Energy Disputes

Contributing editors
William D Wood, Neil Q Miller, Holly Stebbing, Justin P Tschoepe and Ayaz Ibrahimov

2019

GETTING THE DEAL THROUGH

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Norton Rose Fulbright

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

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

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2016
Fourth edition
ISBN 978-1-912228-85-0

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

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Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Energy Disputes*, 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.

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, William D Wood, Neil Q Miller, Holly Stebbing, Justin P Tschoepe and Ayaz Ibrahimov of Norton Rose Fulbright LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2019

Turkey

Ümit Hergüner, Zeynep Tor and Emel Tulun
Hergüner Bilgen Özeke Attorney Partnership

General

1 Describe the areas of energy development in the country.

As an Organisation for Economic Co-operation and Development member country, Turkey had one of the highest growing rates of energy demand over the past 15 years. Currently, Turkey is only able to meet around 26 per cent of its total energy demand through domestic resources; the growing demand for energy has resulted in dependency on energy imports, especially in terms of oil and natural gas.

According to the 2018 Investor's Guide published by the Ministry of Energy and Natural Resources (MENR), Turkey imported 28.7bcm of natural gas from Russia, 9.3bcm of natural gas from Iran and 6.5bcm of natural gas from Azerbaijan in 2017. Major oil and natural gas transmission projects include the Iraq-Turkey Crude Oil Pipeline, the Baku-Tbilisi-Ceyhan Crude Oil Petroleum Pipeline, the Trans-Anatolia Natural Gas Pipeline Project and the TurkStream Natural Gas Pipeline.

In the electricity sector, according to the Investor's Guide, Turkey is the sixth largest European electricity market, with a 5.5 per cent growth in annual demand since 2002. Turkey's installed capacity has exceeded 87GW with the help of investments made by the private sector. Electricity generation is dominated by the private sector, leaving build-operate and build-operate-transfer model-based power plants with a shrinking share. With its top priority being to decrease import dependency, Turkey approaches its energy policies with the aim of incentivising the growth of renewable energy generation facilities. Turkey has a growing interest in nuclear energy; a Russian joint venture company commenced construction of the first nuclear power plant, located in Akkuyu, in April 2018, and a French–Japanese consortium is to build the second nuclear plant in Sinop. The government continues to encourage use of local lignite reserves as a valuable alternative to natural gas for electricity generation. Renewable energy resources are becoming more and more attractive in the Turkish energy market. Solar energy is the primary renewable resource, with an installed capacity of 4,726MW at the end of June 2018.

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

Pursuant to the Constitution of the Republic of Turkey, the government is the owner of all natural wealth and resources and has the right to explore and operate such resources. However, the government may transfer this right to individuals or legal entities for a certain period of time.

Turkey's escalating demand for energy combined with its dependency on foreign oil and natural gas forces the government to develop policies and intensify its efforts to ensure supply security. With the aim of reducing foreign dependency, the government encourages the use of domestic energy and mineral resources, supports the production of energy from renewable resources and provides incentives to investors in that regard.

The government's policy is to increase the share of renewable resources and include nuclear energy as a more sustainable resource. Turkey obtains 99 per cent of its natural gas needs from foreign countries but aims to decrease the share of imported natural gas through promoting local resources with government incentives and with a focus on research, exploration and exploitation of natural gas. Although Turkey's coal resource is not abundant, using coal to generate electricity is a valuable alternative to natural gas dependency.

All in all, the MENR continues its efforts to make use of all of its local lignite and hard coal reserves for energy production by 2023 and plans to support the private sector in this respect.

Commercial/civil law – substantive

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

Industry-standard form contracts are used in certain areas of the energy sector in Turkey. The content and form of such contracts varies depending on the nature of the energy sector. The framework of the notable ones can be summarised as follows.

The Turkish Electricity Transmission Corporation uses standard connection and system usage agreements approved by the Energy Market Regulatory Authority (EMRA) when executing contracts with distribution companies, Organised Industrial Zones and consumers who wish to connect and use the transmission system.

Market actors wishing to participate in the Turkish Energy Exchange should sign a market participation agreement and enter into 'intra-day' and 'day-ahead' market participation agreements with the Energy Markets Operation Corporation (EPİAŞ). To register to the Organised Mass Natural Gas Sale Market, a standard form Accession Agreement should be executed between the investor and EPİAŞ.

To participate in the wholesale natural gas market, investors should sign two standard accession agreements: one with EPİAŞ and one with Takasbank.

In addition, shippers, Turkish Petroleum Pipeline Corporation (BOTAŞ) and EPİAŞ should also execute the Protocol for Reconciliation of Imbalances. Carriers of natural gas resources should also sign a standard form carriage agreement with BOTAŞ.

Finally, the end users or distribution companies must sign an outlet connection agreement pursuant to the natural gas distribution regulations.

Exploration and exploitation of petroleum and natural gas, operation rights, and transfer of these natural resources are generally made through licensing, permitting, privatisation agreements and private agreements pursuant to the principle of freedom of contract to be applied in conformity with related laws and regulations.

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

The Turkish Code of Obligations No. 6098 (TCO) is the main piece of legislation detailing the principles of contract law. The general principles in the TCO apply to all contracts including those signed in the energy sector unless the contract is classified as an administrative law contract. Pursuant to article 19 of the TCO, a contract must be interpreted according to the true and mutual intention of the parties. If it is not possible to determine the true mutual intention of the parties in respect to the disputed provision, then the assumed intent of the parties has to be established by the courts. If the parties' mutual intention cannot be determined, contracts are usually interpreted in opposition to the party preparing the contract – this rule generally applies to the standard form one-sided general terms and conditions.

5 Describe any commonly recognised industry standards for establishing liability.

Article 18/2 of the Turkish Commercial Code No. 6102 defines the prudent businessperson standard, requiring each merchant to act as a prudent businessperson in all his or her commercial activities. This standard is based on the due care of an average prudent, responsible, and organised businessperson and is evaluated objectively. In terms of directors, however, the Turkish Commercial Code echoes the well-known business judgement rule.

Overall, prudent businessperson standard is also mirrored in sector specific legislation; accordingly, the Natural Gas Market Certificate Regulation and the Natural Gas Market Licence Regulation holds certificate and licence holders to the standard of a reasonable and prudent businessperson. The Electricity Market Licence Regulation underlines that a company is obliged to make electricity or capacity purchases as a prudent merchant in consumer sales transactions.

As frequently seen in practice, the bona fide principle requires rights owners to act in a reasonable, honest and trustworthy manner when utilising their rights.

The concepts of intent, wilful misconduct and gross negligence are also important in terms of liability analysis. As for the contractual limitation of liabilities, see question 8.

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

Yes, as per the principle of *rebus sic stantibus*, a judge is entitled to adjust the provisions of a contract in line with the concepts of equity and fairness upon the request of the injured party to the contract. However, adjustment of contract provisions by the court is a direct interference with the parties' 'freedom of contract' and the pacta sunt servanda principle. Therefore, for judges to implement the principle of rebus sic stantibus, either the conditions of the contract must be extremely affected (such that fulfilment of the contract obligations under the affected conditions would create an imbalance between the parties) or the basis for the transaction must be partially or totally disrupted. A change in circumstances will invoke adjustment of a contract if: (i) the parties do not perform their obligations; (ii) new circumstances affecting the contract arise; (iii) such new circumstances do not arise from the acts of either party; (iv) it was not possible for the parties (at the execution of the contract) to foresee the change in circumstances; and (v) the new circumstances make it impossible for one party to comply with its contractual obligations.

The above-mentioned general principles of the TCO and the Turkish administrative laws are also applicable to contracts in the energy sector. In addition, energy market legislation (electricity, gas and petroleum) regulates specific force majeure events that may lead to the suspension or postponement of a licence holder's market-related obligations.

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

Under Turkish law, any person who is directly or indirectly affected by the actions of a third party or a decision of an administrative body may initiate a lawsuit before the relevant court. Initiation of a lawsuit per se will not suspend an energy project. However, the court may render a decision for injunctive relief, resulting in suspension of the relevant project. In terms of nuisance, operators may be subject to private nuisance claims stemming from smoke, noise, vibrations or other various factors that the operator may have caused pursuant to article 730 of the Turkish Civil Code No. 4721. This article depicts the liability of a real property owner to its neighbouring landowners. In terms of public nuisance claims, judicial review of claims to cancel administrative licences is open to applicants with the appropriate locus standi. For negligence claims, the court may decide indemnification of the affected party pursuant to the general provisions of the TCO.

8 How may parties limit remedies by agreement?

Under Turkish law, the principle of freedom of contract prevails. Therefore, contractual clauses limiting the liability of parties are valid and enforceable, except for liability arising from severe fault (including wilful misconduct and gross negligence).

In addition, the TCO introduces two other exceptions to the general principle of limitation of liability arising from slight fault. Accordingly, contract provisions limiting liability for slight fault are invalid provided that such liability arises from either an employment agreement or a provision of services requiring contractor's expertise and conducted within the scope of a permit issued by a governmental authority (such as, engineers or architects who must obtain a licence from the relevant occupational chamber).

Furthermore, while Turkish law does not have an exact equivalent concept to 'liquidated damages', the TCO does contain similar contractual concepts. Under the general principle of freedom of contract and articles 158–161 of the TCO, contractual penalties, including penalty interest, are enforceable under Turkish law. Furthermore, the contracting parties may freely determine the penalty to be imposed for failure to perform the obligations arising from such contract. Accordingly, if the parties to a contract have agreed on a penalty clause, the sum fixed is the limit on damages for breach regardless of whether or not it exceeds or falls short of the actual damage (unless the creditor proves that its actual damages are more than the penalty amount).

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

Turkish law introduces the concept of 'objective liability' (which is similar to the principles of strict liability in foreign jurisdictions), where fault is not required for a party to be held liable under Turkish law. Objective liability is limited to specific instances explicitly codified under the relevant legislation. The instances relevant to the energy sector are liability arising from environmental pollution, employer liability and liability of property owners stemming from defective construction.

As per the Environmental Law No. 2872 (Environmental Law), polluters of the environment and those who cause damage to the environment are responsible, regardless of their degree of fault, for any damage arising from the pollution and destruction it may cause. The polluter will also be required to pay compensation for the resulting damage according to the general provisions.

For the objective liability of employers, an employer can avoid liability by demonstrating that due care in employment decisions, inspection of work, selection of tools and organisation of work was shown under an objective standard. A construction owner's objective liability cannot be diminished, but the construction owner may seek recourse from the person who caused the damage.

In addition, article 5 of the Law of Construction and Operation of Nuclear Power Plants and the Sale of Energy No. 5710 refers to the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy for the establishment of the objective liability of the nuclear power plant operator.

Commercial/civil law – procedural

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

Turkish law does not provide for a straightforward solution on how to address competing clauses in multiple contracts relating to a single transaction. However, Turkish law recognises choice in dispute resolution mechanisms set forth in the relevant agreement and contractual freedom of the contracting parties. Therefore, issues are addressed on a case-by-case basis to take into account the specifics of the relevant contract bundle by applying the methods of contractual interpretation within the auspices of the TCO.

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

Under the applicable legislation, there is no explicit provision prohibiting stepped and split dispute resolution clauses. However, there is no established or unified understanding on this matter, particularly when arbitration is involved as dispute resolution mechanism. The International Arbitration Law No. 4686 defines the most important element of an arbitration agreement as the will of the parties. Turkish courts have held arbitration agreements invalid in cases where the will

of the parties is not clear. For instance, in its decisions dated 2013 and 2015, the Court of Appeals decided that an arbitration clause stipulating that a dispute should be heard in court provided that the subject matter of the dispute is not resolved in an arbitral tribunal is invalid due to the fact that parties' choice to arbitrate is not explicitly stated.

In light of the above, it may be expected that the Turkish courts may not be very welcoming for stepped and split clauses and may tend to render arbitration agreements invalid on the grounds that the intention of the parties is not clear. Accordingly, when setting up a multi-tiered dispute resolution mechanism, the parties should specify under which conditions the dispute should be resolved and by what dispute resolution method. Any approach to the contrary may undermine the validity of the arbitration agreement.

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

As per the Turkish Code on Civil Procedure No. 6100 (Procedure Code), judges may appoint experts to issue their opinions when evaluation of the facts relating to the case requires technical expertise that the judge does not possess. Experts may be appointed by the judge upon request of the parties or ex officio at the sole discretion of the judge. Experts appointed by the court should meet the independence criteria set forth under relevant legislation. If there is an allegation of partiality, the expert appointed may be dismissed by the court.

In practice, most expert opinions include evaluations asserting legal opinions that go beyond the scope of technical analysis. That being the case, the Court of Appeals has a tendency to reverse rulings rendered without an expert opinion at the first instance courts, which leads to encouraging the frequent use of expert opinions.

As per the Procedure Code, apart from expert opinions issued by court appointed experts, the parties may obtain opinions from experts they deem appropriate and use these opinions as reference points in their petitions. That being said, the credibility of an opinion obtained from an external expert (as opposed to court appointed expert) is not as eminent as the former.

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

Under Turkish Law, there is no particular interim or emergency relief provisions specific to energy disputes. Therefore, the general rules governing such measures are applicable to energy disputes. There are a variety of temporary legal protections available, including preliminary injunction, preliminary attachment, record of evidence and decision to stay proceedings.

In an administrative jurisdiction, if the administrative act or judicial decision is clearly contrary to law, the relevant administrative act or judicial decision may be suspended to prevent irreparable damages. Another frequently used tool is a stay of proceedings decision that postpones the implementation of an administrative act or judicial decision until the judicial proceedings have been finalised. Upon the request of the plaintiff, an administrative court may grant a stay of proceedings decision.

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

Turkish courts recognise and enforce foreign arbitration awards and foreign judgments subject to the satisfaction of the various conditions explained below.

Turkey is a party to two principal international treaties applicable to the enforcement procedures of foreign arbitral awards: namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention or Washington Convention).

Turkey acceded to and ratified the New York Convention with two reservations: Turkey will comply with the New York Convention (i) in accordance with the reciprocity principle and only for the recognition and enforcement of arbitration awards rendered in a contracting party's country and (ii) only for disputes that are deemed commercial disputes under Turkish law, arising from either contractual or non-contractual relationships. Accordingly, recognition and enforcement of foreign arbitration awards issued in countries party to the New York Convention are conducted in accordance with the conditions prescribed under the New York Convention.

According to article 54 of the ICSID Convention, an award rendered pursuant to this convention will be recognised as binding by the courts of the contracting states, and the courts should accordingly enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in that state. Turkey is one of the contracting states of the ICSID.

The Turkish International Private and Procedural Law No. 5718 (IPPL) regulates foreign judgments and foreign arbitral awards. As per the IPPL, once the subject matter foreign judgment is finalised in a foreign jurisdiction, the enforcement procedure may be initiated before Turkish civil courts by anyone who has a legitimate interest in its enforcement. The IPPL sets out conditions that must be satisfied for foreign arbitral awards and foreign judgments to be enforced.

Accordingly, Turkish courts will accept the enforcement of foreign arbitral awards unless one of the following circumstances exists:

- the parties have not concluded an arbitration agreement or included an arbitration clause in the agreement;
- the arbitral award is in violation of morality or public policy;
- the dispute in question cannot be resolved by arbitration under Turkish laws;
- either party was not represented in the arbitration and did not explicitly accept the relevant actions afterwards;
- the party against whom the arbitral award is to be enforced was not notified of the selection of the arbitrators or was denied the right to defend;
- the arbitration agreement or the arbitration clause is invalid according to either the law it is subject to or (if there is no such agreement) the law of the country where the arbitral award was rendered;
- the selection of the arbitrators or the procedure followed by the arbitrators is in violation of the parties' agreement or (if there is no such agreement) the law of the country where the arbitral award was rendered;
- the arbitral award is related to a matter that is not included in the arbitration agreement or is exceeding the scope of the arbitration agreement or of the arbitration clause (rejection will only apply to the excluded or exceeding part); and
- the arbitral award is not finalised, not enforceable, or not binding upon the parties according to either the law that it is subject to, or the law of the country where the arbitral award is rendered, or the procedure to which it is subject to, or was revoked by the relevant authority of the country where the arbitral award is rendered.

The conditions for the enforcement of foreign judgements are listed separately under the IPPL. For enforcement of a foreign judgment, the following conditions must be met: (i) there must be a contractual or effective reciprocity between the Turkish courts and the jurisdiction in which the judgment is rendered; (ii) the judgment must not be related to an issue falling within the exclusive jurisdiction of the Turkish courts and must relate to a private law dispute; (iii) the judgment must not clearly violate Turkish public order; and (iv) due process must have been observed under the laws of the relevant foreign jurisdiction.

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

There is no arbitration institution that specifically administers energy disputes in Turkey. However, the Istanbul Arbitration Centre established in 2014 is an independent institution offering arbitration and mediation services for the resolution of disputes. Energy related disputes can be filed at the Istanbul Arbitration Centre. Additionally, Turkey became party to the Energy Charter Treaty in 1994. Pursuant to article 26 of the Treaty, disputes between a contracting party and an investor of another contracting party (as defined in the Energy Charter Treaty) may choose to submit the dispute to the ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce or to a sole arbitrator or ad hoc arbitration tribunal appointed as per the Arbitration Rules of the United Nations Commission on International Trade Law.

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

Given the scale of energy investments, projects usually require significant financial support; for this reason, foreign financial institutions are heavily involved in the Turkish energy sector. Thus, parties often prefer to choose arbitration over litigation as the chosen dispute resolution method.

Over the past decade, mediation has also become a trending dispute resolution method in Turkey. In 2017, the Mediation Centre for Energy Disputes, a sectoral-based institution, was established to enhance the use of mediation in energy disputes. The Mediation Centre, organised under the Energy Law Research Institute, aims to resolve private law energy disputes as per the Rules of Mediation published by the Energy Law Research Institute. As the Mediation Centre is fairly new to the energy sector, the process remains to be tested in practice.

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

Settlement discussions, whether in the form of conciliation or mediation, are confidential. In terms of conciliation for civil disputes, the confidentiality requirement stems from the Attorneys' Code No. 1136. As such, unless decided otherwise, lawyers are required to keep any records or related documents that they acquire during conciliation discussions confidential and breach of such obligation leads to administrative sanctions.

As per the applicable legislation on mediation, the mediator should keep any documents or statements submitted during the mediation process confidential unless parties of the mediation mutually waive such requirement. Failure to comply with such requirement may lead to imprisonment of up to six months.

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

Turkish law does not recognise the e-disclosure or e-discovery procedure within the meaning of the Anglo-American tradition. In terms of the current procedural law, the disclosure obligation refers to the presentation of evidence in which the parties constructed their arguments upon to the court. The court may require further evidence from the counter-party or any other third party. In this case, data protection issues may come up during proceedings.

The Law on the Protection of Personal Data No. 6698, enacted in 2016, provides the core framework of the Data Protection Law and has major similarities with the EU's Data Protection Directive 95/46/EC. Accordingly, in respect to the processing or transfer of personal data, save for a few exceptions, the explicit consent of the data subject is required. Data controllers, who are defined under the Data Protection Law as 'real persons or legal entities that set the objectives and means to process personal data and are in charge of the establishment and management of a data filing system,' must provide the data inventory necessary for the identification and record-keeping of data processing procedures. In addition to administrative sanctions available under the Data Protection Law, the Turkish Criminal Code No. 5237 (Criminal Code) provides the penal framework for any breach of the subject matter.

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

Pursuant to article 36 of the Attorneys' Code, attorneys are under the obligation not to disclose any information related to their clients or potential clients prior to, during, or after representation of the client without the express permission of the client. Attorneys have the right to avoid testifying in relation to information acquired during the representation of their clients.

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

Administrative agency review is not a precondition for judicial review in energy disputes. Administrative Procedural Law No. 2577 provides a discretionary administrative review option. Accordingly, articles 10 and 11 of the Administrative Procedural Law allow individuals to apply to the administrative agency that has adopted the act or actions or to the administrative agency with a higher ranking and request amendment or cancellation of the administration's acts or actions.

That said, according to article 13 of Administrative Procedural Law, application to the agency that has adopted administrative action is only mandatory provided that the individual wishes to be compensated for damages incurred as a result of such action. Therefore, individuals wishing to file a compensation lawsuit against an administrative agency whose actions have caused a certain amount of damage should initially apply to the administrative body itself and request compensation. A lawsuit may only be filed after the administrative agency refuses to pay the compensation without judicial review. For the avoidance of doubt, above prerequisite is not applicable for administrative acts, but solely for administrative actions.

EMRA also has sector specific administrative review duties. EMRA can mediate disputes that arise during the course of negotiations between licence holders when the parties cannot come to an agreement on the terms of the system connection and system usage agreements. EMRA is also empowered to carry out mediation in disputes arising from existing agreements and, if required, to propose amendments to these agreements.

Regulatory

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

Below is a list of the principal agencies that regulate the energy sector in Turkey.

The MENR is the main administrative authority that determines energy policy objectives, plans and programmes with the related institutions.

EMRA is the key body that regulates the electricity, oil, and gas markets. EMRA can issue directives in order to promote consumer rights, ensure quality of service, and set pricing principles. Moreover, EMRA is responsible for issuing and revoking licences.

The General Directorate of Petroleum Affairs supervises applications and issues licenses in relation to upstream oil and gas activities.

The General Directorate of Mineral Research and Exploration is an institution supervised by MENR to conduct geographical surveys in Turkey to explore natural resources.

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

Although Turkish Law encourages private legal entities to enter the energy market, it also guarantees equal treatment for new entrants to ensure the efficient and safe operation of energy resources.

As per the Electricity Market Law No. 6446, operators of distribution and transmission networks are required to provide distribution and transmission services to all distribution and transmission system users equally without discrimination.

Furthermore, according to the Natural Gas Market Law No. 4646, companies in the natural gas market are required to provide other companies active in the same market with accurate and adequate information. In the natural gas market, companies holding transmission licences are obliged not to discriminate between third parties of equal status. Such companies may reject third-party access requests only on the grounds exhaustively listed under the Natural Gas Market Law.

The Petroleum Market Law No. 5015 also obliges companies to meet market demands equally and without discrimination so long as the demands do not infringe on the transmission and storage capacity restrictions.

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

Judicial review of decisions made by administrative agencies is mainly regulated under the Administrative Procedural Law. Individuals may file annulment procedures and compensation procedures against the administrative acts or actions. As stated under question 20, the Administrative Procedural Law provides a discretionary administrative review option for individuals seeking remediation against the acts and actions of administrative agencies.

Update and trends

The MENR focuses on encouraging the use of local energy and mineral resources, support in the generation of energy out of renewable resources, and further aims to reduce production costs. Renewable Energy Resource Area (RERA) projects will increase the portion of local and renewable resources in the generation of electricity. The government also provides production sites for electricity generation facilities and extra incentives for the use of local equipment in the generation processes. In addition to RERA, with the Renewable Energy Resources Supporting Mechanism (RERSM), the number of power plants utilising renewable energy sources continues to increase. Pursuant to the latest statements from the Energy and Natural Resources Minister, the RERSM will not continue under the same conditions, but the government may support new energy power plants built after 2020 by RERA to reach the government's target on renewable energy resources.

As per the Council of Ministers' Decision regarding State Aid on Investments dated 3 May 2017, nuclear power plants are considered a priority investment to benefit from specific tax exemptions or tax reductions and other incentives. As explained in question 1, Turkey has a developing interest in nuclear energy and has taken action for the construction of its first two nuclear power plants. It is expected that a third nuclear power plant will be built in the Thrace region in the upcoming years.

Turkey's national research ships, *Barbaros Hayrettin* and *Paşa Oruç Reis*, are exploring the high seas for national petroleum and natural gas resources in the Mediterranean and Black Sea, and the deep-sea drill ship *Fatih* has begun drilling natural gas in the Alanya district.

All in all, the business environment in Turkey has resisted the domestic and international political and economic challenges of the past year, and it is expected to demonstrate similar resilience throughout 2019. Turkey's sizeable energy demand has played a significant role in the business environment. In terms of M&A deals completed in 2018, the largest portion of deal values belongs to the energy sector. The energy sector is also expected to draw greater attention from domestic and foreign investors going forward.

The TurkStream pipeline project, which aims to transport natural gas resources from Russia to Turkey and Eastern Europe, has been under construction for over three years. The majority of the pipeline's construction has been completed and it is expected to commence operations within the first quarter of 2019. The contemplated length of the pipeline is 930km spanning across the Black Sea to Turkey's Thrace region.

By nature of the energy sector, judicial review of concession agreements is also of importance. In the previous years, there has been question as to whether or not the individuals affected by these administrative law agreements can file for judicial review of the provisions of these agreements. The Council of State, in its many rulings, has stated that individuals whose rights are affected by the concession agreements can file cancellation actions against the concession agreements. In this regard, the Council of State classifies administrative law agreements as if they were regulatory legislation, and conducts judicial review of the agreements.

Additionally, the Ombudsman Law No. 6328 allows an ombudsman to review the acts and actions of an administrative body upon the complaint and is entitled for the unbinding review of administrative actions; therefore, its decisions are advisory in nature. That being said, administrative bodies tend to comply with the advice of the ombudsman.

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

There is no special regime on unconventional upstream activities (such as the exploration and production of shale gas, shale oil, gas hydrates, and coal-bed methane); they are governed under the general framework of Turkish Petroleum Law No. 6491 and its secondary regulations. The hydraulic fracturing method, mostly used for shale gas exploration activities, falls within the scope of unconventional upstream activities and is subject to a strict set of environmental compliance and filing requirements in respect to environmental law obligations. Informing the local population of such activity is also required.

25 Describe any statutory or regulatory protection for indigenous groups.

There is currently no statutory or regulatory protection provided specifically for indigenous groups. Nevertheless, judicial review procedures for the annulment and cancellation of administrative acts are open to all applicants having locus standi under the Administrative Procedural Law.

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

Energy sector regulations are very investor friendly. However, by extension of the limitations set forth in other fields of law, in practice, local investors sometimes gain advantages over energy investments. For instance, the licensing process requires potential investors to prove its sufficiency to the relevant administrative body. While assessing the sufficiency of the investor, the administration also takes into consideration whether or not the investor has enough assets or connections within the country. For instance, when assessing the licensing applications for solar energy and wind energy generation, when the owner of the land on which generation activity will be conducted is also among the applicants, EMRA should grant the licence to the landowner. Given that the acquisition of immovable property in Turkey is slightly more cumbersome for foreign investors, local investors gain an advantage ipso facto. That being said, many mechanisms are available to accommodate foreign investors round such obstacles.

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

Pursuant to the Environmental Law, expenses incurred to prevent, limit and eliminate pollution and degradation should be covered by the polluter or by the person who caused the degradation, and certain administrative fines are imposed by the related the administrative authority.

According to the general principles of the TCO, a person who caused damage is obliged to eliminate this damage. As explained under question 9, there are also some strict liability provisions set forth under the relevant legislation. We refer to our explanations under question 9 for the strict liability and the penalties associated with the same under the Environmental Law. As for the criminal aspect, pursuant to article 181 and the following articles of the Criminal Code, a person who intentionally or negligently causes pollution of soil, water or air, or causes noise pollution, zoning pollution or intoxicates the environment is either imprisoned, punished with a monetary penalty, or both.

The Occupational Health and Safety Law No. 6331 also sets forth certain responsibilities for employers to ensure the occupational health and safety of employees by carrying out all kinds of measures. Failure to comply with this requirement may result in administrative fines, compensation of damages or the shutting down of the facility.

Other

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

We are not aware of any actual or anticipated sovereign boundary dispute that could affect the energy sector.

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

Turkey was among the participants of the Energy Charter Conference and executed the Energy Charter Treaty in 1994. After less than a decade, in 2001, Turkey finally ratified the trade-related provisions of the Energy Charter Treaty. Further, the International Energy Charter, signed in 2015, intends to strengthen energy cooperation between the signatory states.

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

Protection of investors has been an important matter in Turkey for over 30 years. Turkey, as an emerging economy, has adopted various national and international regulations, to ensure the level of security required by foreign investors.

Unless otherwise required under international treaties or specific provisions of law (as explained below), foreign investors are subject to the same treatment and entitled to the same investment incentives as local Turkish investors under the Foreign Direct Investments Code No. 4875 (FDI Code). The scope of incentives granted with respect to a particular investment is determined according to the purpose, volume and location of such investment. Additionally, the Investment Support and Promotion Agency (ISPA) was established in 2006 under the Office of the Prime Minister of the Republic of Turkey to attract foreign investment. The ISPA develops and implements investment support and promotion strategies and assists foreign investors with the procedures for working with governmental institutions.

As per the FDI Code, foreign investors, like local investors, are free to repatriate net profits, dividends, proceeds from the sale or liquidation of their investment, royalties or fees arising from licensing, management and similar agreements, or principal and interest payments under external loans through banks or other authorised financial institutions.

There are only a limited number of exceptions to the principle of equal treatment of foreign and domestic investors, including restrictions on foreign control or ownership in a limited number of regulated sectors, such as defence and broadcasting, and certain approval or notification requirements in others (eg, energy, banking, insurance), as well as the acquisition of real property.

A very valuable instrument for the protection of investors is multilateral treaties, especially in terms of alternative dispute resolution. As explained under question 14, Turkey is a party to the New York Convention and the ICSID Convention to promote its arbitration-friendly environment to attract investment.

Furthermore, Turkey has signed over 80 bilateral investment treaties with various countries. These bilateral investment treaties, similar to the Energy Charter Treaty, mostly include investor-friendly provisions such as most favoured nation provisions, fair and equitable treatment provisions, and monetary transfer provisions. Turkey has also been party to the Multilateral Investment Guarantee Agency, which has been providing political risk insurance to the investors since 1985.

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

In 2012, Pursuant to Decree No. 2012/3842 regarding the Implementation, Management and Coordination of National Cyber Security, a cybersecurity group has been established under the Ministry of Transportation, Maritime Affairs and Communications. In 2014, the Regulation on Protection of Network and Data in the Electronic Communications Sector was issued, which describes the measures to be taken by companies (depending on their field of activity) to provide cybersecurity during electronic communications. The measures mainly include the establishment of an information security management system and an information security working group, the adoption of an information security policy, the evaluation of the possible risks on a yearly basis, reporting of any incident infringing the information security, training of personnel, management of the electronic systems, etc. Also, as per the Regulation on Information Security in Industrial Control Systems, energy companies should report to EMRA the inventory of the industrial control systems used. Accordingly, each company together with EMRA should set out the required actions for elimination of the risks reported under the inventory. As outlined, in Turkey the sectoral cybersecurity rules mainly arise from secondary legislation but not from a dedicated law governing cybersecurity. However, Data Protection Law No. 6698 may be considered as a framework legislation on the issue given that it regulates, among others, cybersecurity in general terms.

Hergüner Bilgen Özeke
Avukatlık Ortaklığı Attorney Partnership

Ümit Hergüner **uherguner@herguner.av.tr**
Zeynep Tor **ztor@herguner.av.tr**
Emel Tulun **etulun@herguner.av.tr**

Büyükdere Caddesi 199
Levent 34394
Istanbul
Turkey

Tel: +90 212 310 18 00
Fax: +90 212 310 18 99
www.herguner.av.tr

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ISBN 978-1-912228-85-0