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THE IMPROVEMENT OF PUBLIC PRIVATE PARTNERSHIP IN THE TURKISH HEALTH LAW

Araştırma

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ABSTRACT

The public–private partnership system has been established in the form of city hospitals for the provision of health services effectively and extensively in line with the needs of modern times. However, there still remains a need for centralised PPP management, familiar with all dimensions of PPP issues that benefit the public while at the same time attracting putative investors for the sustainability of the model.

Objective: This study examines the latest legal situation of the Public Private Partnership in the health sector in Turkey in the light of its historical development and proposes necessary recommendations for a sustainable system for all stakeholders.

Method: The legislation adopted so far in the health sector in Turkey has been reviewed within the scope of judicial decisions. In terms of the relevant law that came into force, the deficiencies of the system on the legal basis were revealed and comparisons were made with other foreign local legislation and international texts.

Findings: It has been determined that public disclosure/transparency is inevitable for the legitimacy of the system, especially in the Public-Private Partnership model in health sector, which needs to be planned considering the public interest. Thus, it is foreseen that the interests of both putative investors and the public can be balanced. As a result, the sustainability of the system can be ensured.

Originality: This article does not only examine the development of the national legislation in its historical scene and the latest legal texts in force, but also examines the works of international organizations that deal with the Public Private Partnership model by comparing other national legislation and practices. Thus, the result puts before us a system that has been tested or is applicable at a global level.

Keywords: Public–Private Partnership, Health PPPs, Turkish PPP Law, City Hospitals, Turkey, Turkish PPPs, Debt Assumption, Settlement of Disputes, International Arbitration, Turkish PPP Projects

JEL Classification: K20, K41

TÜRK SAĞLIK HUKUKUNDA KAMU ÖZEL ORTAKLIĞININ GELİŞİMİ

ÖZET

Türkiye'de özellikle sağlık hizmetlerinin etkin, yaygın ve çağın gereklerine uygun bir şekilde şehir hastaneleri ekseninde sunulması amacıyla kamu-özel ortaklığı sistemi uygulamaya konulmuştur. Ancak, modelin sürdürülebilirliği için bir taraftan kamu yararını diğer taraftan potansiyel yatırımcının haklarını da gözeten ve tüm konulara hâkim bir merkezi KÖİ yönetiminin kurulması ihtiyacı da ortadadır.

Amaç: Bu çalışma, Türkiye'de Kamu Özel Ortaklığının sağlık sektöründeki tarihi gelişimi ışığında gelmiş olduğu son hukuki durumu irdelemekte ve tüm paydaşlar için sürdürülebilir bir sistem için gerekli önerilerde bulunmaktadır.

Yöntem: Türkiye'deki sağlık sektöründe bugüne kadar kabul edilmiş olan mevzuat yargı kararları kapsamında incelenmiştir. Son olarak yürürlüğe giren ilgili kanun bakımından ise, sistemin hukuksal bazdaki eksiklikleri ortaya konularak, yabancı diğer yerel mevzuat ve uluslararası metinlerle karşılaştırmalar yapılmıştır.

Bulgular: Kamu yararının da gözetilerek planlanması gerekli olan sağlıktaki Kamu Özel Ortaklığı modelinde, özellikle kamunun aydınlatılmasının/şeffaflığın sistemin meşruiyeti için gerekli olduğu tespit edilmiştir. Böylelikle hem yatırımcıların hem de kamunun menfaatlerinin dengelenebileceği öngörülmüştür. Bunun sonucu olarak da sistemin sürdürülebilirliği sağlanabilecektir.

Özgünlük: Çalışma sadece ulusal mevzuatın tarih içindeki gelişimi ve yürürlükteki son hukuki metinler üzerinden hareket etmemekte, özellikle Kamu Özel Ortaklığı modelini ele alan uluslararası kuruluşların diğer ulusal mevzuat ve uygulamaları karşılaştıran çalışmalarını da incelemektedir. Böylece, varılan sonuç küresel düzeyde test edilmiş ya da uygulanabilir bir sistemi önümüze koymaktadır.

Anahtar Kelimeler: Kamu Özel İş Birliği, KÖİ hukuku, Sağlıkta KÖİ, Şehir Hastaneleri, Türkiye, Borç Yüklenimi, Uyuşmazlıkların Çözümü, Uluslararası Tahkim, Türkiye KÖİ Projeleri

JEL Sınıflaması: K20, K41

OUTLOOK

In a public-private partnership (PPP), one or more private sector companies undertake substantial financial, technical, and operational risk to deliver a public project that is funded and operated through a contract partnership with the government. In fact, there is no internationally recognized definition of PPP. The concept is sometimes used to describe any form of association of cooperation between the public and private sectors in order to attain a common goal (APMG 2016, p.11). Therefore, it is preferable to speak of different types of PPP concept. Their designation may vary according to the content, style and legal background in relevant jurisdictions.

The main types may be cited as follows: DBFOM (Design, Build, Finance, Operate and Maintain), DBFM (Design, Build Finance and Maintain), DCMF (Design, Construction, Maintain and Finance), DBFO (Design, Build, Finance and Operate), BOT (Build-Operate-Transfer), BOO (Build-Own-Operate), BO (Build-Operate), BTO (Build-to-Order), ROT (Rehabilitate-Operate-Transfer), TOR (Transfer of Operating Rights), PFI (Private Finance Initiative), BLT (Build-Lease-Transfer). The list may of course be extended according to the type of structure of a specific project in hand. One may also differentiate as user-pays or government-pays PPPs. Another criterion to distinguish PPPs is to make reference to the past use of the site, such as *greenfield projects* (PPPs that include B (Build) functions), *brownfield projects* (infrastructure assets that existed prior to the bid) and *yellowfield projects* (PPPs that involve significant renewal, refurbishment or a substantial expansion of the existing infrastructure)(APMG 2016, p.49).

There are two main drivers for PPPs: (i) enabling the public sector to attract expertise and efficiency that the private sector can bring to services and facilities that are traditionally delivered by the public sector; and (ii) an "off balance sheet" method of financing new or refurbished public sector assets. This may also have other positive effects on the internationalization of trade to the benefit of both countries and international markets.

To improve the environment for PPP projects, the State's provision of a favourable investment climate in the following areas is essential: (i) Legal, (ii) Economic and (iii) Political. These three aspects are also considered as risk factors for potential private sector investors.

I. COMPARATIVE FRAMEWORK

A. International Arrangements

As PPPs involve large investment on infrastructure projects and also a means of capital flow from developed economies to developing ones, they attract the close attention of the international multilateral

organizations, OECD, UNCITRAL, EBRD and EPEC(APMG 2016, p.49).[1]

In the years of 1999 and 2000, OECD published a study entitled "Basic Elements of a Law on Concession Agreement" authored by a group of experts from UNCITRAL, OECD, EBRD, the British Export Credit Guarantee Agency and the Freshfields law offices, as well as eight Eurasian countries.[2] This is in the form of a guide rather than a model law. It provides for Basic Elements to be considered at national legislation level that are designed to provide a source for the countries in adopting their laws: (i) to propose a starting point for the negotiation of concession agreements; (ii) to establish a basis for advising transition economy countries on concession agreements; (iii) to help improve the harmonization of concession laws with relevant best practice and international standards; and (iv) to promote a common method and language for concession agreements. The OECD Guide is a short, but a clearly drafted document compared to UNCITRAL's lengthy work on the matter.

Following the OECD Guide, UNCITRAL circulated first a guide and then a model law: the "Legislative Guide on Privately Financed Infrastructure Project" (the PFIP Guide), dated 2001, followed by the "Model Legislative Provisions on Privately Financed Infrastructure Project" (the PFIP Model), dated 2004.[3]

The aim of the PFIP Guide is to facilitate the establishment of a legal basis favourable to private investments in public infrastructure projects. It contains recommendations for possible legislative acts in order to provide a feasible environment for private investment to enter the public infrastructure. It is suggested that this can be done by keeping a balance between the desire to help and incentivise private investors and public interests of the host country. The PFIP Guide encompasses recommended legislative principles called "*legislative recommendations*" that are aimed at assisting in founding a legislative framework. The drafters intended that the legislatures of host countries should take those recommendations into account when preparing new laws or reconsidering the existing legislation. However, the PFIP Guide does not claim to be a model law. Therefore, the PFIP Guide was followed by the model provisions of the UNCITRAL, referred as "the PFIP Model".

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1 The European PPP Expertise Centre (EPEC) is a joint initiative of the European Union (EU), the European Investment Bank (EIB) and the member states of the EU.

2 As updated at https://ppp.worldbank.org/public-private-partnership/library/oecd-basic-elements-law-concession-agreements last accessed 10 December 2019.

3 See the PFIP Guide at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pfip-e.pdf ; and the PFIP Model at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90621_ebook.pdf last accessed 10 December 2019. These two were updated by the UNCITRAL Model on Legislative Provisions on Public-Private Partnerships at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11011_ebook_final.pdf .

The PFIP Model includes not only model provisions, but also a set of general recommended principles as touched upon above. Son states that Model Provisions do not constitute a model law (SON 2012 June). The intention is again to assist the host country in establishing a legislative framework for a better balance between the private investor and the host country where the public infrastructure is to be based. It also comprises notes that offer an analytical explanation of the financial, regulatory, legal, policy and other issues involved in the matter. The PFIP Model deals with the most salient features of drafting legislation in the area of privately financed infrastructure projects. It sets down specific model provisions, together with legislative recommendations and notes, which are advised to be read in combination.[4]

The PFIP Model provisions do not conflict with other branches of law, although those areas of laws such as promotion and protection of investment, property law, security interests, rules and procedures of taking private property, contract law, tax law, environment law, government contracts and administrative law should be borne in mind too.

UNCITRAL's PFIP Guide and PFIP Model had considerable influence on those principles and guidelines subsequently drafted by other international organizations such as EBRD and OECD. EBRD believing that a legislation as proposed in the direction of both the PFIP Guide and the PFIP Model needs to comply with the core principles of international standards and best practice. This need has driven the EBRD to adopt a set of core principles for a modern concession law. The core principles stand as results rather than as processes to be followed. "Core Principles for a Modern Concession Law" (MCL) first appeared on EBRD's site in 2005. The publication of the Core Principles supported the EBRD's initiative towards law reform projects in the area of concessions/PPPs. The main objectives are to promote clearness, fairness, stability, predictability and flexibility in order to protect both investors and the public authority from unfair treatment and abuse. Following the core principles, the EBRD legal transition team prepared and published "EBRD Core Principles for a Modern Concessions Law – Selection and Justification of Principles". The aim of this document is to explain the meaning of the Core Principles and the basis on which those principles were structured (EBRD 2006).

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[4] For instance, the Model Clause on dispute resolution reads:
"V. Settlement of disputes
Model provision 49. Disputes between the contracting authority and the concessionaire (see the *Legislative Guide*, recommendation 69 and chap. VI, paras. 3-41)
Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.[47]
(Note 47) The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of privately financed infrastructure projects."
As seen, there is a reference to relevant legislative recommendation in the PFIP Guide. To combine it all, the corresponding legislative recommendation 69 reads: "The contracting authority should be free to agree to dispute settlement mechanisms regarded by the parties as best suited to the needs of the project." In the referred ch. VI paras 3-41 there are some 14 pages explaining the issues that may be involved in the settlement of disputes between the host state authority and the private investor concessionaire.

Another document in this regard is the work carried out by the European PPP Expertise Centre (EPEC) as a joint initiative of the EIB, the European Commission, the EU Member States and Candidate Countries for the EU. It is called the "EPEC Guide to Guidance". The Guide to Guidance recommends that public procurement authorities should consider the use of PPP arrangements available in the market. Following the positive feedback from the industry, EPEC turned the Guide into an interactive web tool rebranded as the "EPEC PPP Guide", to be regularly updated. It is structured to help public authorities prepare, launch and implement PPP projects in a better environment by way of the Guide's guidance to understanding the key issues and steps involved in the execution of PPP arrangements.[5]

EU law has no specific legislation governing PPPs. However, public procurement and concession legislation cover PPPs as one method of public sector procurement. There are two procurement directives. The first is the *Public Sector Directive* (later becoming the *Public Procurement Directive*), *which* sets out provisions defining the procedures for the award of work contracts, public supply contracts and public service contracts.[6] The second is the *Utilities Directive* that prescribes awarding procedures for the sectors of water, energy, transport and postal services.[7] *The Concession Directive* may be cited here too.[8] The European Parliament and Council Regulation 1303/2013 was adopted to govern the use of European funds, commonly referred to as ESI Funds (European Structure and Investment Funds), i.e. in PPP projects.[9] Despite this legislation, one cannot conclude that the EU has satisfactory legislation covering PPPs in real terms. PPP arrangements by nature involve a long-term contract and are more complex than ordinary public procurement. Thus, certain countries within the EU proposed that specific PPP legislation should be put in place.[10]

B. National Jurisdictions

As regards national legislations, both mainstream jurisdictions, i.e. common law and civil law, have divergent approaches to the various issues of PPPs. As PPPs by nature are a public service, so they are governed by administrative law principles in civil law countries. Due to public interest, the public

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5 http://www.eib.org/epec/g2g/index.htm last accessed 12 December 2019.

6 (2004/18/EC) Official Journal of the European Union (OJEU) , L 134 20.04.2004, 114. This Directive was repealed by the Directive (2014/24/EU) with effect from 18 April 2016. OJEU 28.03.2014 L 94, 65.

7 (2004/17/EC) OJEU, L 134 20.04.2004 p.1. This Directive was repealed by the Directive (2014/25/EU) with effect from 18 April 2016. OJEU 28.03.2014 L 94, 243.

8 Directive (2014/23/EU) OJEU 28.03.2014 L94, 1.

9 Regulation EU 1303/2013 20.12.2013 L 347, 340.

10 See Commission (EC), Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions (Green Paper), COM (2004) 327 Final at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1586176331838&uri=CELEX:52004AE1440; European Parliament (EU), Resolution on Public-Private Partnerships and Community Law on Public Procurement and Concessions (2006/2043(INI)) at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52006IP0462 26 October 2006; Concessions (Green Paper), COM; European Commission Guidelines for Successful Public-Private Partnership, 2003 at https://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf last accessed 12 December 2019.

authority has unilateral rights, e.g. on early termination of the contract, the right to request changes to the contract etc. Since UK, US and Ireland are common law jurisdictions, common law is the basis for their commercial transactions. Common law jurisdictions thus have a more flexible approach to PPP structure.

In certain countries, specific laws have been enacted: for example, in one of the pioneering developing countries, Brazil(Freire et al 2020). The first specific PPP legislation in the area goes back to 2004. It was introduced as a response to the need to attract private investment in infrastructure projects in the areas of water and sewage, health and hospitals, administrative facilities and logistics, including roads, urban mobility, undergrounds and transportation in general. A specific form of concession has been developed in contrast to the ordinary concessions, whereby the economic–financial feasibility of the project is structured exclusively through tariffs on users of the granted activities (services).

PPPs are rather new in Japan. Concession projects started bidding processes in 2014 for several airports. The Act on the Promotion of Private Finance Initiatives (the PFI Act) was adopted in 1999 to regulate most PPP projects, referred to as private finance initiatives (PFIs). It was revised in 2011, 2013 and 2015 to open the way for the use of concessions and to expand user-pays projects. The Cabinet Office published guidelines in 2015 for PFI/PPPs, for local government to make laws following those guidelines. As a result, 740 PFI projects had been recorded as of 31 March 2019(Kikuchi and Wakasa 2020).

In France, the PPP legal framework was restructured following the 2014 European directives regarding public procurements and concession agreements. There are two main types of PPPs there: concession agreements aim to implement major infrastructure projects; and partnership contracts follow the style of PFI contracts, both being administrative contracts under French law. The two differ in reference to their payment terms as well: in the partnership contract, the grantor public authority pays a rent to the private investor; whereas in the case of concession agreements, it is the users of the service who pay compensation to the concessionaire. Two Ordinances were adopted to transform the EU Directives into French law. First, regarding partnership contracts, Ordinance No. 2015-899 dated 23 July provided for a new legal framework for procurement contracts and designated the partnership contract as a specific type of public procurement contract. Second, concession agreements were regulated by Ordinance No. 2016-65 of 29 January; the reshaping intended to simplify and unify the existing legislation that applied to PPP contracts, and this new single legal framework applicable to concession agreements came into force on 1 April 2016, replacing the previous legal provisions. Later in 2018 a Public Procurement and Concession Agreements Code was adopted and came into force on 1 April 2019(Vaissier et al 2020).

In the US, PPPs are limited or unavailable in most states, due to lack of legislation. Thus, to accelerate enactments throughout the US, the Bipartisan Policy Center published a model law in 2015 to enable PPPs. One early success was the Water Resources Reform and Development Act (WIFIA) of 2014. The

Transportation Infrastructure Finance and Innovation Act (TIFIA) was also enacted in 2014, prescribing long-term financing tools to highway and transit projects that required dedicated revenue sources. There are other laws underway in the Senate. There is not one shape to PPP law, but rather in various sectors there are corresponding arrangements. State laws vary in how their legislation enables or restricts PPP. A survey by the National Council for Public-Private Partnerships showed that a total of 36 states and the District of Columbia have introduced legislation allowing some form of PPPs. The Bipartisan Policy Centre published a model law in 2015 so that states who wish to pass laws enabling the use of PPPs for infrastructure projects can use this tool to draft such legislation(Mirchandani and Jacobo 2020).[11]

In Ireland, the State Authorities (Public Private Partnership Arrangements) Act of 2002 constitutes the legislative basis for the participation of Irish state authorities in PPP projects. The Act clears any ambiguities that may be found in other jurisdictions in terms of the capacity of the public authorities in the *vires* doctrine. Thus, it provides for the powers of the state authorities to enter into PPPs, even to form a joint venture with private parties. In the majority of cases, the public authority keeps the ownership and grants the PPP company a licence to operate. At the termination of the agreement the assets remain the property of the public authority (Parliamentary Budget Office 2018). This is still not considered a fully-fledged PPP legislation as adopted in certain other jurisdictions.

Australia is among the countries that do not have PPP-specific laws. Nevertheless, PPPs have been in operation for almost 30 years. Victoria was a front runner and developed a plan based on the UK's PFI soon after 2000. The federal government introduced the National PPP Policy and Guidelines to harmonise all approaches at state level. In some states the National PPP Policy is supplemented by specific guidelines setting out state-specific requirements of PPPs, e.g. for New South Wales (Griffiths et al 2020).

Last but not least, despite the UK boasting a vast number of projects labelled as PPP, since the early days of PPPs no special legislation has yet been introduced. Nevertheless, the UK has implemented one of the most widespread and successful programmes of PPPs so far among all countries. The first PPP projects were commenced in the early 1990s, in most cases branded as PFI. So, the UK is one of the most mature markets around the world and has always been at the forefront of such developments. Therefore, the number and value of closed PPP projects are at the top of international records. All over the UK there has been substantial delegation to local or municipal level. It follows that local public authorities have an important role in the implementation of PPPs (EPEC 2012; Richards net al 2020). As of March 2018,

[11] Public-Private Partnership (P3) Model State legislation, 17 December 2015 at https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-P3-Enabling-Model-Legislation.pdf last accessed 8 March 2020.

700 PFI and PF2 (the updated PFI model) PPP projects have been delivered across a wide range of sectors (UK Government Report 2018).

II. THE TURKISH LEGAL FRAMEWORK

A. PPPs in Turkey

1. The Constitutional Basis

It is key to any investment, partnership and contractual relationship to assess the particular country's legal framework governing such investment, relationships and contracts.

Turkey's history of enactment of PPPs (Boz 2013;Tansuğ 2001; Orak 2006)[12] goes back even to Ottoman times, despite their primitive forms. One of the first examples in the chronological table below[13] was the Law on Concessions for Public Benefit, dated 1910 (*Menafii Umumiyeye Müteallik İmtiyazat Hakkında Kanun*). These government contracts were found to be of concessionary nature and thus considered a purely administrative law issue. Therefore, it was not possible, prior to the change in the Constitution, for such PPP contracts to be separated from the sphere of administrative law.

At the time, the high administrative court of Turkey, the equivalent of the Council of State (the "*Danıştay*"), had the absolute authority to make a concession contract valid. According to the then Constitution, Article 155, the *Danıştay* had the authority to "approve" any concession contract that come into force. Additionally, the law on *Danıştay* would also indicate that the *Danıştay* was the appropriate court to hear disputes arising out of concession contracts as a first-tier court. Moreover, the law on administrative procedure had a provision stating that cases involving concession contract disputes were listed as administrative law cases.

Under the circumstances, it was highly unlikely to suggest that any concessionary issue could be considered out of the scope of administrative law, although there were certain attempts to carve out some PPP contracts, such as BOTs (Build Operate Transfers), by including a provision in the BOT Law. In 1994 the legislature adopted the BOT Law (Law on the Procurement of Certain Investments and Services under the Build Operate Transfer Model)[14] such that any BOT agreement or contract under the law is a

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[12] The name PPP has various versions as suggested in Turkish doctrine, such as PPC (Public Private Cooperation), PPSC (Public Private Sector Cooperation), PPSP (Public Private Sector Partnership), PPPM (Public Private partnership Model).

[13] See III A 3supra..

[14] Prior to this attempt, there had been a change in the law authorising the Council of Ministers for privatisation procedures where international arbitration included as a dispute resolution method in Article 3/f. The law numbered 3987 and dated 5.5.1994 at https://www.resmigazete.gov.tr/arsiv/21931_1.pdf last accessed 12 March 2020. This law was annulled by the Constitutional Court as being against the Constitution. For the decision dated 7.7.1994 – 1994/45-2 Decision No, see http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/55d9b012-8828-49d2-84d9-c924bd98dba7?excludeGerekce=True&wordsOnly=False last accessed 12 March 2020.

private law contract. The BOT Law also maintained that such an agreement did not constitute a concession.[15] As per the law, an implementation council of ministers issued a decree (the "Decree") with the same provisions.[16] The aim was to make such contracts subject to private law as opposed to administrative law, and thereby have the possibility to choose international arbitration for dispute resolution, as demanded by international investors and finance circles. However, the opposition party brought this attempt before the constitutional court, and the constitutional court annulled this part of the BOT Law in 1995.[17] After the constitutional court annulment, the government introduced another change in the BOT Law that would in essence give effect to the annulled provisions by redefining the part of the Decree that was not subject to the annulment.[18] Once more this amendment was taken to the constitutional court for annulment, and the court annulled the said redefined part of the relevant amendment in 1997.[19] Had the constitutional court not annulled the relevant parts of the BOT Law, it would have been possible for any disputes thereunder to be defined as private law disputes and be considered within the jurisdiction of commercial courts.

It was clear for the government at the time that the only way to have a modern PPP law as part of the private/civil law was to amend the Constitution. In 1999 the Constitution underwent an amendment procedure for certain provisions in order to ensure this, i.e. that certain contracts of a concessionary nature, notably PPPs, could become private law contracts. To this end, a paragraph was added to Article 47 titled "Nationalisation and Privatisation[20]" which reads: "*Those investments and services which are carried out by the State, State economic enterprises and other public entities which could be performed by or delegated to real persons or legal entities through private law contracts are to be determined by law*." (Emphasis added.) This new provision explicitly stated that any contract of a concessionary nature (including PPPs) can be made subject to private law. PPPs are also referred to as a "limited concession" by some authors (Karahanoğulları 2011). However, the legislative tool to do so is indicated as "law" in the hierarchy of norms[21] that is the one that should be adopted or passed by the Turkish Parliament. The

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15 Article 5. For the original form of the BOT Law, see *Official Gazette of Turkey* (OG) 13.6.1994 No 21959 at https://www.resmigazete.gov.tr/arsiv/21959.pdf last accessed 12 March 2020.

16 Council of Ministers Decree 1994/5907, OG 1.10.1995 No 22068 at https://www.resmigazete.gov.tr/arsiv/22068.pdf last accessed 12 March 2020.

17 Constitutional Court (*Anayasa Mahkemesi*) Decision dated 28.06.1995 Decision No 1995/23. OG 20.03.1996 No 22586 at http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/e17f7052-45cc-4b4b-9c34-a46e795e5724?excludeGerekce=False&wordsOnly=False last accessed 12 March 2020.

18 The change to the amendment referred to Article 11. For the amending law No 4180 dated 1996 see OG 4.9.1996 No 22747 at https://www.resmigazete.gov.tr/arsiv/22747.pdf last accessed 12 March 2020.

19 Constitutional Court (*Anayasa Mahkemesi*) Decision dated 26.03.1997 Decision No 1997/40. OG 28.06.2001 No 24446 at http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/206ed189-2343-49ee-9d5c-5e88d72bfba9?excludeGerekce=False&wordsOnly=False last accessed 12 March 2020.

20 This second word "*privatisation*" in the title was added by the amendment.

21 Under Turkish law, the hierarchy of norms was as follows: 1. Constitution ("*Anayasa*"), 2. International Treaties relating to Basic Rights and Freedoms ("*Temel Hak ve Hürriyetlere İlişkin Milletlerarası Antlaşma*") 3. Law ("*Kanun*")/Decree Having the Force of Law ("*KHK*")/ International Treay (*Milletlerarası Antlaşma*), 4.

Constitution with this new change made clear the principle of legality. In other words, any such legislation must be in the form of "law" which can only be created by parliament.

By the same token, Article 7 of the Constitution lays down that the authority to legislate belongs to the Grand National Assembly of Turkey (the "Turkish Parliament") on behalf of the Turkish nation. This authority cannot be transferred. Therefore, it is imperative that any such authorization to regulate a matter in the realm of Article 47 should emanate from a "*Law*" as defined by the Constitution. It follows from the foregoing that any authorization to become a certain concessionary kind of contract is a private law issue and must be in the form of a law. It cannot be determined by a regulation or by law unless such authority is clearly granted in law and delegated by law.

Having the possibility of a certain concessionary type of contract as a private law matter means that dispute resolution can no longer be an administrative law issue. Civil law dispute resolution has to come into play. When there is a dispute between a relevant public authority and private party investor or sponsor, it becomes an issue for the commercial courts as opposed to the administrative courts or *Danıştay*.

A change in Article 155 was also introduced. The power of *Danıştay* in approving concession contracts was downgraded to "*rendering its opinion* in two months" (emphasis added). It goes without saying that "rendering opinion" is not of a binding nature, considering that the earlier version was "approval of concession contracts".

In addition to the above stated changes, one important issue still remained to be addressed: that is the settlement of disputes by *arbitration*. It was not possible until the following change to disputes arising out of concessionary contracts that PPPs could be resolved by arbitration. Administrative courts, mainly *Danıştay*, had the exclusive competence. International investment and finance circles would continuously stress this issue. There were even certain projects that could not see daylight due to not having arbitration for the settlement of disputes.

The legislature also adopted certain other changes in the Constitution to address this question in an explicit manner. Article 125 paragraph 1 would simply state that any and all acts and actions of the administration are subject to judicial review. The second and third sentences were inserted in the

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Regulation ("*Tüzük*"), 5. By Law ("*Yönetmelik*"). This pyramid of norms was restructured with the amendment of the Constitution dated 21.1.2017 and published in OG 11.02.2017 No 29976 at https://www.resmigazete.gov.tr/eskiler/2017/02/20170211-1.htm last accessed 12 March 2020. It has become as follows: 1. Constitution ("*Anayasa*"), 2. International Treaties relating to Basic Rights and Freedoms ("*Temel hak ve Hürriyetlere İlişkin Milletlerarası Antlaşma*") 3. Law ("*Kanun*")/Presidential Decree at state of emergency times ("*Cumhurbaşkanlığı Kararnamesi*")/ International Treaty (*Milletlerarası Antlaşma*), 4. Presidential Decree in relation to Executive ("*Yürütmeye İlişkin Cumhurbaşkanlığı Kararnamesi*"), 5. By Law ("*Yönetmelik*"). For an English translation of the Constitution, see http://www.lawsturkey.com/law/constitution-of-turkey last accessed 12 March 2020.

paragraph, which state that the settlement of disputes arising from concession contracts relating to public services can be resolved by arbitration. However, international arbitration may only be resorted to for disputes involving a foreign element. The adoption of these provisions paved the way for arbitration as a means of resolving disputes emanating from PPPs. We should also emphasize that the amendment presupposes that a contract of a concessionary nature does not have to fall into the private law sphere in order to contain an arbitration clause for settlement of disputes arising thereunder. However, if there is a law on a specific PPP area indicating that those contracts are of a private law nature, then it is already assumed *ipso iure* that arbitration is an alternative to private law dispute resolution, i.e. the venue of civil courts including commercial courts. What the change brought to the table is that even disputes under concession contracts can be the subject of arbitration if so agreed by the parties thereto.

In pursuance of the above changes in the Constitution, the Turkish Parliament passed implementing legislation. The relevant amendments were made both to the Law on *Danıştay* and to the Law on Administrative Procedure. In the former, the exclusive competence of *Danıştay* for concession contracts is limited to cases for which no arbitration has been agreed.[22] In the latter, an exception was made to the definition of administrative cases of concession contracts. It was laid down that if arbitration is chosen for settlement of disputes under a concession contract, such a case would no longer be considered as an administrative case.[23]

In the private law sphere, Parliament has adopted a law which regulates the main principles for resorting to arbitration for disputes arising out of concession contracts in relation to public services. There, for the first time in Turkish private international law, the definition of "foreign element" appeared in the legislation.[24] Thereafter, International Arbitration Law("IAL") has been adopted regulating the matter of international arbitration in Turkey for the first time.[25] It should be noted here that prior to the change in Constitution, Turkey had already acceded to the Washington Convention on the Settlement of International Investment Disputes between States and National of Other States (the "Washington

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[22] Article 24/1/last paragraph. The Law on Council of State ("*Danıştay Kanunu*") in OG 20.01.1982 No 1758 at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.2575.pdf where the amendments can be traced. Last accessed 12 March 2020. For an English translation see http://www.lawsturkey.com/law/council-of-state-act-2575 last accessed 12 March 2020.

[23] Article 2/1/c. The Law on Administrative Procedural Law ("*İdari Yargılama Usulü Kanunu*") in OG 20.1.1982 No 17580 at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.2577.pdf where the amendments can be traced. Last accessed 12 March 2020. For an English translation of the law, see http://www.lawsturkey.com/law/2577-procedure-of-administrative-justice-act last accessed 12 March 2020.

[24] Article 2/c. The Law on the Principles to be Followed in Resorting to Arbitration for Disputes Arising from Concession Contracts and Charters Relating to Public Services ("*Kamu Hizmetleriyle İlgili Şartlaşma ve Sözleşmelerinden Doğan Uyuşmazlıklarda Tahkim Yoluna Başvurulması Halinde Uyulması Gereken İlkelere Dair Kanun*") in OG 21.01.2000 No 23941 at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4501.pdf last accessed 12 March 2020.

[25] ("*Milletlerarası Tahkim Kanunu*") in OG 5.7.2001 No 24453 at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4686.pdf English translation at http://www.lawsturkey.com/law/international-arbitration-law-4686 last accessed 12 March 2020.

Convention"),[26] to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to the European Convention on International Commercial Arbitration.[27] Moreover, starting from 1965, Turkey has signed numerous bilateral investment treaties where international arbitration, including ICSID arbitration,(Yılmaz 2004 and Yılmaz 2006)[28] has been agreed as one of the dispute settlement mechanisms, i.e. for investment disputes involving concessionary contracts and the like.[29]

To sum up, one can easily acknowledge that the Turkish legal regime for the settlement of disputes involving PPPs is very investor-friendly, in the sense that it adopts the competence of the administrative venue for most cases and places it within the neutral forum of international arbitration. It is presumed that this legal environment will attract in particular foreign investors to take part in PPP projects in Turkey with greater interest.

2. Legal Overview

Turkish legislation in the area of PPP law covers various branches of practice in the field.

In the early stages, Turkey's aim was to expand investment and provide services in the main supply of infrastructure projects for energy and transportation. To this end, two laws were enacted in those specific areas of vital importance for a strong economy and public comfort that also needed considerable investment. The first law came into existence in 1984, titled the "Law on Empowering the Enterprises other than the Turkey Electricity Institution for the Production, Transportation, Distribution and Trade of Electricity". The second law was the "Law on Empowering the Enterprises other than the General Directorate of Highways for the Construction, Maintenance and Operation of Highways", dated 1988. These two laws were pioneers in the field and provided not only the BOT model in the achievement of their aim, but also transferred the operation rights that were already in the hands of the relevant state institutions, in other words privatization(Tan 1992; Akıllı 2013).

Following the relatively limited practices of those two laws, the government had the idea to extend the BOT model to other areas of investment, intending a widespread application. In 1994, the "Law on the Procurement of Certain Investments and Services under Build Operate Transfer Model"[30] was adopted,

[26] For the law of accession in OG 2.6.1988 No 19830 see https://www.resmigazete.gov.tr/arsiv/19830.pdf last accessed 12 March 2020.

[27] For the laws of accession of both conventions in OG 21.5.1991 No 20877 see https://www.resmigazete.gov.tr/arsiv/20877.pdf last accessed 12 March 2020.

[28] ICSID stands for the International Center for Settlement of Investment Disputes established by the Washington Convention. The ICSID or the Center set up for investment disputes between foreign investors and host follows the provisions of the Washington Convention. It provides a kind of international arbitration but is of a special nature that is very much preferred by international investment dispute practitioners.

[29] Currently 81 bilateral investment treaties are in force in Turkey. See the list at https://www.sanayi.gov.tr/anlasmalar/yktk last accessed 13 March 2020.

[30] For the Official Gazette references see III A 3 supra.

which was subject to certain discussions as aforesaid.

In respect of the BO model as an alternative model, another law was passed in 1997 titled the "Law on Establishment and Operation Electricity Energy Production Plants and Sale of Energy on Build Operate Model"[43] regarding electricity energy.

In the case of the transfer of operation rights, the law dated 1984 was the first in the area of electricity energy. Additionally, the law relating to privatization implementations may be cited. The Law on Privatization Implementation[43]was adopted in 1994 following the BOT law. As the title suggests, the privatization law is in a general form and covers not only the energy sector but also other sectors that are owned and operated by the state.

Within the framework of the aforesaid legislation in general, BOT, BLT, BO and ORT models are utilized. The main area has for years been the electricity sector. Records state that 221 PPP projects were put in place between 1986 and June 2017, but only 6 in the first part of 2017 (11[tt] Development Plan 2019; Kamu Özel İş Birliği Raporu 2019).

We may conclude here that legislation covering Turkish PPP practice extends beyond conventional areas such as education. The full picture is shown in the table of PPP legislation (Kamu Özel İş Birliği Raporu 2019, p.25).

3. Table of PPP legislation

Model	Year	Law no.	Legislation
Concession	1910	-	Law on Concessions for the Public Benefit[31]
	1943	4483	Law on Authentication of the Contract for the Purchase of İzmir Tram and Electricity Turkish Joint Stock Company and Operation of This Enterprise[32]

[31] *Düstur*, *Tertip*: 2 Volume: 2 Page: 362 (*Menafii Umumiyeye Müteallik İmtiyazat Hakkında Kanun*) at https://www.mevzuat.gov.tr/MevzuatMetin/0.1.6.pdf last accessed 13 March 2020.

[32] OG 24.7.1943 No 5464 (*İzmir Tramvay ve Elektrik Türk Anonim Şirketi İmtiyaziyle Tesisatının Satın Alınmasına Dair Mükavelenin tasdiki ve Bu Müessesenin İşletilmesi Hakkında Kanun*) at https://www.mevzuat.gov.tr/MevzuatMetin/1.3.4483.pdf last accessed 13 March 2020.

	2000	4501	Law on the Principles to be Followed in Resorting to Arbitration for Disputes Arising from Concession Contracts and Charters Relating to Public Services [33]
	1924	406	Telegram and Telephone Law, as amended by numerous laws in particular for this purpose in 1994 onward.[34]
Build Operate Transfer	1984	3096	Law on Empowering the Enterprises other than the Turkey Electricity Institution for the Production, Transportation, Distribution and Trade of Electricity[35]
	1987		By-Laws relating to Empowering the Enterprises other than Turkey Electricity Production Transportation Distribution Joint Stock Company and Turkey Electricity Distribution Joint Stock Company for the Production, Transportation, Distribution and Trade of Electricity[36]
	1988		Law on Empowering Enterprises other than the General Directorate of Highways for the

[33] OG 22.1.2000 No 23941 (*Kamu Hizmetleri İle İlgili İmtiyaz Şartlaşma ve Sözleşmelerinden Doğan Uyuşmazlıklarda Tahkim Yoluna Başvurulması Halinde Uyulması Gereken İlkelere Dair Kanun*) at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4501.pdf last accessed 13 March 2020.

[34] OG 21.2.1924 No 59, (*Telgraf ve Telefon Kanunu*) at http://www.mevzuat.gov.tr/MevzuatMetin/1.3.406.pdf last accessed 20 March 2020.

[35] OG 19.12.1984 No 18610 (*Türkiye Elektrik Kurumu Dışındaki Kuruluşların Elektrik Üretimi, İletimi, Dağıtımı ve Ticareti İle Görevlendirilmesi Hakkında Kanun*) https://www.mevzuat.gov.tr/MevzuatMetin/1.5.3096.pdf last accessed 13 March 2020.

[36] OG 23.2.1987 No 19381 (*Türkiye Elektrik Üretim İletim Anonim Şirketi ve Türkiye Elektrik Dağıtım Anonim Şirketi Dışındaki Kuruluşlara Elektrik Enerjisi Üretimi, İletimi, Dağıtımı ve Ticareti Konusunda Görev Verilmesi Esasları Hakkında Yönetmelik*) at https://www.mevzuat.gov.tr/MevzuatMetin/3.5.859799.pdf last accessed 13 March 2020.

			Construction, Maintenance and Operation of Highways[37]
	1993		Implementation By-Laws relating to the law on Empowering the Enterprises other than the General Directorate of Highways for the Construction, Maintenance and Operation of Highways[38]
	1994	3996	Law on the Procurement of Certain Investments and Services under Build Operate Transfer Model[39]
	2011		Decree on the implementation principles relating to the Law numbered 3996 on the Procurement of Certain Investments and Services under Build Operate Transfer Model[40]
Build Operate		4283	Law on Establishment and Operation of Electricity Production Facilities by Build-Operate Model and Arrangement of Energy Sale[41]
			By-Laws on Establishment and Operation of Electricity Production Facilities by

[37] OG 2.6.1988 No *19830* (*Karayolları Genel Müdürlüğü Dışındaki Kuruluşların Erişme Kontrollü Karayolu (Otoyol) Yapımı, Bakımı ve İşletilmesi İle Görevlendirilmesi Hakkında Kanun*) at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.3465.pdf last accessed 13 March 2020.

[38] OG 14.4.1993 No 21552 (*Karayolları Genel Müdürlüğü Dışındaki Kuruluşların Erişme Kontrollü Karayolu (Otoyol) Yapımı, Bakımı ve İşletilmesi İle Görevlendirilmesi Hakkında Kanunun Uygulama Yönetmeliği*) at https://kms.kaysis.gov.tr/(X(1)S(tka5o4bhdc0iojicijlt2xvh))/Home/Goster/26232?AspxAutoDetectCookieSupport=1 last accessed 13 March 2020.

[39] OG 13.6.1994 No 21959 (*Bazı yatırım ve Hizmetlerin Yap-İşlet-Devret Modeli Çerçevesinde Yaptırılması Hakkında Kanun*) at https://www.mevzuat.gov.tr/M199evzuatMetin/1.5.3996.pdf last accessed 13 March 2020.

[40] OG 11.6.2011 No 27961 *Bis* (*3996 Sayılı Bazı yatırım ve Hizmetlerin Yap-İşlet-Devret Modeli Çerçevesinde Yaptırılması Hakkında Kanunun Uygulama usul ve Esaslarına İlişkin Karar*) at https://www.resmigazete.gov.tr/eskiler/2011/06/20110611M1-11-1.pdf last accessed 13 March 2020.

[41] OG 19.7.1997 No 23054 (*Yap-İşlet Modeli İle Elektrik Enerjisi Üretim Tesislerinin Kurulması ve İşletilmesi İle Enerji Satışının Düzenlenmesi Hakkında Kanun*) https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4283.pdf last accessed 13 March 2020.

			Build-Operate Model and Arrangement of Energy Sale[42]
Privatization and Operation Rights Transfer (Lease)	1994	40 46	Law on Privatization Implementation,[43] as amended
	2005	53 35	Law on the Amendments in Certain laws and Decrees Having the Effect of Law, Article 33 for the transfer/lease of operation rights on airports[44]
	2013/ 2014 (1999)	44 58	Law on Customs,[45] Article 218/A, brought by Laws No 6455 and 6552 in 2013/2014 for the transfer/lease of operation rights on customs gates
Build Lease Transfer	2013	64 28	Law on Construction and Renewal of Facilities and Provision of Healthcare Services through Public Private Partnership Model,[46] as amended in 2014, 2015, 2016, 2018, 2019 (the "BLT Law")
	2014		Implementation By-Laws on Law on Construction and Renewal of Facilities and

[42] OG 29.8.1997 No 23095 (*Yap-İşlet Modeli İle Elektrik Enerjisi Üretim Tesislerinin Kurulması ve İşletilmesi İle Enerji Satışının Düzenlenmesi Hakkında Yönetmelik*) at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4283.pdf last accessed 13 March 2020.

[43] OG 27.11.1994 No 22124 (*Özelleştirme Uygulamaları Hakkında Kanun*) at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4046.pdf; for an English translation see http://www.lawsturkey.com/law/4046-implementation-of-privatization-law last accessed 13 March 2020.

[44] OG 27.4.2005 No 25798 (*5335 Sayılı Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*) at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5335.pdf last accessed 13 March 2020.

[45] OG 4.11.1999 No 23866 (*Gümrük Kanunu*), Article 218 at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4458.pdf last accessed 13 March 2020.

[46] OG 9.3.2013 No 28582 (*Sağlık Bakanlığınca Kamu Özel İş Birliği Modeli İle Tesis Yaptırılması Yenilenmesi ve Hizmet Alınması İle Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun*) at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6428.pdf last accessed 13 March 2020.

			Provision of Healthcare Services through Public Private Partnership Model[47]
	2011	652	Decree having the effect of Law on the Organization and Duties of the Ministry of National Education, Article 23[48]
	2012		By-Laws on Procurement of Education Facilities in return for Lease and Renovation of Services and Areas outside Education Services Areas in return for Operation[49]
	2010/ 2015/ 2018 (1961)	351	Law on High Education Loans and Dorms Services, Article 20 as amended in 2010, 2015 and 2018[50]

B. PPPs in the Healthcare Sector

1. PPP Projects in General

The birthplace of PPP projects in the health sector of public services is the UK. After the inception of public private partnerships in 1991, the UK government signed the first PPP deal of its kind for a 1,000-bed hospital. Since the opening of the first PPP hospital in 2001, more than 130 healthcare-related PPP projects have been put in place. The main idea behind this movement was the dichotomy between a rising demand for public healthcare services and limited public financial resources to meet such demand(UK

[47] OG 9.5.2014 No 6428 (*Sağlık Bakanlığınca Kamu Özel İş Birliği Modeli İle Tesis Yaptırılması Yenilenmesi ve Hizmet Alınmasına Dair Uygulama Yönetmeliği*) at https://www.mevzuat.gov.tr/MevzuatMetin/3.5.20146282.pdf last accessed 13 March 2020.

[48] OG 14.9.2011 No 28054 (*Milli Eğitim Bakanlığının Teşkilat ve Görevleri Hakkından Kanun Hükmünde Kararname*) at https://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=4.5.652&MevzuatIliski=0&sourceXmlSearch last accessed 13 March 2020.

[49] OG 8.9.2012 No 28405 (*Eğitim Öğretim Tesislerinin Kiralama Karşılığı Yaptırılması ile Tesislerdeki Eğitim Öğretim Hizmet Alanlarının Dışındaki Hizmet ve Alanların İşletilmesi Karşılığında Yenilenmesine Dair Yönetmelik*) at https://www.mevzuat.gov.tr/MevzuatMetin/3.5.20123682.pdf last accessed 13 March 2020.

[50] OG 22.8.1961 No 10887 (*Yüksek Öğrenim Kredi ve Yurt Hizmetleri Kanunu*) https://www.mevzuat.gov.tr/MevzuatMetin/1.4.351.pdf last accessed 14 March 2020.

Government Report 2018).

Turkey experienced the same dichotomy to a much deeper degree, so was eager to be inspired by the practice in the UK and other countries that followed suit. A concept of "Transition in the Health Sector" was established by the Turkish Ministry of Health, and a PPP department was formed in 2007 within the Ministry. In order to enable such a transition, legislation had been already changed in 2005 by the addition of an article (Supplementary Article 7) to the Health Services Basic Law. Two months later, the relevant by-laws to implement such an additional article paved the way for build lease transfer model PPPs in the health sector.

Whilst legislation evolved in the following years, the Ministry had signed 18 health facility PPP agreements [51] as of March 2020 in various cities in Turkey. These are mostly named as "City Hospitals/(*Şehir* Hastaneleri)": Adana (1550 beds), Mersin (1294 beds in operation), Isparta (755 beds in operation), Yozgat (475 beds in operation), Kayseri (1607 beds in operation), Manisa (558 beds in operation), Elazığ (1038 beds in operation), Ankara Bilkent (3711 beds in operation), Eskişehir (1081 beds in operation), Bursa (1355 beds in operation), Konya Karatay (1250 beds), Tekirdağ (480 beds), Kütahya (610 beds), Kocaeli (1210 beds), İstanbul İkitelli (2682 beds), Ankara Etlik (3624 beds), Gaziantep (1875 beds), and İzmir Bayraklı (2060 beds). The ones not stated as in operation are planned to be opened by the end of 2021. There are further projects at the stage of tender such as Trabzon (900 beds), İstanbul Sancaktepe (4200 beds), Ordu (900 beds), Denizli (1000 beds), Antalya (1000 beds), Aydın (800 beds), Diyarbakır (750 beds) and Samsun (900 beds).

2. Previous Healthcare PPP Law

One law (Supplementary Article 7) was enacted on 14 July 2005 and the implementing By-Law on 22 July 2006 to regulate PPP in healthcare services in greater detail.[52] The law introduced the build lease transfer model In particular, the by-law providing broad authority to the Ministry of Health to determine all details of PPP projects. As the Ministry (of Health) has no authority to pass a law, it regulated these details through by-laws instead of a law passed by Parliament. Following the tender for the Ankara Etlik project, the Turkish Medical Association (*Türk Tabipler Birliği-TTB*) brought an action against the Ministry of Health and the Prime Ministry for the annulment of the tender and demanded:

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51 https://sygm.saglik.gov.tr/TR,33960/sehir-hastaneleri.html last accessed 19 March 2020.

52 The relevant provision of Supplementary Article 7 was added to the basic Law on Health Services (*Sağlık Hizmetleri Temel Kanunu*), the provision published in OG 15.7.2005 No 25876 at https://www.resmigazete.gov.tr/eskiler/2005/07/20050715-2.htm last accessed 20 March 2020. The By-Laws on Procurement of Health Facilities in return for Lease and Renovation of Services and Areas outside Health Services Areas in return for Operation (*Sağlık Tesislerinin Kiralama Karşılığı Yaptırılması ile Tesislerdeki Tıbbi Hizmet Alanları Dışındaki Hizmet ve Alanların İşletilmesi Karşılığında Yenilenmesine Dair Yönetmelik*), OG 27.7.2006 No 26236 at https://www.resmigazete.gov.tr/eskiler/2006/07/20060722-2.htm last accessed 20 March 2020.

i- the annulment and suspension of the execution of the bid and the core provisions of the by-law on the legal basis that these issues can only be determined in law by Parliament, not by the Ministry of Health, pursuant to Articles 2, 7 and 47 of the Constitution;

ii- the Council of State (*Danıştay*), where the annulment case was filed, to apply to the Constitutional Court for the annulment of Supplementary Article 7.

The Council of State ("*Danıştay*") ruled that(Sözer 2013):[53]

i- they apply to the Constitutional Court for the annulment of Supplementary Article 7 of the Law considering that it might be in contradiction of the Constitution;

ii- the bid contained provision for the transfer of premises that were not connected to healthcare premises for non-medical commercial services. This is against the law and thus the execution of the bid be suspended.

This decision of suspension by *Danıştay* was given for the three projects (Ankara Etlik, Ankara Bilkent and Elazığ). While the cases were pending, the Turkish Parliament adopted the new law to boost Healthcare PPP projects before the Constitutional Court rendered its judgement on the matter.

The law numbered 6428, called the "Law on Construction and Renewal of Facilities and Provision of Healthcare Services through Public Private Partnership Model" ("New PPP Law" or "BLT Law") has been enacted[54]. Following the enactment of the New PPP Law, the Constitutional Court on 6 June 2013 ruled that since the subject matter claimed to be unconstitutional, it has been re-enacted by the New PPP Law, so there remains no subject to be decided upon. The suspension of the execution of the previous law was refused on the same grounds.[55]

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[53] *Danıştay* 13th Chamber E. No 2011/3392 dated 6.7.2012 at https://www.ttb.org.tr/images/stories/file/etlik.pdf last accessed 20 March 2020. Further to this bid and case, *TBB* also filed identical cases against the tenders for Elazığ and Ankara Bilkent projects. For Elazığ, *Danıştay* 13th Chamber E. No 2011/4233 dated 9.7.2012 at https://www.ttb.org.tr/images/stories/file/elazig_karar.pdf last accessed 20 March 2020; and for Ankara Bilkent *Danıştay* 13th Chamber E. No 2011/4558 dated 6.7.2012 at https://www.ttb.org.tr/images/stories/file/bilkent.pdf last accessed 20 March 2020. As in the Ankara Etlik case, the same chamber of *Danıştay* applied to the Constitutional Court whether Supplementary Article 7 was against the Constitution. It did not repeat the same application regarding the Ankara Etlik and Ankara Bilkent cases, since the decision of the Constitutional Court would be binding for all.

[54] See footnote 61.

[55] Constitutional Court Decision E. 2012/105 Decision 2013/71, dated 6.6.2013 at http://kararlaryeni.anayasa.gov.tr/Karar/Content/1ad5f2e2-103e-4e10-a315-31fc7c00691b?excludeGerekce=False&wordsOnly=False last accessed 12 March 2020. The decision was decided by a majority. The dissenting member of the Court opined that the case must be decided as per the law that was in force when the case was filed. Thus, the Court should have rendered its decision as per the law then in force and reviewed the case on its merits.

3. New PPP Law

a. Coming into Force

The BLT Law as referred to in the above table was promulgated in the Turkish Official Gazette on 9 March 2013 and entered into force on that same day. The main characteristic of the BLT Law is that it clearly stated its private law nature. As explained above, the Turkish Constitution paved the way for the legislature to adopt private laws for the provision of certain public services by private law persons. This was a way towards improvement as far as the former regulatory provision that is Supplementary Article 7 is concerned. The BLT Law emanated from the discussions and practice that hit the supreme courts in terms of whether those project agreements were valid under the then applicable law. There is a clear reference under the BLT Law to its being a private law through its Article 1 which reads "*The purpose of this law is by tender and according to private law provisions under the framework of public private partnership model … to set relevant procedures and principles.*" Through this explicit definition of the private nature of services to be provisioned under the BLT Law, they could no longer be construed as "*public services*" falling within the ambit of administrative law. This means that all the court practices and difficulties as aforesaid have become history. The Constitutional Court stated its decision that with the addition of paragraph 4 to Article 47 of the Constitution, it is now possible to admit a contract as a private law contract even if such contract contains the features of a concession contract, provided the legislature adopts a law allowing so, which is the case for the BLT Law.[56]

Although one of the parties to the project agreement under the BLT Law is a state body or the administration (in fact the Ministry of Health), the agreement will still be a private law contract, concluded and executed under private law provisions as opposed to administrative law. The BLT Law thereby created a balance between contracting parties, whether administration or private party. Due to the changes as indicated already above, in the legislation there is now no involvement of any administrative court, in particular *Danıştay*, in the formation of a contract or relevant project agreement. Even disputes arising from such a private law contract shall be legal disputes rather than administrative law disputes. It goes without saying that the new BLT Law was a landmark move by the administration, to create a better legal environment for more effective public–private partnership projects in the health sector in Turkey.

b. Transition Provisions

The tenders that have already been initiated as per the earlier law (Additional Article 7) prior to the

[56] Following enactment of the BLT Law, the Constitutional Court also affirmed the private law nature of agreements concluded thereunder and rejected the claims of a plaintiff for the cancellation of the BLT Law. Constitutional Court decision dated 1.4.2015 published in OG 15.4.2015 – 29327 at https://www.resmigazete.gov.tr/eskiler/2015/04/20150415-27.pdf last accessed 18 March 2020.

enactment date of 9 March 2013 of the BLT Law shall be completed as per their tender provisions. However, the tender procedure (the one currently used is the Dutch auction method), as set down in Article 3/7 and Article 4/9, regarding amendments to the project agreements and their schedules, with the object of clarifying understanding but not changing the agreement price or provisions relating to servitude rights in the BLT Law, shall also be applicable to those tenders that are pending at tender stage, and even to projects for which project agreements have been signed (Provisional Article 1/1).[57]

Provisional Article 1 paragraph 2 has brought up an essential matter for already completed tenders and for continuing projects (meaning project agreements signed under the earlier law). The provisions in those tender documents which permitted premises outside the Healthcare campus to be used as commercial premises for the benefit of the project contractor shall not be applicable for tenders either pending or completed. Any contracts that have been signed with such provisions shall be valid only without those provisions. In other words, the BLT Law through this provisional article withdrew those rights of project contractors from any project agreement that was already signed under the earlier law. Needless to say, those rights would not be granted to any new project contractor to be signed up under the BLT Law.

Interestingly enough, the BLT law also makes reference to court cases that were rendered according to earlier law by the administrative courts. Paragraph 3 of Provisional Article 1 indicates that the requirements set in those decisions of the administrative courts shall be met either in the tender documentation or in the project agreements, as the case may be. Any works thereunder shall be executed as per those requirements as embodied in the relevant legal document.[58]

The BLT Law contains further provisions for better implementation of the project agreements that had already been signed when the BLT Law came into force. With reference to necessities that appeared during the investment period of signed project agreements, and if those necessities could not be overcome within the relevant variation procedure thereunder, then Provisional Article 2 allows such variation just for once by the decision of the President or the committee that the President delegates at the request of the Ministry of Health. The project contractor's approval is also required for those additional works

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[57] The explanation in the last sentence of this paragraph was added to the BLT Law on 26.2.2014 by the law No 6527 OG 1.3.2014 No 28928 at https://www.resmigazete.gov.tr/eskiler/2014/03/20140301-1.htm, Articles 23 and 24, last accessed 20 March 2020.

[58] This 3rd paragraph was added to the BLT Law on 26.2.2014 by the law No 6527 ibid. Please note that the amendments brought by the law No 6527 to the BLT Law were also challenged in the Constitutional Court for annulment. However, the Constitutional Court rejected those claims by its decision rendered on 28.1.2016 published in OG 6.3.2016 – 29642 at https://www.resmigazete.gov.tr/eskiler/2016/03/20160303-3.pdf last accessed 20 March 2020.

outside the scope of the project agreement.[59]

As a concluding matter to this section, one should bear in mind that any reference made to the previous law shall be deemed to be made to this new Law.

c. Project Agreement

The BLT Law lays down detailed provisions for agreement governing relations between the parties, i.e. the administration of the Ministry of Health ("MOH") and the private party contractor, referred to as the "sponsor" in the sector. A project agreement is signed with the bidder, who is granted the project through a joint stock company (*Anonim Şirket*).[60] Once the project is granted, then the bidder is to establish a special purpose vehicle (SPV) or special purpose company, as the BLT Law defines it, to operate solely in activities falling within the ambit of the project agreement.[61] It may also be referred to as the "project company".

In reference to earlier explanations above, the provision first reinstates that any agreement is subject to private law provisions, and the duration (operational term/lease term) may be up to 30 years.[62] In practice, the MOH requires this duration to be 25 years, unless extended or interrupted by the Ministry of Health, in addition to the construction period of the premises (completion term), which the latter may vary with reference to the size of the health premises concerned. The 25-year term is granted for all of the projects indicated herein above. The agreement also includes penalties and compensation provisions for any potential non-performance and losses to be incurred by the administration.

Pursuant to the project agreement, the contractor is under the obligation to prepare the premises, and facilitate the finance, construction, operation, maintenance, performance of the services that are left to the contractor, as well as running the commercial service areas. It goes without saying that the core medical services are to be provided by the administration as the lessee of the premises. The services referred to in the sentence above are listed in the project agreement or its schedules attached thereto. In practice, a project agreement may include voluminous detail.

It is also regulated in the BLT Law that the contractor may transfer or assign all of its rights and obligations to private law third parties, with the approval of the administration, provided that the putative

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[59] This Provisional Article 2 was added to the BLT Law on 2.7.2018 by the Decree having the effect of Law No 703 OG 9.7.2018 No 30403 at https://www.resmigazete.gov.tr/eskiler/2018/07/20180709M3-1.pdf last accessed 20 March 2020.

[60] Article 4. By-law Article 12. When there is reference to an Article from this footnote onward, it is to the BLT unless otherwise stated.

[61] Article 1/2/o.

[62] Article 4.

assignee meets the requirements as the contractor under the BLT Law. In fact, by such assignment of the agreement, all other ancillary agreements are deemed assigned as well. [63]

d. Tender Procedure

Three tender types are possible:

i) open bidding;

ii) bid between pre-qualified selected bidders, ending with a Dutch auction, and

iii) bargaining.

The price proposal with the least cost and with maximum benefit shall be deemed the most economically advantageous proposal. It should be noted here that bargaining is an exceptional tender procedure and can only be done in the following circumstances: in the first two types of tenders if there is no tenderer, if the project is somewhat unique and complex so that technical and financial specifications cannot be attained, or if there is an urgent situation due to pandemic, natural causes or unforeseen circumstances, so that the (completion) works are procured under BLT Law on behalf of the contractor and for the works to be under a certain sum of money.[64]

e. Required Performance Bonds

There are three different performance bonds which are required to be held by the Ministry of Health of Turkey:

- **Bid Bond (temporary)** 3% of either the total fixed investment or the bid value lodged by the bidder at the bidding stage.

- Construction Term Performance Bond (final) This bond shall be delivered by the project company on the execution date of the project agreement, and its value shall be 3% (three percent) of the total fixed investment sum. When the construction term performance bond is lodged, or if the tender is not granted, the bid bond is returned by the administration.

- Operational Term Performance Bond This bond shall be delivered by the project company on the execution date of the project agreement, and its value shall be 1.5% (one and half percent) of the total fixed investment sum. The value of the operational performance bond is increased every year as per the production price index announced by the Turkey Statistics Institution (*TÜİK*). When the operational term

[63] Apart from the provisions referred to herein, both the BLT Law and its implementation By-law contain rather detailed provisions that need to be embodied in the project agreement. Article 4 of the BLT Law and By-law Article 48 onward.

[64] Article 3 and Article 19 of By-law.

performance bond is lodged, the construction term performance bond is returned by the administration.[65]

f. Financing and Minimum Equity

The contractor shall provide all finance for the project. The minimum equity capital to be provided by the contractors shall not be less than 20% of the total fixed investment. Of course, the sponsor/s may invite financial investors to the project company and complete their portion of the equity as the project company vis-à-vis external financing. Inclusion of financial investors as shareholders of the project company is subject to approval by the administration.[66]

g. Determination of Lease Payment

Lease payments and the project term shall be determined by taking into consideration the PPP project's construction cost according to the following factors:

- value of the project,
- nature of the project,
- whether the Project Company provides medical equipment,
- profits of the Project Company,
- whether it is permitted by the contract to operate other services or commercial service areas of the campus by the Project Company.[67]

h. Starting Date of Lease Payments

The project company shall be entitled to receive lease payments from the Ministry of Health starting from the actual completion and the first operational date of the project up to the end of the operational term. There shall be no payment by the Ministry of Health before the completion date. However, there is an exception to this rule: if any specific agreement contains provisions for phase completions or partial operation, being subject to partial acceptance by the administration.[68]

i. Adjustments (increase) in Lease Payments

The lease payments for the project shall be adjusted at the beginning of every year on the basis of the inflation rate of the previous lease term. For the purpose of the calculation of the new lease term, the arithmetic mean of the CPI ("Turkish Consumer Inflation Rate") and the PPI ("Turkish Production Inflation Rate") announced by the *TÜİK* shall be applied. Moreover, in the event that foreign currency finance is involved, if the increase in foreign currency at the time of increasing the lease is higher than

65 Article 3/12 and Articles 37-39 of By-law.
66 Article 6 and Article 54 of By-law.
67 Article 5.
68 Article 5/2.

the increase rate of (CPI+PPI) / 2, it is also added to the lease payment.[69]

j. Lease Payments' Funding

Lease payments are funded not only by the revolving fund mechanism budget, but also by the central budget of the Ministry of Health.[70] However, in practice the Ministry of Health aims to cover those payments from the revolving fund mechanism. It may well be the case that the Ministry can cumulatively use both. It may be correct to say that all lease payments are under the payment guarantee of the government/treasury by law.

k. Local Procurement Requirement

20% of all medical equipment as listed in the fixed investment, which shall be used for health PPP projects, shall be the product of Turkey. The details shall be determined in the tender documentation.[71]

l. Ownership Status of the Land

The site/land of health PPP projects shall be in the full property and ownership of the administration. There shall be no transfer of ownership rights of land to the project company. However, an independent and continuous servitude right without any value may be established and registered to the land registry (*Tapu Sicili*) in favour of the project company for a maximum term of 30 years (covering the operation term) excluding the fixed investment term. The servitude right agreement shall be signed between the project company and National Real Estate Directorate of the Ministry of Finance.[72]

m. Tax Benefit for Project Companies

Contracts and documents that are signed between the administration and private law persons relating to investments under the BLT Law during the investment period[73] are all exempted from stamp tax and duty. Exemption is also valid for the main PPP contract, signed between the Ministry of Health and the project company.[74]

Under VAT law, VAT is exempted from the delivery of goods and services (directly related to the

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69 Article 5/1. The By-law includes very detailed provisions and formulae for calculating lease payments (Appendixes 1 and 2), calculating net current value (Appendix 3) and determining minimum and maximum lease payment amount (Appendix), over a total of 9 pages.

70 Articles 5/5 and 56 of By-law.

71 Article 3/16.

72 Articles 1/1, 1/2/ü, 2/1 and Article 53 of By-law.

73 The "investment period" is defined in the By-law as the period from signing the project agreement and delivering the site until the time when the premises are taken over by the administration following the contractor's completion of construction and fixing to be ready for operation. By-law Article 4.

74 Article 9.

investment) within the project for the duration of the investment period.[75]

n. Transfer at the End of the Term

Just as in classic concession agreements, the contractor is liable to hand over the premises to the administration at no cost, as the counterparty to the agreement, without any debt or undertaking and in good shape and working condition at the end of the contract term.[76] In fact, by the operation of law, all assets of the project are deemed transferred to the Ministry of Health at the expiry of the contract period. For this reason, the project company is responsible for maintaining all assets of the project in good condition during the operational period. At the end of the operational term, the Ministry of Health and the project company will issue a joint handover and delivery document, which should explain all details and conditions of the project's assets.

o. Debt Assumption

As a means of government support for PPP projects in Turkey, the Turkish Treasury, through the Ministry Treasury and Finance, may assume financial obligations towards the project lenders.[77] The President of the Republic of Turkey (the "President")[78] is entitled to grant assumption of the financial burdens (debts) for financing the project, including its derivative debts. In order for this assumption to be realized, the Treasury should have given its approval to the provisions relating to such assumption in the draft agreement, both prior to the tender phase and after tender, but before signing the project agreement. The following requirements must be met too: (a) if the project value is over 500 million TL, (b) it should be agreed in the project agreement that the administration is entitled to take over the operation and assets of the project before its agreed expiration date, (c) official proposal of the Health Minister.

As for the debt assumption by the Treasury in PPP projects under the BLT Law, the minimum investment amount should be 500 million Turkish Liras. The application of this limit for a possible debt assumption shall be in force as of 1 January 2014. Other provisions of debt assumption except the minimum investment limit that are brought by the BLT Law shall be applicable as from 1 December 2012.

We should also emphasize that the By-law for the implementation of the debt assumption law[79] was

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[75] Value Added Tax Law (*Katma Değer Vergisi Kanunu*) Provisional Article 29 at https://www.gib.gov.tr/gibmevzuat last accessed 21 March 2020.

[76] Article 7 and Article 64 of By-law.

[77] Debt assumption is regulated under Article 8A of the Law on Regulation of Public Finance and Debt Management (*Kamu Finansmanı ve Borç Yönetiminin Düzenlenmesi Hakkında Kanun*) dated 28.03.2002 at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4749.pdf last accessed 30 March 2020.

[78] This power was held by the "Council of Ministers" prior to the amendment becoming law on 2 July 2018.

[79] See footnote 91 (Debt Assumption Law).

recently amended at the end of 2019.[80] The By-law has brought the following amendments: i) the coverage of the debt assumption regardless of the fault of the project company in termination is 100% of the principal loan amount plus all the financing costs. Prior to the change, when there was a default by the project company, the coverage was 85%. ii) In the BLT, the equity ratio for the project financing was minimum 20%. With the amendment, only a project with minimum 30% equity ratio can benefit from debt assumption. According to the By-law,[81] the changes referred to above shall be applied to any new debt assumption agreements **still to be executed** after the assumption undertaking is made further to 1 December 2012. Needless to say, any debt assumption agreements already executed remain intact.

p. Lenders' Step-in Rights in case of Default

The project agreement also contains provisions in respect of the right for the project lenders to step in. During both the investment term and the operation term, if any default occurs by the contractor, lenders shall also be notified of that default by the project company. If the project company cannot rectify the default during the reasonable period granted by the administration in the default notice, lenders shall be entitled to modify the shareholding structure of the project company in order either to complete the project during the investment period or to continue the project within the operating term. Of course, the lenders' choice of new shareholding structure for the project company is always subject to the approval of administration.[82]

Apart from the project agreement where such step-in rights are included, these rights, in practice, are mainly regulated in an agreement called the "Funders Direct Agreement" ("FDA"). This agreement creates a direct relation between the lenders and the administration, and is signed by the lenders, the project company and the administration.

r. Planning Regulation of Health PPP Projects

All planning regulations for the buildings of health PPP projects shall be developed and undertaken by the Ministry of Environment and Infrastructure of Turkey in place of local municipalities which would have had the authority to do so.[83]

s. Dispute Resolution Procedure – Anticipating Arbitration

As a rule, the Turkish commercial courts rather than the Turkish administrative courts are competent to make a final settlement of any dispute arising out of or relating to the agreement, according to Turkish law. Referring to the history of the provisions allowing agreements to become private law agreements

[80] The amending By-law was published in the official gazette on 25.12.2019 at https://www.resmigazete.gov.tr/eskiler/2019/12/20191225-37.pdf last accessed 30 March 2020.
[81] Provisional Article 3 of the By-law.
[82] Article 4/7 of the BLT and Articles 49/v, 57 and 62 of the By-law.
[83] Article 8 and Article 65 of the By-law.

and thus be subject to civil law as opposed to administrative law, this is currently a completely settled matter.

The BLT Law does contain specific provisions for the settlement of disputes.[84] The law applicable to the disputes is Turkish law. Although there is a choice of law provisions under Turkish private international law provided there is a foreign element in the legal relationship, the BLT Law rules out this possibility.[85] As regards the judicial authority competent to resolve disputes, the BLT Law states that the courts of the republic of Turkey are competent and have jurisdiction. Again, this provision prevents parties in a legal relationship with foreign elements from agreeing to the jurisdiction of a foreign court as opposed to Turkish courts.[86]

However, the provisions include a kind of salvation clause for the benefit of international dispute resolutions, by saying that the parties may agree that the dispute be resolved by international arbitration in accordance with IAL[87] provided that the law applicable to the merits of the dispute shall be Turkish law. The BLT Law in its original version required the place of arbitration to be in Turkey. In the amendment that was adopted in 2015, this constraint was lifted. Following the amendment, the parties may freely agree to a place of arbitration outside Turkey. If there is no agreement on the place of arbitration, then it is the arbitrators who decide thereon as per Article 9 of the Turkish IAL. Likewise, as per the arbitration law, the dispute may also be resolved through an arbitration institute even at a place outside Turkey.[88]

The BLT [Build-Lease-Transfer model] does not specify any further clarification as to whether the IAL [International Arbitration Law] shall be applicable as the law governing arbitration proceedings. Under the provisions of the IAL for determinating the rules governing arbitral proceedings, it is explicitly stated that the parties can freely agree on the procedure to be followed by the arbitral tribunal, or in determination of such procedure make reference to any law or international or institutional arbitration rules. However, such determination shall always be without prejudice to the mandatory provisions of the law (the IAL). If the parties have not agreed on this issue, then the arbitral tribunal shall conduct the proceedings pursuant to the provisions of the IAL.[89]

Taking a literal interpretation of the IAL, it may be argued that once the parties can have resort to the

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84 Article 4/11 and Article 67 of the By-law.

85 Article 24 of the Law on Private International Law and Procedural Law dated 2007 at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5718.pdf; for an English translation see http://www.lawsturkey.com/law/act-on-private-international-and-procedural-law-5718 last accessed 30 March 2020.

86 Ibid., Article 47.

87 See footnote 25.

88 Ibid., Article 8.

89 Ibid., Article 8/A.

IAL for dispute resolution, then as per the foregoing provisions of the IAL they are also entitled to agree on the rules governing the arbitral proceedings by making reference to any other foreign law or international arbitration rules, for instance UNCITRAL [United Nations Commission on International Trade Law] rules, or the rules of any arbitration institute like ICC [International Chamber of Commerce] or SCC [Stockholm Chamber of Commerce], provided, however, that mandatory provisions of the IAL are preserved. Another argument may assert that when reading the relevant provision of the BLT, Article 4/11, the purpose behind letting the parties choose their arbitration as opposed to local Turkish courts is to have the provisions of the IAL's procedural provisions applied instead. Accordingly, it is not the purpose of the lawmaker to free parties to conduct their arbitral proceedings in accordance with other rules of procedures, but those of the IAL. This purposive interpretation of the law may be employed in this regard.

In fact, considering that the provisions of the IAL are inferred from the UNCITRAL model law on arbitration,[90] they may not be significantly different from those of other national arbitration laws and even international or institutional arbitration rules. It follows that it does not make any notable difference which laws or rules govern the arbitral proceedings once it is settled that the arbitration will be subject to the IAL. What this means ultimately is that as the arbitration is subject to the IAL, any case for annulment of any arbitral award thereunder can and should be filed at competent courts in Turkey as per the provisions of the IAL. It may well be concluded that this is a mandatory provision of the IAL from which the parties cannot opt out.

We should emphasise here that the application of the IAL is not automatic. In order for the IAL to apply, the relationship by which arbitration is agreed as the dispute resolution method must include a foreign element in accordance with Article 2 of the IAL. Additionally, the seat of arbitration must be outside Turkey **or** else the IAL is either chosen by the parties or by the arbitral tribunal. In our case of PPP [Public Private Partnership] projects or contracts, one party is the state administration, that is the Ministry of Health [MOH] as the owner. The other party must be a joint stock company constituted in Turkey in accordance with Turkish laws for this specific project purpose, namely a Turkish company, pursuant to the provisions of the BLT.[91] Under these circumstances, the criteria that may be applicable to meet the foreign element requirement under the IAL can be one of the following:

i- where a shareholder of the company that is party to the underlying contract as the subject of the arbitration agreement has brought foreign capital pursuant to the law on the encouragement of foreign investments, or

[90] For UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf, last accessed 25 January 2021.

[91] Article 4/y.

ii- in order to implement the underlying contract it should be necessary to formulate loan and/or security agreements for the provision of capital from abroad, or

iii- the underlying contract or the legal relationship that forms the basis for the arbitration agreement realizes the transfer of capital or goods from one country to another.

Item (i) above covers the situation that a foreign investor forms the company, or a shareholder of the project company signs the project agreement with the MOH. It is known that certain PPP projects have been signed with the project companies that include foreign investors in their partnership combination.

The second possibility suggests that even if no foreign shareholder is involved in the partnership structure of the project company, if the project is financed from abroad, the foreign element requirement of the IAL is met. In practice, we can see that in most of the projects the World Bank and/or European Investment Bank provides finances to implement the project, as well as other financial institutions.

The item (iii) situation embodies the most general criterion of the IAL, to attribute a foreign element to a legal relationship and thereby make it subject to arbitration under the IAL. Very basically, it implies the movement of capital or goods between countries. This criterion may be construed as the most inclusive criterion. It was even rightly argued that this very criterion would have been ample in itself to qualify for giving the foreign element characteristic to a legal relationship (Akıncı 2016, p.63).

As may be seen from the foregoing criteria for a foreign element, it is highly likely that a PPP project relationship may contain a foreign element and thus become the subject of international arbitration under the IAL. Of course, the second requirement of that is either that the place of arbitration is outside Turkey, or that the parties to the arbitration agreement or the arbitral tribunal have chosen the IAL as the applicable law for their arbitration.

In relation to the second requirement, we have already touched on the second limb of the sentence that is the choice of the IAL. The original version of Article 4/11 of the BLT Law has seen a change that lifted the requirement relating to the seat or the place[92] of arbitration to be in Turkey. This allowed parties to an arbitration under the IAL to have the place of the arbitration outside Turkey, i.e. in a foreign country.

Referring to our above explanations, such a change may have been aimed at providing a neutral place for the arbitral proceedings, since any annulment case will still be subject to the IAL at the competent court in Turkey. This is because of the fact that the BLT Law imposed that the arbitration will be mandatorily governed by the IAL.

The legislature may have thought that for the purpose of neutrality, the court which reviews the

[92] We used the two words as alternatives to refer to the legal functionality of the words, rather than meaning just the meeting place of a tribunal that may occasionally be changed.

annulment case can be outside Turkey as the place or seat of the arbitration. The reason may have been that under normal circumstances an arbitral award is subject to the annulment case at the competent court of the country where the arbitration takes place, namely the place of arbitration. One of the legal reasons for importance of the place/seat of arbitration(Akıncı 2016, p.172; Belohlavek 2013, p.262) is to determine where a potential case for annulment (setting aside) of the arbitral award is to be filed. Thus, one would think that, as per the BLT's provision, when the parties to the project agreement choose the place of arbitration as a place outside Turkey, the courts of Turkey would not have jurisdiction to hear such an annulment case.

However, although this interpretation or attribution makes legal sense for general understanding, it may not be tenable as far as the purpose of the BLT's provision in making arbitration subject to the IAL is concerned. It may be asserted that the aim of the legislature, by having this mandatory provision regarding the law applicable to the arbitration proceedings, was to have the arbitration as an alternative dispute resolution but be subject still to Turkish courts' assessment when it comes to the annulment case. This interpretation would entail that the competence of the courts in the place of arbitration is not exclusive.

We can support this argument by looking at the provisions of the New York Convention for the enforcement of foreign arbitral awards. Article V of the New York Convention lists the grounds for the refusal of an enforcement. Its paragraph 1/e speaks of the place for setting aside (annulment) the award as being "… *by a competent authority of the country in which, or under the law of which, that award was made*". The provision in its second part envisages that the courts of the country under the law by which the award is made will have competence to set aside an award. In our case, since the BLT imposes that the arbitration be subject to the IAL as the law applicable to arbitration [*lex arbitri*], then the award so rendered shall be an award rendered pursuant to the IAL and any annulment or setting aside case shall be heard at the competent court as specified by the IAL in Turkey. Besides, the MOH under normal circumstances may not be willing to agree to such a clause of the place of arbitration being outside Turkey, their being the owner of the project and the party with the administrative power.

Additionally, looking from the legal procedural standpoint, the courts at the place of arbitration may have still some intervening and/or assisting powers that can in principle be exercised within the boundaries of the country where the court is located. Choosing a place outside Turkey may naturally avoid the intervention of the Turkish courts, at least during the arbitral proceedings. Therefore, we may conclude here that a change in the BLT may have targeted minimising the intervention of the Turkish courts during the arbitration proceedings.

As this point may need more lengthy discussion; let it suffice to conclude that allowing parties to choose the place of arbitration outside Turkey appears to aim at assuring a neutral place as the seat of arbitration

for the arbitral proceedings, as far as the BLT is concerned.

4. Improving the Efficacy

a. Intervention in the Project Contract

This issue of intervention to PPP contracts or project agreements during the execution phase of the project agreement may stem from the necessities of public interest. The question is whether the government or the owner of the PPP project, the MOH, can later intervene with the contract provisions that have already been agreed and even implemented.

As the BLT stated, PPP contracts are private law contracts and subject to private law provisions, such as the provisions of the Turkish Code of Obligations [TCO].[93] The governing tool for PPP projects is by law stated as the use of private contracts, the roots of which can be found in the provisions of Article 47 of the Constitution. Therefore, one cannot question the legality of the contract practice. However, it is also argued that this, on the other hand, amounts to "*the power to rule without Parliament*"(Daintith 1979).

The question can also be rewritten as the intervention of public administration in the freedom to contract. This is so because we speak of an intervention once the relevant PPP contract is properly signed by the parties, i.e. the MOH administration on the one hand and the private party on the other. The intervention may arise when the contract provisions or the result of the contract at the implementation stage prove to be too expensive to bear for the public budget. This may arise in particular if the relevant PPP contract is concluded in foreign currency or with reference to foreign currency. In the event that the local currency experiences constant devaluations against the contracted currency, the cost of the project may become burdensome on the budget. Therefore, the public administration in such circumstances may think of intervening with the contract, claiming public interest. Considering that the Turkish healthcare PPP projects are expressed with reference to foreign currency with certain fiscal guarantees, this question may be at issue in the Turkish case.

The freedom to contract is the main pillar of the Turkish law of contracts. This principle is also included in the Constitution under Article 48, that anyone has the freedom to work and contract in any field they desire. This freedom to contract implies not only the freedom to conclude a contract, but also the prohibition of any intervention from outside. According to the Constitutional Court, it is the state that should grant this constitutional protection to contracting persons.[94] This freedom can also be subject to

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[93] At https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=6098&MevzuatTur=1&MevzuatTertip=5, last accessed 28 January 2021.

[94] Decision of the Constitutional Court, 08.01.2009, E. 2004/87, K. 2009/5, published in *Official Gazette* 05.03.2009 – 27160, 13.

limitation, but without touching the core of the freedom and its law.[95] It means that any limitation to the freedom to contract can only be made by law. It follows that any intervention by the administration must derive from a provision of law. In our case, there is no specific law that entitles the administration to intervene with a PPP project in the way that is referred to above.

In fact, the Turkish public law practice, i.e. the Constitutional Court and the Council of State ("*Danıştay*"), have always relied on the dictum of *pacta sunt servanda* [agreements must be kept] as regards boundaries to any intervention by the public to the contracts (Tan 2014). It is also stated that the freedom to contract is not only a formal freedom, but should also include a material content that shapes the freedom. That material content may need to be informed by the values of economic public policy that aims at scrutinizing the market and protecting consumers (Tan 2014). Certain regulatory bodies have already been established to shape the contract freedom in terms of intervention for the benefit of the consumer or competitors, and the public. These independent regulatory agencies [IRA] are established by law and empowered with powers to intervene with the freedom of contract within the framework of the relevant laws.

Once a contract is freely concluded between the administration and the private party, it cannot be altered by a legislative act of the legislature or the administration. In the past, both the Constitutional Court and *Danıştay* refused any attempt by the legislature (the Turkish Parliament) and Council of Ministers as part of the administration to deprive the private parties of their contractual rights by enacting laws or decrees. Both courts explicitly made clear that the principle of the rule of law as embodied in the Constitution prevents the lawmaker from rescinding already signed contracts unilaterally and introducing new provisions for the benefit of the administration, on the ground that it is against the principle of legal security and the dictum of *pacta sunt servanda*. Such laws and decrees brought before both courts were annulled.[96] Accordingly, it is untenable to suggest that new regulatory arrangements can be a means of intervention in current projects.

Although there is currently no IRA in the healthcare sector, we may cite several of them in various sectors in Turkey: for example, banking, competition, the energy market, data protection, information technology and communication. These authorities are endowed with the powers to regulate the market and practices within their field of application. In certain cases, they are even entitled to propose changes

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95 Article 13 of the Constitution.

96 See e.g. the Constitutional Court Decisions: 13.02.2002, E. 2001/293, K. 2002/28, published in *Official Gazette*, 18.04.2002 – 24730; 31.01.1997, E.1996/66, K. 1997/7, published in *Official Gazette* 28.10.1997 – 23154. Council of State Decisions: 10th Chamber 10.10.1996, E.1995/926 K.1996/5932, *Danıştay Dergisi* (journal of *Danıştay*), 1997, Vol. 93, 494 at https://drive.google.com/file/d/1hm6vir52SaHcQSCFM37JCd9mCkgwXo1i/view, last accessed 26 January 2021; 10th Chamber, 13.05.2011, E.2010/14697, at https://www.verginet.net/Dokumanlar/2011/2010-14697.pdf last accessed 26 January 2021.

to relevant agreements that are already concluded and in use. Their powers may include changes to the agreements the parties already signed. The suggestions of the IRAs can be either directly or indirectly binding on the contracted parties.

This power of intervention no doubt is intended to assist in economic public order. However, when considering agreements or contracts to which a public administration is party, any such suggestion, proposal or order by an IRA to rescind or amend the contract at the implementation phase will be against the freedom to contract and the principle of legal security(Tan 2014).

Following the foregoing discussion, what is left to be examined for a possible intervention to PPP contract projects is a legal case that can be brought to the courts, whether state courts or arbitration courts. If a party to a contract believes that the contract needs to be repealed or amended due to change in circumstances, the parties to the contract can do so amicably. If no amicable solution is reached, then either party has the right to file a case at the competent venue to obtain a decision to that end. As already stated above, for a PPP project contract, the competent venue may be either the courts of Turkey or, if the parties have agreed to arbitration, then the arbitral tribunal so established as per the provisions of the IAL. However, in both cases the law applicable to the disputes or to any such request by either party will be Turkish law.

Therefore, if, for example, the MOH is of the opinion that a project agreement needs to be repealed, partly or wholly, or amended, it should bring this as a legal case at the competent venue. Once it is filed, the court or the tribunal should examine the case as per the substantive provisions of the Turkish laws, in particular the provisions applied to the law of contracts that are embodied in the TCO.

The principle of *pacta sunt servanda* is one of the pillars of the law of contracts. However, in certain circumstances the conditions or economic-legal environment may change during the implementation phase of a contract. Therefore, scholars have created and developed some theories that can be applicable when the circumstances have materially changed. In early ages this exception was worded in Latin as *clausula rebus sic stantibus* [things thus standing], but this was mostly used in public international law. In modern regulations the exception is seen under different names, though with mostly the same result.

In Turkish law, the early and the main provision that would allow the courts to intervene in a contract in use is the principle of *bona fide* [in good faith], which finds its meaning in Article 2 of the Turkish Civil Code.[97] The provision reads "*everyone has to obey the principles of good faith when utilising their rights and fulfilling their obligations. The legal order does not protect the abuse of rights.*" This general provision was later backed in the newly adopted version of the TCO by adopting a provision in Article

[97] At https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=4721&MevzuatTur=1&MevzuatTertip=5, last accessed 28 January 2021.

138 for a specific situation where contracting parties under certain conditions may have resort to the courts to amend or even repeal or terminate their contract due to changed circumstances. This can only be made by a determination of the competent judge/arbitrator in a judgement or award. The Article is titled "*Excessive Difficulty of Performance*". As the title suggests, when a party claims that their performance under the contract has become excessively difficult, that party can request the court to adapt the contract to the changing circumstances that have made it impossible to perform. If the adaptation is not possible, then a termination of the contract can be demanded.

The provision has prerequisites to allow an adaptation or termination if all of the following requirements have been met:

i- there must be extraordinary changes between the time when the contract was agreed and the time during the performance of the contract. Such extraordinary changes must have arisen after the contract was agreed;

ii- such event of difficulty should not be caused by the debtor;

iii- this event must have changed the situation as it was at the time of the agreement of the contract, and the request for action by the debtor under the new circumstances comes under the principle of good faith due to such change;

iv- the debtor either has not performed his obligations or has performed them by saving his rights, arising from the excessive difficulty of the performance. The relevant Article 138 says that this provision can be applicable to foreign currency debts.

Since a PPP project agreement is subject to Turkish laws, it is tenable that when the above requirements are met, Article 138 can be applicable; one example could be the MOH claiming that due to economic turmoil and excessive foreign currency fluctuations, it has become excessively difficult for the MOH to perform its obligations under the contract. Although this is possible in theory, we should ask whether this can work in practice. Because if we look at the circumstances under which PPP contracts are concluded, it may not be possible to argue that at least the first requirement above would hold. In fact, circumstances at the time when those PPP contracts were signed have not changed in the sense that they were unforeseeable. The Turkish economy's performance has not altered, and it was predictable at the time of the conclusion of those contracts. The foreign financing of the projects has been carried out in foreign currency. Thus, since the parties to the PPP projects predicted then that the Turkish Lira would be devalued during the implementation of the project agreement, thus they indexed the payments of the rentals by the MOH to the foreign currency in which the finance is concluded. Hence, any argument under Article 138 would not be a solid base to amend the contract.

There is another provision under Turkish law that might be invoked. Article 27 of the TCO states that if contracts are in breach of mandatory provisions of the law, ethics, *public policy*, personal rights or the

subject of which is impossible, they are definitely null and void. Among other reasons, public policy or public orders may be singled out as providing a base for possible termination of a PPP project contract. The argument might be that the contract even when agreed was against public policy by not meeting or satisfying the general public interest.

The content of public policy in the field of private law and in particular in the application of the above provision is rather limited. First, it is suggested that any definition of public policy for the application of Article 27 of the TCO should reflect the written rules of the legal system8Atasoy 2020, p.147). This is the Constitution at the base of the legislative pyramid. Otherwise, invoking the unwritten rules of law would diminish the main principle of rule of law. It should also be remembered here that Article 48 of the Constitution refers to the very subject matter of the freedom to contract.

The limitation adopted under Article 27 for the grounds of public policy is mostly aimed at balancing the interests and strengths of the contracting parties. When there is an imbalance at the expense of the other contracting parties, then public policy or public order limitation may come into play. Additionally, contract justice may also be cited in this regard(Atasoy 2020, p.105).

There are numerous variations in public policy that can be considered within the application of Article 27. For the sake of this study, we believe that the most relevant ground for the limitation of freedom to contract in interpreting the public policy concept is economic public policy. In a contract it may be that not only the specific interest of a party can be breached, but also a general interest relating to economic order (Atasoy 2020, p. 176). However, this is rather an abstract subject that needs to be suggested by the decision-makers. When the decision-makers try to shape this concept in a concrete way, it must be realised with a clear reference to legal security and freedom to contract. Therefore, one can only speak of such limitation as a last resort [*ultimo ratio*] (Atasoy 2020, p. 212). Likewise, the decision-makers, judges or arbitrators have no mandate to create new obligations for the parties to a contract other than those already agreed at the inception of the legal relationship. This is so even when monitoring contracts for the purposes of social and economic concerns. This is a result of the prevalence of the principle of the rule of law.

Another concept that may come into play is the attainment of public economic peace in order to protect the legal order and to ensure the public interest. However, the concept of public economic peace is more a public or administrative law issue than a law of obligations. The public economic peace notion is a concept that lends itself to the unwritten principles of the legal order. Therefore, when the decision-makers are faced with setting a balance between this notion and the contract that the parties agreed by their own free will, the decisive criterion should be the freedom to contract. The reason is that that notion has yet to be shaped by laws. Thus, in order to avoid any abuse of such limitation and to protect legal security as well as the rule of law, usage of the public policy limitation to contractual freedom should

stay as an ancillary concept(Atasoy 2020, p.254). Additionally, the principle of the freedom to contract as embodied in the Constitution should not be sacrificed for an exceptional and abstract notion. Hence, the decision-makers should look into the provisions of the contract first to find the best solution for the parties if the equilibrium of the contractual obligations is a concern.

Consequently, we believe that public policy or public order limitation may not be utilised to intervene in PPP project agreements. The MOH as one of the parties and representing the administration as the stronger and the more powerful party to the contract is not in a position to rely on this exception in Article 27 of the TCO.

Since we accept that the use of public policy is an exception, we should look into the provisions of the project agreement that is signed by the parties with free will. If any party thereto is of the opinion that the contract has become insupportable due to concerns that cannot be attributed to the other party, then it should first have resort to the agreement itself. From the standpoint of the MOH, if the MOH thinks that a specific project agreement is of that category, then it should try to apply the provisions of the relevant project agreement.

Looking at the provisions of the PPP project agreements, one may conclude that almost all of them have identical provisions. Of these, there are specific provisions for the MOH to have recourse to the termination of the project agreement, in particular in the event of failures by the project company that are specified in project agreements in a very detailed manner. The project agreement, being a mutual contract, can be terminated by both parties' agreement as per the TCO. We should emphasize that the project agreement is not the only agreement signed between the MOH and the project company. The whole bunch of agreements runs to hundreds of pages. Even the creditors or funders have agreements not only with the project company, but also with the MOH as well. In particular, the three parties sign a funders' direct agreement, wherein provisions for certain termination events are also contained.

Any termination or amendment request by the MOH is best dealt with by reference to the provisions of the project agreement. Any unilateral act would run counter to the reputation of the country in terms of the climate for foreign investment. Intervention in the contract through means outside the contractual relationship may also trigger the responsibility of the state, the MOH being a part of thereof, under bilateral investment protection and promotion treaties that Turkey already signed.

b. Legitimacy

In order to pursue a successful PPP scheme, one of the most important factors is the issue of building legitimacy. It is widely accepted that both developing and sustaining PPP applications is profoundly dependent on the concept of legitimacy (Hodge 2006; Jooste et al 2009). The reason is mainly that PPP projects aim at transferring the provision of services that have traditionally been publicly delivered, to

the private sector. Then comes the responsibility to ensure the interests of various groups of stakeholders in this new framework, namely the public sector, private sector and the civic sector. While the first two combine to make a contract to implement the relevant PPP project, the civic sector comprises the users of the services or the assets, local residents, non-governmental civil rights organisations, and most importantly the wider group of taxpayers.

It is evident that the responsibility to ensure and promote the legitimacy of PPP programmes and to protect the interests of user groups lies with the government (Jooste et al 2009). The instances of PPP programmes as deployed at international level proved that the PPP instrument generally lacks legitimacy in the eyes of citizens for which those programmes have been implemented. One example is the New South Wales and Victoria states in Australia which conducted parliamentary inquiries that determined a lack of legitimacy in the eyes of the taxpayers. This still does not mean that it is a public versus private debate. What needs to be done is to provide evidence of better value for money for the public users of the PPP services (Hodge 2006).

However, it takes effort to establish this legitimacy. Government officials may not be equipped to tackle the complexity of PPP projects, at least on a wider spectrum. They may well employ advisers who are competent. But most of the legislature and government support such deals on trust. When it comes to citizens in the civic sector, then we may experience a brick wall of both complexity and commercial confidentiality (Sands 2006; Hodge 2006; Jooste 2009). In fact, these two obstacles are interrelated. The complexity can be easily overcome by giving the civic sector improved accessibility to details of the PPP projects. Otherwise, the government's accountability will be in question. It is an established fact that transparency is the best way to assure legitimacy.

The above-mentioned parliamentary inquiry in Australia made certain suggestions to achieve legitimacy, and democratic legitimacy in particular (Hodge 2006). The first group of recommendations relating to accountability suggested the mandatory publication of PPP documentation. This may not of course include all the documentation, but just the salient features of the contract and summaries. This should also contain the value for money report, which is important in the eyes of taxpayers. The second group suggests that public interest be given a great deal of importance in PPP assessment. The third group of recommendations entails increased policy review systems for disclosure and arrangement of PPPs, which can be done by periodic audits by the government agencies endowed with such competence and powers. It is evident that commercial confidentiality clauses, albeit a necessity from a commercial standpoint, diminish transparency and negatively affect public accountability and thus legitimacy. Additionally, reduced scrutiny has the potential for creating corruption and patronage (Sands 2006).

There is no doubt that the above findings are totally applicable to having a successful PPP programme around the world, including in Turkey. In fact the World Bank, assessing the importance of transparency

in the success of PPPs, have authored a report titled “Disclosure of Project and Contract Information in Public-Private Partnerships” (World Bank Institute 2013, January).

The World Bank Report examined 11 jurisdictions representing 8 countries, including some of their sub-national regions. The objective of the report and the review is to provide emerging practices around the disclosure of information on PPP projects and contracts. It also makes recommendations to government agencies as to how they can transmit more detailed information to their civic sector. The report also found that PPP projects require greater transparency than similar projects implemented by traditional public procurement. PPP projects may by their very nature demand further considerations for disclosure that do not exist in publicly executed projects. It is apparent that considerable disclosure can help PPP programmes to attain better value-for-money (World Bank Institute 2013, January).

In relation to the disclosure arrangements in those 11 jurisdictions, the report determined that certain jurisdictions proactively disclosed a considerable amount of information. In some others, although information was provided by the government through general transparency laws, yet to access that information needed time and lengthy procedures.

For example, the Latin American countries Brasil (Federal), Brasil (Bahia), Brasil (Minas Greais), Chile and Peru apply full proactive disclosure as standard. They also disclose all guarantees included in the PPP contracts too. However, performance and audit reports are not disclosed, with the exception of Peru which discloses performance reports proactively for transport projects (World Bank Institute 2013, January). Australia’s New South Wales and Victoria, widely using PPP projects, the United Kingdom and Canada’s British Columbia make proactive disclosures, but with redactions. The first two also provide a detailed summary. The guarantees in the PPP contracts are provided in these four jurisdictions, but with some limitations. Again, audit reports are proactively disclosed by the four jurisdictions, whereas performance reports are disclosed reactively (World Bank Institute 2013, January). In India, there is proactive disclosure in selected sectors, with all guarantees granted in the contracts. Audit reports are proactively disclosed, whereas performance reports are disclosed reactively (World Bank Institute 2013, January). South Africa adopts a reactive disclosure system for contract disclosures; guarantees are proactively disclosed for new contracts too; guarantees for old contracts are subject to reactive disclosure; performance reports are both proactively and reactively disclosed, depending on the project; audit reports are disclosed proactively (World Bank Institute 2013, January).

The World Bank report in the end believed the disclosure of information relating to PPP contracts suggested approaches for PPP projects and contracts that could be applied in all relevant jurisdictions, including Turkey. However, in order to execute those suggestions, laws and in particular the BLT need to be amended. Alternatively, general legislation to this end may also be enacted which could cover the disclosures of PPP projects and contracts, if not all public contracts. It is also important that such

disclosures include not only the contracts or certain redacted parts of the contract but also guarantees, grants, performance criteria and the reports thereof, including audit reports.

The report concludes that a PPP disclosure policy should ensure that the public is fully informed about:

i- range of services in the contract, performance levels agreed upon and performance levels attained;
ii- salient features of the procurement process;
iii- the government grants guarantees and other financial incentives, together with significant risk-bearing.

This disclosure should be in a way that the competitive position of the company delivering the PPP project is still protected. The report provides detailed tables that include the key elements of proactive disclosure, as well as good practice in terms of disclosure of information regarding PPPs (World Bank Institute 2013, January).

For the sake of a better PPP environment for both the civic sector and the public and private sectors, Turkey should adopt the disclosure system that is articulated in the World Bank report. This will undoubtedly ensure the transparency and thus legitimacy of the PPP healthcare projects. It will also enhance the accountability of the government by creating democratic legitimacy as well. Considering the long-term effects of PPP projects, subsequent governments will also benefit from this legitimacy, as will taxpayers.

It follows from the foregoing that PPPs may work better when commercial confidentiality is not imposed so strictly as to limit the public accessing the information that is necessary to evaluate its legitimacy. This would also provide accountability systems that would discourage any misconduct. Consequently, the social contract would thereby be improved.

OUTCOME

As regards PPPs in the health sector through so-called "City Hospitals" (*Şehir Hastaneleri*), adopting the BLT Law in its sphere has brought a strong legal basis to putative investors/sponsors. The practice of an improved legal environment has meant that numerous contractors have successful bids for projects in the pipeline. With respect to the efficiency and customer satisfaction for the services rendered by the completed projects (in operation), studies (Çınar et al 2017) show a positive reception due to these city hospitals' state of the art construction and modern facilities, as well as quality of service. If the government succeeds in promoting, encouraging and attracting international health tourism to the city hospitals, the burden on the public budget would be very much lessened if not lifted completely.

On the other hand, it should be stated here that Turkey should ideally have one unifying PPP law to regulate basic principles for all areas that are open to public–private partnership or cooperation. In fact, there was a proposal dated 2006 to that end prepared by the State Planning Organization (*DPT*), which

became statute barred. The need for a unifying law is increasing day by day(100th Year Turkey Plan 2019).[98] This would save labour and money. It would also guarantee efficiency and maximum utilization of the sources available. More importantly, a unifying law in conformity with other local laws would clarify parties' standings both in the administration and private sectors in a balanced manner and thereby clear the way for a better investment environment. It would also strengthen the legal security and foreseeability that is a *sine quo non* in international investment law from the standpoint of, in particular, the investors. There is no doubt that such a move would strengthen Turkey's hand in international competition for the attraction of quality foreign investors.

Last but not the least, as outlined in the foregoing sections of this study, if a steady and fruitful environment is to be established for the interests of both the private and the public circles, the key solution is to ensure the legitimacy of the public private partnership.

[98] A centralized PPP unit within the general central administration is also a must for smoother operation. The government believed the same, providing in the 11th Development Plan, which covers years 2019-2023, that "*a new framework regulation will be introduced to ensure effectiveness, efficiency and value for money in PPP implementations*".

BIBLIOGRAPHY

Akıllı, H. (2013). Kamu Hizmeti İmtiyazından Yap İşlet Devret Yöntemine: Yasal Serüven. (*From the Public Service Concession to the Build Operate Transfer Method*). *Sayıştay Dergisi*, Nisan Haziran, 91-114.

Akıncı, Z.(2016). Milletlerarası Tahkim,(*International Arbitration*). 4. Bası, İstanbul.

APMG. (2016). *Public-Private Partnership (PPP) Certification Guide*, Chapter 1 PPP Introduction and Overview (the APMG PPP Guide) at https://ppp-certification.com/ppp-certification-guide/about-ppp-guide last accessed 1 October 2019.

Atasoy, K. (2020). Sözleşme Özgürlüğünün Kamu Düzenine Aykırılık Sınırı (*Public Policy Limitation of the Freedom of Contract*), İstanbul.

Belohlavek, A. J. (2013). Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth, *ASA Bulletin*, Volume 31, Issue 2, 262-292, last accessed 25 January 2021.

Boz, S S. (2013). Kamu Özel İşbirliği(PPP) Modeli" (Public Private Cooperation (PPP) Model), *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, Cilt: 4 Sayı:2, 277-332.

Commission (EC). (2004). *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions* (Green Paper), COM, 327 Final, 30th April https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1586176331838&uri=CELEX:52004AE1440

Comission (EC). (2003). Concessions (Green Paper), COM; *European Commission Guidelines for Successful Public-Private Partnership*, https://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf.

Çınar, N. F., Türkoğlu, Ç., Tütünsatar, A. (2017). 'Kamu Özel Ortaklığı/İşbirliği Modeli ve Sağlık Hizmetlerinin Sunumunda Hizmet memnuniyetinin Ölçülmesi: Entegre Sağlık Kampüsleri (Şehir Hastaneleri) İçin Bir Araştırma' (*Public Private partnership/Cooperation and Measuring of Service Satisfaction in Provision of Health Services: A Research on Integrated Health Campuses (City Hospitals)*), *Süleyman Demirel Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* Sayı 4, 215-232.

Daintith, T.(1979). 'Regulation by Contract: The New Prerogative', *Current Legal Problems*, Vol. 32/1, 41-64.

EBRD. (2006). *Core Principles for a Modern Concessions Law-Selection and Justification of Principles*, http://www.ebrd.com/cs/Satellite?c=Content&cid=1395238764510&pagename=EBRD%2FContent%2FContentLayout last accessed 10 March 2020.

EPEC. (2015), the EPEC PPP Guide, http://www.eib.org/epec/g2g/index.htm last accessed 10 March 2020.

EPEC. (2012). UK (England) - *PPP Units and Related Institutional Framework*, June, http://www.eib.org/epec/resources/publications/epec_uk_england_public_en.pdf last accessed 4 May 2017.

European Parliament (EU). (2006, 26 October). *Resolution on Public-Private Partnerships and Community Law on Public Procurement and Concessions* (2006/2043(INI)), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52006IP0462.

Freire, A. L., Sombra, T. L. S., Neto, D. S. R. (2020). Chapter 4 Brazil, in *Public-Private Partnership Law Review*, 35-47. Freire A L, Sombra ST L and Neto RD S (eds).

Griffiths, A., Carney, N., Goss, A. (2020), Chapter 2 Australia, 10-19. in *Public-Private Partnership Law Review*, Sixth Edition, Freire A L, Sombra ST L and Neto RD S (eds).

Güneş, S. (2017) İmtiyaz Sözleşmelerinde Tahkim, (*Arbitration in Concession Contracts*), *MHB*, Cilt:37, Sayı:2, 408-438.

Hodge, G. (2006). Public Private Partnerships and Legitimacy, *UNSW Law Journal*, Vol. 29(3), 318-327.

Jooste, S. F., Levitt, R. E., Scott, W. R. (2009). "Capacity, Legitimacy and Interest Toward a Framework for PPP Program Success", 1-14, at https://www.researchgate.net/publication/228885734_, last accessed 25 January 2021.

100th Year Turkey Plan. (2019, 18 July). Eleventh Development Plan (2019-2023), at http://www.sbb.gov.tr/wp-content/uploads/2020/03/On_BirinciPLan_ingilizce_SonBaski.pdf last acessed 30 March 2020.

11th Development Plan. (2019). PPP special experts' first report of Turkey covering 2019-2023 (*11. Kalkınma Planı (2019-2023) Kamu Özel İşbirliği Özel İhtisas Komisyonu Ön Raporu*), http://www.sbb.gov.tr/wp-content/uploads/2019/07/OnbirinciKalkinmaPlani.pdf last accessed 13 March 2020;

Kamu Özel İşbirliği Raporu 2018. (2019, Mayıs). (*Public Private Partnership Report*), https://www.sbb.gov.tr/wp-content/uploads/2019/05/Kamu-Ozel_Isbirligi_Raporu-2018.pdf last accessed 13 March 2020.

Karahanoğulları, O. (2011). "Kamu Hizmetleri Piyasasında Dördüncü Tip: Eksik İmtiyaz (Kamu-Özel Ortaklığı)" (*Limited Concession (Public-Private Partnership): A New Model of Participation of Private Entrepreneurs in the Production of Public Services*), *Ankara Üniversitesi SBF Dergisi*, Cilt 66, No. 3, 177-215.

Kikuchi, K., Wasaka, K. (2020). "Chapter 8 Japan", 91-103 in *Public-Private Partnership Law Review*, Sixth Edition, Edited by FREIRE Andre Luiz / SOMBRA T L Santos/ NETO D S Raul.

Mirchandani, D., Jacobo, A. R. (2020). "Chapter 23 United States", 275-284 in *Public-Private Partnership Law Review*, Sixth Edition, Freire A L, Sombra ST L and Neto RD S (eds).

Orak, C. Ç. (2006). Kamu Hizmeti İmtiyaz Sözleşmelerinde Tahkim,(*Arbitration in Public Services Concession Contracts*) Ankara 2006.

Parliamentary Budget Office. (2018). *An Overview of Public Private Partnerships in Ireland*, p. 17 at https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2018/2018-03-16_an-overview-of-public-private-partnerships-in-ireland_en.pdf last accessed 5 March 2020.

Richards, M., Calder, K., Hadrill, A. (2020). "Chapter 22 United Kingdom", in *Public-Private Partnership Law Review*, Sixth Edition 2020, 252-273, Freire A L, Sombra ST L and Neto RD S (eds).

Sands, V. (2006). "The Right to Know and Obligation to Provide: Public Private Partnerships, Public Knowledge, Public Accountability, Public Disenfranchisement and Prison Cases", *UNSW Law Journal*, Vol. 29(3), 334-341.

Son, S. (2012, June). "Legal Analysis on Public-Private Partnerships regarding Model PPP Rules" , https://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704_Report_on_PPP_legal_IssuesSon_Seungwoover.11.pdf last accessed 14 March 2020.

Sözer, A. N. (2013). "Sağlıkta Yeniden Yapılanmanın (Özelleştirmenin) Devamı Olarak Şehir Hastaneleri" (*City Hospitals as a Continuance of Restructuring (Privatisation) in Health*), *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, Cilt.15, 215-253.

Tan, T. (1992). "*Kamu Hizmeti İmtiyazından Yap İşlet Devret Modeline*" (From the Public Service Concession to the Build Operate Transfer Model), *Ankara Üniversitesi SBF Dergisi*, Sayı 3, 307-325.

Tan, T. (2014). "Sözleşme Özgürlüğüne Kamunun Müdahalesi", (*Intervention of the Public to the Freedom of Contract)*, 513-524,

http://repository.bilkent.edu.tr/bitstream/handle/11693/52032/Sözleşme_özgürlügüne_kamunun_müdahalesi.pdf?sequence=1&isAllowed=y , last accessed 26 January 2021.

Tansuğ, Ç. (2001). İdari Sözleşmelerde Tahkim, (*Arbitration in Administrative Contracts*) Galatasaray Üniversitesi Yayımlanmamış Yüksek Lisans Tezi, İstanbul.

UK Government Report. (2018). Private Finance Initiative and Private Finance 2 Projects: 2018 Summary Data, p. 5 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805117/PFI_and_PF2_FINAL_PDF1.pdf last accessed 25 May 2020.

UNCITRAL the PFIP Guide at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pfip-e.pdf last accessed 10 December 2019

UNCITRAL aPFIP Model at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90621_ebook.pdf last accessed 10 December 2019

UNCITRAL Arbitration Model Law. (2006). on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf, last accessed 25 January 2021.

UNCITRAL Model on Legislative Provisions on Public-Private Partnerships at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11011_ebook_final.pdf

Vaissier, F-G., Laisney, L-J., Le Bars, O., Houires, D., Ruffie, S. (2020). "Chapter 6 France", 58-77 in *Public-Private Partnership Law Review*, Sixth Edition, Freire A L, Sombra ST L and Neto RD S (eds).

World Bank Institute. (2013, January) Disclosure of Project and Contract Information in Public-Private Partnerships, at http://documents1.worldbank.org/curated/en/886371506355247197/pdf/119987-PUBLIC-JAN-2013-92p-DisclosureofProjectandContractInformationinPPPs.pdf last accessed 26 January 2021.

Yılmaz, İ. (2006) "Uluslararası Yatırım Tahkimleri" (*International Investment Arbitrations*), *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi*, Sayı 1, 69-84.

Yılmaz, İ. (2004). Uluslararası Yatırım Uyuşmazlıklarının Tahkim Yoluyla Çözümü ve ICSID (*Settlement of International Investment Disputes by Arbitration and ICSID*) Istanbul.