

# Project Finance

*Contributing editors*

**Phillip Fletcher and Aled Davies**



2018

GETTING THE  
DEAL THROUGH

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*Contributing editors*

Phillip Fletcher and Aled Davies

Milbank, Tweed, Hadley & McCloy LLP

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

© Law Business Research Ltd 2017  
No photocopying without a CLA licence.  
First published 2007  
Eleventh edition  
ISSN 1755-974X

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



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# Turkey

Esin Çamlıbel, Grace Maral Burnett and Gizem Günel

Turunç

## Creating collateral security packages

### 1 What types of collateral and security interests are available?

Subject to special regulations and certain formalities, assets can be charged, made subject to liens or otherwise encumbered under Turkish law. Collateral may include real estate, moveable property, to-be-acquired property, inventory, securities such as promissory notes and shares, bank accounts, receivables and commercial enterprise pledges which include the trade name and commercial title, intellectual property rights such as copyrights, trademarks, patents and designs, machinery, equipment, tools and vehicles (including ships and aircraft). Guarantees and sureties given by the third parties may also serve as security.

With the exception of a commercial enterprise pledge, a floating charge or blanket security is not recognised under Turkish law. Unless an enterprise pledge is established, each asset of an enterprise must normally be pledged separately.

### 2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Registration of encumbrances over real estate is necessary for perfection. A mortgage is created pursuant to a notarial deed executed before a civil law notary, which mortgage must subsequently also be registered in the public registers of the Turkish land registry. In principle, a stamp tax of 0.948 per cent is applied for each of the security agreements (subject to statutory maximum amounts). A mortgage is subject to deed charges of 4.55 per cent over the mortgage amount. Authorised signatories or duly appointed proxies must be present at the relevant registries for execution of the mortgage agreements.

There are two types of mortgages: capital mortgages and upper-limit mortgages. In capital mortgages, the maximum amount of obligations must be stated in the deed. This type of mortgage is usually preferred when there is a settled debt. In the upper limit mortgages, a mark-up over the principal amount is included in the secured obligations to cover interest and costs. A mortgage can be established over property or certain rights connected to the property. In principle, mortgages include the components and fixtures and fittings of that property.

A fixed-degree system is used in Turkey to determine the priority of a perfected security over real estate. According to this system, an immovable property's value is divided into ranks. For every rank of an immovable's value, there is an established mortgage degree. Unless a claimant who ranks first is able to fulfil his or her claim from the sale of the property, claimants who rank lower will not be able to benefit from the sale.

Shares in Turkish companies can be pledged by executing a share pledge agreement. Share certificates of joint stock companies must be in printed form (registered or bearer) and the pledged shares must be endorsed by the shareholder. Approval decisions of a company whose shares are pledged must be registered in the company's share ledger. Share pledge agreements for pledge over Turkish company shares cannot be governed by foreign law.

Pledges over bank accounts can be achieved by the parties entering into a written pledge agreement, a notification being filed with the relevant bank, and an acknowledgement from the bank being issued.

A commercial enterprise pledge agreement, which includes a list of pledged assets, is executed (*ex officio*) before a notary public and registered within 10 days at the relevant trade registry (ie, where the commercial enterprise is located). A commercial pledge agreement must contain:

- the trade name and commercial title;
- the machinery, equipment, tools and transportation vehicles that are allocated to the operation of the commercial enterprise as of the date of registration of the pledge; and
- intellectual property rights such as licences, trademarks, models, drawings, etc.

With the recent enactment of the Law on Pledges over Moveable Assets in Commercial Transactions (Law No. 6750), pledges over moveable assets can be created without any requirement for transfer of possession (possession used to be required under the old regime). This new law establishes a public registry called the Moveable Pledge Registry, provides alternative foreclosure methods and extends the range of moveables that can be subject to pledge agreements.

A pledge agreement must contain the amount and the nature of the debt, the maximum amount secured by the agreement and information about the parties. The degree system and priority rights stated above for immovables can also be applied for pledges over moveable assets.

In order for a pledge agreement to be effective, it must be registered with the Moveable Pledge Registry. Receivables, intellectual property rights, livestock, raw materials, any earnings and revenues, rental income, tenancy rights, all commercial equipment, agricultural products, commercial licence plates or commercial transportation lines and commercially funded projects can be subject to pledge agreements.

Law No. 6750 does not apply to capital market instruments or pledge agreements related to financial agreements regarding derivative securities and deposit pledges. Also, moveable assets that are currently registered with the Land Registry will not be subject to this law. In the event of default, a first-degree pledgee may demand the transfer of ownership of a pledged moveable from the appropriate execution office. In principle, such demand would be void due to the prohibition of *lex commissoria* in Turkish law. The pledgee should make the request within seven days of the occurrence of the event of default. Additionally, a pledgee may transfer his or her rights under pledges over receivables to asset management companies or a pledgee may exercise rental rights or licence rights for assets that are not subject to a transfer of possession.

An agreement for the transfer of receivables may be executed between the transferor and transferee as security.

### 3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Certain encumbrances are required to be registered with a public registry. For example, the registration of encumbrances over real estate is necessary for perfection and binding in rem against counterparty and third parties. Priority depends on the time of registration. All pre-existing rights and encumbrances are shown along with rank and amount in public land registry records. However, other encumbrances such as share pledges are not registered in public records. Accordingly, creditors

will need to undertake customary commercial and legal due diligence with respect to such encumbrances.

**4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?**

Foreclosure proceedings follow a rigid procedure under Turkish law under which the properties or assets secured are generally sold by way of public auction and the sale proceeds are then distributed to the beneficiaries of the security. Accordingly, close monitoring of the performance of the relevant covenants is crucial during the life of the security.

**5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?**

As a general principle of the Turkish Enforcement and Bankruptcy Law (EBL), depending on the legal power of the documents possessed by the creditor, proceedings for each legal circumstance differ from case to case. The period for payment and objection and the outcomes of objection are different for each type of procedure.

Article 45 of the EBL dictates that if a creditor has security over a debtor's assets (eg, mortgage, share pledge, bank account pledge), the creditor may enforce its rights only by initiating execution proceedings against the debtor first. However, if the amount of the pledge is insufficient to pay the debt, the creditor may fulfil its rights through bankruptcy or foreclosure. This process is called enforcement by foreclosure of collateral.

If the official document, known as an agreement table, which is prepared by the land registry office, shows the degree of mortgages and contains an absolute acknowledgment of the debt then the creditor may initiate a more secure execution proceeding and the debtor will receive an 'execution order'. In this procedure, the debtor will be sent a notice stating that the asset will be sold unless the debtor pays the debt within 30 days or can submit a petition for adjournment of execution.

If there isn't any official document that contains an unconditional acknowledgment of the debt, the creditor must pursue the common execution proceedings and the debtor will receive a payment order instead of an execution order. In response to such a payment order, a debtor has the right to file an objection petition about the validity of the debt. If the debtor objects to the execution proceedings, the creditor must initiate a lawsuit to continue pursuing the matter.

An ordinary execution procedure may be ineffective and may end without obtaining an adequate result for the creditor. As such, Turkish legislation allows the creditor to initiate bankruptcy proceedings against the debtor. In a bankruptcy case, creditors who have secured their claims with collateral have favoured rights. Claims are divided into four ranks with employee and social security claims having priority over all other claims.

**Foreign exchange and withholding tax issues**

**6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?**

Turkey's liberal foreign exchange system allows companies and individuals to open foreign exchange accounts freely and transfer funds abroad via banks.

**7 What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?**

In principle, there are no such restrictions or controls. Certain withholding and other taxes are payable depending on the nature of the payment, the type of recipient and the recipient's jurisdiction (subject to double taxation treaties and other

**8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?**

There are no repatriation or conversion requirements. A company's foreign earnings in Turkey are normally subject to Turkish tax in accordance with the worldwide income principle.

**9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?**

Yes. Also see question 6.

**Foreign investment issues**

**10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?**

Foreign investment is encouraged by the Turkish government and there is special legislation in place that regulates foreign investment. The Foreign Direct Investment Law rules out most restrictions on foreign investment into the country. Under this law, foreign investors have the same legal status as Turkish companies and are subject to the Turkish Commercial Code, with only very limited exceptions where regulatory approvals may be necessary (for example, for sectors deemed to be strategically significant). Foreign investors can access government incentives in the same manner as local enterprises.

Foreign investors are free to transfer their profits, fees, royalties, and repatriate their capital. In principle, there are also no restrictions on equity participation: foreign companies operating in Turkey are not obliged to have Turkish nationals to participate in equity and 100 per cent foreign-owned companies are permissible. Some sectors are an exception and exclusive to state-owned entities such as the mining and processing of borax, uranium and thorium.

Furthermore, Turkey has signed treaties for the avoidance of double taxation with 80 countries. Finally, Turkey is party to 75 bilateral investment treaties. That being said, because Turkish legislation is very favourable and open to foreign direct investment, and Turkey treats foreign investment virtually identically to local capital, such treaties are arguably less significant in the Turkish market than in certain other jurisdictions.

**11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?**

In order to sell or underwrite insurance policies in Turkey, the insurance company must be locally licensed. Having said that, reinsurance by foreign companies is permitted.

Properly underwritten policies can be payable to foreign secured creditors.

**12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?**

There are four types of permits in Turkey, namely the 'turquoise card', the general work permit, the independent work permit and the indefinite work permit. Owing to a recent amendment to the relevant law, obtaining a work permit is sufficient to work and reside in Turkey, and it is no longer necessary to have separate residence and work permits for foreign employees. Applications for work permits are filed directly with the Ministry of Labour and Social Security. If an application is filed abroad, it should be presented to Turkish embassies or consulates in the country where the foreigner is a citizen or a legal resident. Turkish embassies and consulates transmit the applications to the Ministry. Requirements for obtaining work permits can vary in relation to the international workforce policy of Turkey. Factors that affect requirements include the mobility of the international labour force, regional developments, developments regarding employment and work fields, economic and industry-specific periodic changes, bilateral economic

and diplomatic relations with workers' home countries, international treaties and bilateral treaties to which Turkey is a party, public policy and public security.

A one-year general work permit can be obtained by foreigners on their first application. A foreign employee must be working in a particular workplace, public body, agency or specific position in other workplaces of such entities operating in the same sectors. Foreign employees and employers in Turkey must make online applications to the Ministry of Labour and Social Security along with the necessary documents. Along with the application form and other supporting documentation, employers are required to submit a statement explaining the reason behind the hiring of the applicant instead of a Turkish national; the applicant's unique skills and qualities must be expressed in this statement.

At the workplace for which a work permit is requested, at least five persons who are citizens of the Republic of Turkey must be employed for each non-national employee. Furthermore, the paid-in capital of the workplace must be at least 100,000 liras or the lowest figure for its gross sales amount must be equal to 800,000 liras or its export amount in the last year must be at least US\$250,000. The salary amount, which is declared by the employer to be paid to the foreigner, must be at a level that complies with the position and competence of the foreigner. These criteria must be fulfilled before the work permit application is granted. Foreign workers must apply for renewal of their work permits within a 60-day period before the expiration of their permits.

Foreigners who have the long-term residence permit or minimum eight years of prior general work permits can file an application for a permanent work permit (also known as the turquoise card). An independent work permit is given for a definite duration based on a foreigner's level of education, professional experience, contribution to science and technology, the effect on economy and employment through his or her investments and activities in Turkey.

### 13 What restrictions exist on the importation of project equipment?

There are no major restrictions on the importation of project equipment. Turkey's Free Trade Agreements with an extensive list of countries also eases the importation of such equipment. Nevertheless, there are certain restrictions that apply to the purchase of used equipment from abroad.

### 14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Foreign direct investments will not be expropriated or nationalised, except for public interest and upon compensation by due process of law. In practice, it is extremely rare for such expropriation or nationalisation to occur.

### Fiscal treatment of foreign investment

#### 15 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Because foreign investors and domestic investors are treated equally, no special tax or other types of incentives apply exclusively to foreign investors.

With respect to foreign loans, unless the lender is a regulated financial institution, certain taxes (eg, withholding, VAT, stamp duty) not applicable to domestic loans will be applicable.

### Government authorities

#### 16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The Energy Market Regulatory Authority (EMRA) regulates the energy sector including petroleum, electricity, natural gas, and LPG; the Information and Communication Technologies Authority (ICTA) regulates the telecommunications industry. These government authorities

### Update and trends

Turkey's development of its energy infrastructure is a major trend to watch. Pipe laying for the \$12.7 billion Turkstream gas pipeline between Turkey and Russia began in May 2017. Operations of the pipeline are anticipated to commence in 2019, with one of the pipes serving the Turkish domestic market. Meanwhile, the new Trans-Anatolian pipeline, which is due to open next year, will connect Turkey with Azerbaijan's major BP-operated Shah Deniz gas field. Last year, Turkey opened its first liquefied natural gas terminal at the Aegean port of Aliaga to process imported natural gas. It is reported that at least two more terminals are planned as part of the project. Rosatom is leading the US\$20 billion Akkuyu nuclear power station project in southern Turkey. This first Turkish nuclear plant project is expected to commence construction in 2018, with electricity production to be achieved in 2023. We would expect these projects, among others, to rely to a significant extent on project finance.

grant licences, regulate companies, monitor market performance, set up regulations and regulate compliance, administer tariffs and provide administrative sanctions in case of a violation.

The telecommunications sector has been privatised. In the energy sector, there is still widespread state ownership, but the overall state policy is towards the privatisation of this sector as well.

For several projects types, such as construction, transportation and mining there are a number of project-related bodies including the following:

- the Ministry of Agriculture;
- the Ministry of Environment;
- the Ministry of Health;
- the Ministry of Industry;
- the Ministry of the Interior;
- the Ministry of Public Finance;
- the Ministry of Public Works and Settlement;
- the Ministry of Transport; and
- the State Planning Organisation of the Prime Ministry.

Each of these listed bodies handles various types of matters that could arise in projects such as financial, regulatory, privatisation and PPP issues in accordance with their respective jurisdiction and mandate. Depending on the nature of the project or issue at hand, there are several responsible bodies of regulations that could have jurisdiction or be applicable in each instance.

### Regulation of natural resources

#### 17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

According to the Turkish Mining Law, minerals are under the sovereignty and disposition of the state; they are not under the proprietorship of the landowners of the land where they exist. The state has the exclusive right to explore and operate facilities related to minerals. It may transfer those rights to a real person or legal entity for a given period, subject to payment of royalties and compliance with all relevant licensing requirements. Some sectors are exclusive only to state-owned entities such as mining and processing of borax, uranium and thorium.

#### 18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

As mentioned in question 17, the licence holder must pay an annual royalty to the government for extracted minerals. The royalty is based on the annual total sales of raw ore (pithead sale price) and varies depending on the type of mineral. A licence holder's earnings obtained through mining operations are subject to income and corporate tax, however, certain tax incentives are provided for mining activities.

#### 19 What restrictions, fees or taxes exist on the export of natural resources?

There are no special restrictions, fees or taxes exist on the export of natural resources.

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**Legal issues of general application**


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**20 What government approvals are required for typical project finance transactions? What fees and other charges apply?**

While loan transactions are in principle not subject to approvals and capital markets transactions subject to customary registration (or exemption from registration) requirements, in practice, governmental authorities play a crucial role in providing required approvals, authorisations and permits in projects requiring project finance. Depending on the sector, the magnitude of the project and field of operation, concession agreements will be signed and necessary permits obtained. For example, if there is a project in the energy sector, EMRA and the Ministry of Energy and Natural Resources will be the competent authorities. Fees for relevant approvals differ based on the authority involved, sector and project size.

**21 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?**

The registration of encumbrances over real estate is necessary for perfection and binding against a counterparty and third parties. Depending on the project, relevant financing and project documents may need to be submitted to competent authorities for information, notification or approval. Some submission requirements may arise in relation to, inter alia, tax matters, construction permits, environmental issues, and price and tariff concessions.

**22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?**

Turkey ratified both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the ICSID Convention. As a result, foreign arbitration awards are recognised and enforceable in Turkey. Further, Turkey has executed bilateral investment treaties with 75 countries. The Istanbul Arbitration Centre, Turkey's first international arbitration centre, was established in 2015. The Centre offers innovative and speedy resolutions of domestic and international disputes for competitive fees using rules which conform to accepted international practices.

The following types of disputes are not arbitrable:

- in rem rights of immovable properties located in Turkey;
- criminal law cases;
- family law cases;
- bankruptcy law issues.

It should also be noted that disputes related to employment generally cannot be subject to the exclusive jurisdiction of arbitration tribunals because such disputes are normally subject to the jurisdiction of Turkish courts.

The types of disputes subject to automatic domestic arbitration are as follows:

- disputes between the administrations and municipalities;
- disputes relating to securities exchange; and
- labour law disputes arising from collective bargaining.

**23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?**

Project agreements are typically governed by Turkish or Swiss law. However, in commercial agreements and finance documents, English law is widely used. Parties may freely agree to choose any other law provided that the applicable law is not in conflict with public policy and binding provisions of Turkish law. Property, tax, labour, environmental law consists of mandatory rules, and in these cases, Turkish law will be exclusively authorised. For example, the applicable law on immovable properties is exclusively Turkish law.

**24 Is submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?**

The law explicitly designated by the parties in a contract governs the contractual obligations, and the parties may agree on the jurisdiction of a court of a foreign state (or, similarly, arbitration) in a dispute that contains a foreign element and arises from contractual obligations. Enforcement of court decrees rendered by foreign courts in the course of civil lawsuits in Turkey that are final pursuant to the law of that foreign state shall be subject to the enforcement order of the competent Turkish court.

Waivers of immunity are normally effective and enforceable for private law matters.

**25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?**

See questions 16 and 20.

**26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?**

They are typically structured as joint stock companies. The principal sources of financing available to these companies are bank loans and bonds, in addition to capital.

**27 Has PPP-enabling legislation been enacted and, if so, at what level of government and its legislation industry-specific?**

With Turkey's position as a developing economy, project finance under the build-operate-own (BOO), the build-operate-transfer (BOT) and the transfer-of-operating-rights (TOR) schemes have been used widely to fund public projects without state funds. Under Turkish law, BOT agreements are considered to be concession agreements that enable private sector investors to carry out public projects. However, there is

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no general code for PPPs in Turkey because there are various methods for the operation of public services. The authorised entity for approving BOT projects is the Higher Planning Council, and a formal tender is required for this process.

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**28 What, if any, are the practical and legal limitations on PPP transactions?**

There is no single unified piece of legislation, no single ministry or department that deals with such projects in general. There are many project bodies along with highly fragmented PPP legislation. However, the overall state policy for infrastructure projects in Turkey is reflected in the trend towards the privatisation of these sectors. Privatisation policies are supported by Law No. 3996 (Law on Build-Operate-Transfer Projects), Law No. 4046 (Law on Privatisation), Law No. 4734 (Public Procurement Code) and Law No. 4735 (Public Procurement Agreements Code). One must primarily comply with the particular

procurement or PPP regulations applicable to relevant activity. For example, some PPPs are undertaken pursuant to Law No. 4734, while others may fall under the health ministry's or other relevant ministries' regulations. Also, BOT projects are governed by Law No. 3996. The authorised entity for approving BOT projects is the Higher Planning Council, and a formal tender is required for this process as well.

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**29 What have been the most significant PPP transactions completed to date in your jurisdiction?**

The third Istanbul airport (€6 billion) in Turkey is one of the largest PPP projects closed in Europe in recent years. Some significant PPP activity has recently taken place in the healthcare sector, including the Etilik-Ankara health campus and the Bilkent health campus (€2.2 billion). Forty-eight new hospital projects including health campuses, city hospitals and state hospitals will be built in 30 cities.



## Getting the Deal Through

Acquisition Finance  
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THE QUEEN'S AWARDS  
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