

Turkish Energy Arbitrations and the Question of Applicable Law

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Turkish energy legislation went through a series of changes in the 1980s and 1990s for the purpose of allowing and expanding the role of private companies in the energy sectors. As a basis, the Turkish Grand National Assembly passed Law No. 3096 on the "Authorization of parties other than the Turkish Electricity Authority to Generate, Transmit, Distribute and Sell Electricity in the Republic of Turkey".¹ This law enabled private companies to legally carry out activities in the electricity market in Turkey.

As per Article 3 of the said Law, the Council of Ministers may authorize the Ministry of Energy and Natural Resources (the "Ministry") to sign concession contracts with private companies by issuing decrees. Accordingly, the Council of Ministers issued a number of decrees (the "1998 Decrees") in 1998 and the Ministry entered into concession contracts with private companies in the electricity sector under various models such as "build-operate-transfer", "build-operate-own" or "transfer of operating rights".

On August 13, 1999, Articles 47, 125 and 155 of the Turkish Constitution were amended allowing public entities to enter into private law contracts with private parties for the performance of public services. Particularly, the following provision was added to Article 125: "Concession agreements concerning public services may provide that the disputes arising from such agreements are settled by way of national or international arbitration." Furthermore, this provision was implemented by Law No. 4501² providing for the concession contracts to be replaced by permitting private companies being parties to existing concession agreements to request the conversion of such contracts into contracts governed by private law and the incorporation of international arbitration clauses into such agreements. In 2000, the Council of Ministers issued a second series of decrees (the "2000 Decrees") authorizing the Ministry to proceed to replace

concession agreements by implementation agreements, which are governed by private law. However, after concession agreements had been converted into implementation agreements, State Council³ annulled the 1998 Decrees and the 2000 Decrees and the Ministry claimed that it was impossible to perform the obligations under the implementation agreements given that such agreements became invalid due to the annulment of the decrees, which were the legal basis for both the implementation contracts and the arbitration agreements.

Private companies party to such implementation contracts initiated arbitration proceedings before the ICC⁴ upon such claim of the Ministry. The Ministry's aforesaid argument, which was common in such arbitration cases, led to the question whether the annulment of the Council of Ministers' decrees authorizing the conclusion of private law implementation agreements renders such agreements null and void. Tribunals' common approach to this question was that in the light of clear provisions of Article 125 of the Turkish Constitution and the Law No. 4501 implementation contracts are subject to private law and their validity including the validity of the arbitration clauses they contain should be decided on the basis of private law and such agreements and the arbitration clauses they contain are valid under the private law principles.

1. Announced in the Official Gazette and entered into force on December 19, 1984.

2. Provisional Article 1 of Law No. 4501 concerning "Principles to be applied in Arbitration for Resolution of Disputes Arising out of Concession Specifications and Agreements in respect of Public Services." Announced in the Official Gazette and entered into force on January 22, 2000.

3. Council of State or Danistay is the high court in the area of Turkish Administrative Law.

4. Arbitration proceedings followed by Cerrahoglu Law Offices are "Kanel Kangal Elektrik Limited Şirketi vs the Ministry of Energy and Natural Resources of the Republic of Turkey, ICC Arbitration N° 12463/MS", "Güney Ege Enerji İşletmeleri Ltd. Şirketi vs the Ministry of Energy and Natural Resources of the Republic of Turkey, ICC Arbitration N° 12815/MS", "SBD Sakarya Bolu Elektrik Dağıtım AS vs the Ministry of Energy and Natural Resources of the Republic of Turkey, ICC Arbitration N° 12575/MS".

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