various PPP models explicitly acknowledges the step-in right concept. Nevertheless, lenders' step-in rights are usually recognised in the direct agreements executed in BOT and BLT projects entitling lenders to exercise step-in rights under certain circumstances.

49 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

Lenders are also subject to same conditions with the project company. Notwithstanding, direct agreements grant lenders step-in rights that constitute a contractual mechanism entitling lenders to step into the place of the defaulting project company for an additional limited period in order to rectify the default and prevent termination of the PPP agreement. Generally, in case of the project company's breaches, the government party grants a cure period to the project company and if the relevant defaults are not remedied during the cure period, lenders' step-in rights begin. If the lenders do not use their right to step-in, the government party will become entitled to terminate the PPP agreement.

50 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

Except for the healthcare BLT projects, we have not seen such a case to date. In addition, there is no reference as to the share of the gains from refinancing under the applicable legislation.

Governing law and dispute resolution

51 What key project agreements must be governed by local law?

The PPP agreements should be governed by Turkish law. Other than this requirement (and the fact that certain security documents should be governed by Turkish law owing to their nature), there is no legal restriction in terms of the governing law for other documents. In practice, direct agreements between the lenders and the government party are also governed by Turkish law.

52 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

State parties may only enjoy immunity in relation to their sovereign powers. State parties do not enjoy immunity in disputes concerning private law relations. Therefore, it is not necessary to seek a waiver of immunity from the state or the administrations in the implementation contract. However, it should be noted that under the Execution and Bankruptcy Law, state assets specifically allocated to the performance of public services are immune from attachment or seizure.

53 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

Since there is no single law governing all PPP projects, there are different provisions under various pieces of legislation regarding dispute resolution in different PPP models. Most of these laws set forth that

disputes arising from a PPP agreement are settled by Turkish courts. Nevertheless, many of them allow the parties to opt for arbitration according to International Arbitration Law No. 4686 provided that Turkish law is applied to the substance of the dispute. Dispute resolution clauses in healthcare and highway PPP agreements typically stipulate that the place of arbitration is Turkey.

54 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

Although PPP laws do not mandate such preliminary dispute resolution procedures, PPP agreements may require the parties to exhaust these options first.

55 Is there a special mechanism to deal with technical disputes?

There is no special mechanism dealing with technical disputes under Turkish law. However, some PPP agreements introduce such mechanisms contractually.

Hergüner Bilgen Özeke
Avukatlık Ortaklığı Attorney Partnership

Senem Denktas
Nihat Aral
Ahmet Zafer Yilmaz

sdenktas@herguner.av.tr
naral@herguner.av.tr
azyilmaz@herguner.av.tr

Büyükdere Caddesi 199
Levent 34394
Istanbul
Turkey

Tel: + 90 212 310 1800
Fax: +90 212 310 1899
www.herguner.av.tr

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