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Contents

Pay-when-paid and Pay-if-paid Clauses in Subcontracting Construction Contracts

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Introduction

This article briefly describes the practical operation of pay-when-paid and pay-if-paid type payment clauses, which are frequently encountered in construction projects and, accordingly, in construction contracts. In this piece, I will not go into the details of the doctrinal debates and will rather adopt a practical perspective.

Such clauses provide that payment to the subcontractor is contingent on the main contractor having received payment from the employer, and they often arise when there is a back-to-back contractual structure. The article will first examine how these arrangements arise in contractual practice and explain the distinction between pay-when-paid and pay-if-paid clauses. It will then address, in light of the principle of freedom of contract under Turkish law, the validity of such clauses and the limited circumstances in which their application may be limited. Finally, it will discuss, through two hypothetical scenarios, how these clauses may come into play in disputes, and will summarise certain points that may usefully be borne in mind when drafting such provisions.

Overview of the contingent payment clauses

Construction projects are typically based on a structure with multiple contracts and different players are involved in the process. In addition to a contract concluded between the employer and the main contractor, there are other contracts entered into between the main contractor and various subcontractors. Although these contracts are not directly dependent on one another from a legal perspective, they

are interconnected due to the financial and administrative structure of the project. In practice, the amounts received by the main contractor from the employer often constitute the source of payments to subcontractors. In other words, the work performed by the subcontractor is, in practice, indirectly financed by the employer.

For main contractor, one of the key risks is the obligation to pay the subcontractor the sums that could not be recovered from the employer. In practice, it is commonly observed that pay-when-paid or pay-if-paid clauses are incorporated into contracts in order to allocate this risk, at least to some extent, within the contractual chain. Such clauses typically aim to manage payment flows and to pass on, or at least share, the risk of non-payment by the employer with the subcontractor.

These types of clauses may take different forms. In some cases, the contract expressly provides that "no payment will be made to the subcontractor unless payment has been received from the employer". In other cases, the same outcome is achieved indirectly. For example, the subcontractor's entitlement may depend on a payment certification mechanism under the main contract, or structured through sequential processes in which each stage depends on the completion of the preceding one. In this way, payment mechanisms are established such that both timing and scope are shaped by reference to the contractual relationship between the employer and the main contractor.

Independently two principal models can be identified. The first is the pay-when-paid model. Under this model, the subcontractor's entitlement has arisen; however, the deferral of that entitlement is made contingent upon the main contractor receiving payment from the employer. The second is the pay-if-paid model. In this model, the very existence of the subcontractor's entitlement is directly contingent upon payment being made by the employer. In order to illustrate this distinction more concretely, I set out below two brief examples of each:

Example 1: Pay-When-Paid (Deferral-Based Arrangement)

Payments to the Subcontractor shall be made after the Contractor has received payment from the Employer in respect of the relevant item of work. The Contractor shall pay the corresponding amount to the Subcontractor within [7/14] days following such receipt, and only to the extent of the amount collected from the Employer.

In such an arrangement, the debt exists; however, the timing of payment is linked to receipt of payment from the employer.[1]

[1] Such arrangements, in a sense, rest on an underlying assumption—perhaps even an optimism—that the employer will ultimately make payment.

Example 2: Pay-If-Paid (Condition-Based Arrangement)

The Subcontractor's entitlement to interim payments under this contract is conditional upon the Contractor having received payment from the Employer for the same work items. If the Contractor does not receive such payment from the Employer, no payment obligation shall arise vis-à-vis the Subcontractor in respect of that item.

In this type of arrangement, payment is subject to a condition; in other words, the existence of the debt depends on the employer's payment.

These examples demonstrate that the distinction between pay-when-paid and pay-if-paid appears to be significant. However, in practice the difference between the two may become less strict. As long as the employer does not make payment, the subcontractor's receivable will not be realised in fact. For this reason, even though pay-when-paid clauses are, in principle, characterised as arrangements relating to deferral, they may, in light of their wording, produce effects similar to pay-if-paid clauses in situations where the Employer fails to pay.[2]

The Legal Characterisation of These Clauses under Turkish Law

Turkish law does not contain any specific statutory provision governing these types of clauses. Therefore, the starting point in assessing these clauses is the principle of freedom of contract. Under Article 26 of the Turkish Code of Obligations ("TCO"), the parties are free to determine the content of their agreement within the limits set by law. On that basis, linking a payment obligation to a particular event, or to payment under another contractual relationship, is not, in itself, prohibited.[3] Indeed, such clauses are frequently encountered in practice.

It is also worth to consider whether such provisions should be characterised, under general principles, as conditional obligations or as limitation-of-liability clauses.[4] Depending on how the relevant provision is drafted, both characterisations may be arguable. This classification will not, as a rule, affect the validity of the clause.

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[2] For this reason, some authors in the literature suggest that, where there is uncertainty as to whether a contractual provision constitutes a pay-if-paid or a pay-when-paid clause, it should be interpreted in favour of the subcontractor and treated as a deferral-based arrangement rather than a condition affecting the existence of the debt.

[3] Ziya Akıncı, *Milletlerarası İnşaat Sözleşmeleri*, 1st ed., 2023, pp. 203-204; Gökçe Kurtulan, "Alt Yüklenici Sözleşmelerinde Yer Alan "Pay If Paid" ve "Pay When Paid" Ödeme Klozlarının Hukuki Niteliği ve Geçerliliğine İlişkin Bir Değerlendirme", Jurix, 2025 (Kurtulan), pp. 737-740; Halil Akkanat, *Alt Yüklenicilik Sözleşmesi*, İstanbul, On İki Levha Yayıncılık, 2010 (Akkanat), pp. 89-91.

[4] Akkanat, pp. 89-91; Kurtulan pp. 739-741.

However, as will be discussed below, it may become relevant when assessing the circumstances under which the application of such clauses may be limited.

Despite the principle that the parties can validly include such clauses in their contracts, in certain cases, their application may be restricted under general provisions. In this regard, the following section will examine the potential relevance of standard control terms (Articles 20–25 TCO), the principle of good faith (Article 2 of the Turkish Civil Code), and, as a specific manifestation thereof, the rule that a party may not prevent the fulfilment of a condition in bad faith (Article 175 TCO). In addition, the limits applicable to limitation-of-liability agreements, particularly in cases involving gross fault (Article 115 TCO), may also become relevant in restricting the application of such clauses.

When the Application of Such Clauses May Be Limited?

As noted above, while the validity of such clauses is, as a rule, recognised within the framework of freedom of contract, their validity or application may nevertheless be restricted under general principles of law. In this context, issues such as the control of standard terms, the principle of good faith, the prevention of the fulfilment of a condition in bad faith, and the limits applicable to limitation-of-liability agreements may come into play.

Pay-when-paid or pay-if-paid clauses may, in certain circumstances, also be examined within the framework of standard terms control.[5] Under the Turkish Code of Obligations, standard terms are defined as provisions that are prepared in advance by one party and incorporated into the contract without being negotiated with the other party (Articles 20 et seq. TCO). In such cases, it may be assessed whether the relevant clause was unexpected in light of the nature of the contract or whether it disrupts the contractual balance between the parties in a manner contrary to the principle of good faith.

That said, it should also be borne in mind that construction contracts are typically concluded between commercial parties (*tacir*), and that such risk allocation mechanisms are commonly used in commercial practice. Accordingly, it would be exceptional for these clauses to be invalidated on the basis of standard terms control. A finding of invalidity on this ground would generally arise only in exceptional

[5] Yeşim M. Atamer, *Sözleşme Özgürlüğünün Sınırlandırılması Çerçevesinde Genel İşlem Şartlarının Denetlenmesi*, Beta, 2001.

situations, such as where the clause was not genuinely negotiated and imposes an unusual or disproportionate risk on the subcontractor.[6]

Another doctrine that may limit the application of such clauses is the prohibition of abuse of rights. Pursuant to Article 2 of the Turkish Civil Code, the manifest abuse of a right is not protected by law. This principle is also capable of finding practical application in the context of pay-when-paid and pay-if-paid clauses. Indeed, where a dispute arises in connection with such provisions, it would not be surprising for arguments based on a breach of the principle of good faith to come into play.

For instance, it is possible that the main contractor cannot receive payment because of its own failure to perform its contractual obligations, to properly administer the certification process, or to pursue payment claims with due diligence. In such a case, it may be inconsistent with the principle of good faith for the main contractor to rely on its own failure to obtain payment as a basis for withholding payment from the subcontractor. But it is important to bear in mind that not every failure to receive payment would amount to restrictive application of the contingent payment clauses.

Similarly, reliance on pay-when-paid clauses may be problematic where such provisions are deliberately misused by the main contractor. In particular, where the main contractor fails to exercise its contractual rights against the employer, refrains from advancing payment claims, or does not make use of available mechanisms such as suspension or termination, the subcontractor's receivables may be left in a state of indefinite suspension. Such a result may be incompatible with the principle of good faith. That said, not every delay or partial non-payment should be regarded as a reason to restrict the payment clause based on the good faith principle.

These issues are not merely theoretical. These discussions come into question frequently in practice. Pay-when-paid clauses are generally intended to reflect delays in upstream payments in a reasonable manner within the subcontract. However, where the main contractor fails to pursue payment with due care or effectively suspends the recovery process, reliance on such clauses may amount to an abuse of rights. Accordingly, the application of pay-when-paid or pay-if-paid clauses requires an assessment not only of the contractual wording, but also of the conduct of the main contractor in pursuing payment from the employer.

In addition, the limits applicable to limitation-of-liability agreements, particularly in cases involving gross fault, may also become relevant in restricting the application

[6] Turkish Court of Cassation also acknowledges that provisions regarding standard terms control are not limited solely to consumer relationships but may also apply to contracts entered into between merchants. However, it is noted that, given the presumption that contractual terms are established with greater awareness in commercial relationships between merchants, such scrutiny will arise only in a more limited and exceptional manner: Turkish Court of Cassation, 11th Civil Chamber, Case No. 2016/4676, Decision No. 2017/3160, dated 29.05.2017.

of such clauses. As noted above, some views characterise these provisions as forms of limitation-of-liability clauses. From this perspective, the statutory limitations applicable to such agreements must likewise be taken into account.[7]

Under Article 115 of the Turkish Code of Obligations, it is not possible to exclude liability for gross fault. On that basis, where the main contractor fails to pursue, with due care, the processes necessary to secure payment from the employer, amounting to gross fault, and nevertheless relies on such clauses to withhold payment from the subcontractor, the relevant arrangement may fall to be assessed under Article 115 TCO. In such a case, the agreed allocation of risk would have been exceeded, and the application of the clause may be limited.

Examination Through the Lens of Two Hypothetical Scenarios

Against this background, the key distinction, in my view, lies in whether these clauses are applied in line with their intended purpose or in a manner that departs from it. The wording of the clause will be of course relevant in determining the threshold for this assessment. That said, in practice, I observe that most of the times the difference in approach reflected in the two scenarios below is often important in resolving concrete disputes.

In the such hypothetical first scenario, assume that the main contractor is generally receiving payments from the employer, although certain payments are delayed or subject to deductions. The main contractor has duly followed the certification process, submitted its payment claims, and exercised its contractual rights.

In such circumstances, some delays or shortfalls in payment may still occur. In this case, it may be reasonable to assess the subcontractor's claim by reference to the amounts actually recovered by the main contractor from the employer. These types of delays or deductions fall within the range of risks that could have been anticipated at the time of contracting. The party expected to make payment to the subcontractor, in this case, the main contractor, has not misused this risk allocation. Accordingly, the application of a pay-if-paid or pay-when-paid clause would generally be consistent with the risk distribution on which the contract is based.

In the second scenario, however, a different situation may arise. The main contractor receives no payment, or only very limited payment, from the employer. This may be due to the main contractor's failure to pursue its payment claims in accordance with the contractual procedures. For instance, the main contractor may have failed

[7] *See* Ferda Nur Güvenalp, *Milletlerarası Özel Hukukta Alt Yüklenicilik Sözleşmeleri*, İstanbul, 2025, pp. 75-76.

to submit its payment applications properly, even though the subcontractor has complied with its obligations. Alternatively, the main contractor may have refrained, without justification, from exercising contractual remedies such as suspension of works or termination, effectively allowing its exposure to increase on the assumption that the subcontractor will bear the financial burden.

In such a case, reliance on a pay-if-paid or pay-when-paid clause to withhold payment from the subcontractor becomes questionable from the perspective of good faith. What is at issue is no longer a reasonable and anticipated allocation of risk, but rather a use of the clause that departs from its intended purpose.

Accordingly, in real-life disputes, the central question will often be whether the main contractor has pursued the recovery of payment from the employer in a manner consistent with the principle of good faith, and whether the contractual allocation of risk has been exceeded. In other words, the issue is less about the formal validity of such clauses and more about whether they have been applied in good faith or used in a manner that goes beyond their intended function.

Drafting Considerations for Pay-When-Paid and Pay-If-Paid Clauses

The considerations relevant when drafting such clauses are closely linked to the thresholds discussed above. In other words, the way in which the contractual provision is structured will often shape how it is later interpreted and whether its application may be limited. For instance, where the subcontractor's entitlement is made directly contingent upon the employer's payment, that is a classic pay-if-paid arrangement, the threshold for its application may be regarded as higher. By contrast, where the clause is drafted as a simple mechanism governing deferral, a more flexible interpretation of the subcontractor's entitlement may be possible.

That said, as with any contractual arrangement, it is preferable to consider the potential risks in advance and to draft such provisions in a more detailed manner. Although this is not always feasible in practice, particularly in projects of significant size and value, clarifying certain matters at the drafting stage may be beneficial. For example, the contract may specify the steps the main contractor is required to take in order to secure payment from the employer, and under what circumstances it will be deemed to have failed to do so. Such clarity can significantly facilitate the assessment of a dispute if one arises. Similarly, the maximum period for which payment may be deferred, or the types of delay that may be considered acceptable, may also be addressed.

In addition, the contract may define the extent to which the subcontractor is expected to tolerate delays, and at what point it may resort to remedies such as suspension of performance or termination. If such arrangements are included, this may help clarifying the parties' expectations and narrowing the scope of potential disputes, particularly in large projects with complex payment structures.

At the same time, we know well that the parties do not pay attention to such details for rather niche issues in drafting their contracts. Construction contracts are often concluded between parties of unequal bargaining power, and negotiations may be constrained by practical considerations. Moreover, developing detailed provisions of this kind can be time-consuming and may not always be treated as a priority by the parties. As a result, many contracts contain pay-when-paid or pay-if-paid clauses expressed in relatively brief and general terms. In such cases, the interpretation of the contractual wording drafted in general terms, together with the general principles outlined above, becomes more decisive in resolving disputes.

Conclusion

Pay-when-paid and pay-if-paid clauses function as mechanisms through which payment risk is allocated within the contractual chain in construction projects. Under Turkish law, the starting point in assessing such clauses is the principle of freedom of contract. Accordingly, such provisions are not categorically invalid. That said, freedom of contract is not absolute, and the application of such clauses may, in certain circumstances, be limited by general principles and the practice between the parties.

In practice, the decisive issue is less the theoretical validity of these clauses and more how they are applied. Where they operate within a pre-agreed allocation of risk and are applied in a manner consistent with the principle of good faith, they can be regarded as a part of the contractual framework. By contrast, where the payment process is not properly pursued without good faith, and/or where such clauses are relied upon to leave the subcontractor's receivables in a state of indefinite suspension, a different assessment may be considered.

Climate Litigation Implications of EU Sustainability Directives for Turkish Companies

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Introduction

Over the past decade, climate change litigation has been increasingly pertinent for the private sector,[1] particularly for companies engaged in high-emission operations or fossil fuel activity.[2] Of more than 3.000 documented climate change lawsuits worldwide, approximately 20% now name companies as defendants.[3] These lawsuits are deemed to be "strategic", since the claimants do not solely seek compensation for the individualized harm and success in their individual case, but also aim to shape public discourse and compel key actors to alter their conduct regarding high-emissions.[4]

The recent advisory opinions delivered by international and regional courts put more emphasis on the responsibility of private actors, and highlight the States' obligations

[1] Earth.org, "Climate Litigation No Longer a 'Niche Concern', 226 New Cases Filed in 2024: Report", 30 June 2025, https://earth.org/climate-litigation-no-longer-a-niche-concern-as-impacts-become-increasingly-visible-report-says/, ("Earth.org Report") accessed 06 March 2026.

[2] London School of Economics Grantham Research Institute on Climate Change and the Environment, "Global trends in climate change litigation: 2025 snapshot," 25 June 2025, https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2025-snapshot/, accessed 06 March 2026; British Institute of International and Comparative Law, "Corporate Climate Litigation: Lessons Learned, Comparative Perspectives and Future Pathways", 11 May 2023, https://www.biicl.org/documents/165_corporate_climate_litigation-_lessons_learned_comparative_perspectives_and_future_pathways.pdf, accessed 07 March 2026.

[3] World Economic Forum, "Climate litigation is evolving and businesses should take notice", 13 January 2026, https://www.weforum.org/stories/2026/01/climate-litigation-business-risk/, accessed 10 March 2026.

[4] Earth.org Report.

to mitigate such private activities domestically.[5] The International Court of Justice, in its Obligations of States in respect of Climate Change Advisory Opinion, established that the fulfillment of international obligations requires States to exercise due diligence through domestic mitigation measures. The Court also emphasized that this due diligence obligation is not confined to public authorities; it extends to the conduct of private actors operating within a State's jurisdiction.[6] The International Tribunal for the Law of the Sea, in its Climate Change Advisory Opinion, also observed that the "*obligation of due diligence is particularly relevant in a situation in which the activities in question are mostly carried out by private persons or entities.*"[7]

To fulfill their obligations under international law and reduce national emissions, States have adopted domestic measures regulating the private sector activities, particularly those with high emissions. The European Union, in particular, has been leading the way in this regulatory activity. Through instruments such as the Corporate Sustainability Reporting Directive (CSRD),[8] the European Sustainability Reporting Standards (ESRS)[9] and the Corporate Sustainability Due Diligence Directive (CSDDD),[10] the EU imposes sustainability-related obligations on private entities.

The scope of these regulations is not limited to EU-companies. Instead, they extend beyond the EU, targeting non-EU entities either with commercial or industrial activity within the EU, or that are integrated into the chain of activities of entities subject to EU law. Consequently, Turkish companies involved in the production or development of goods and services that meet the directives' turnover thresholds must comply with these regulations. Following the publishing of the Omnibus 1 Directive amending the CSRD and CSDDD in the Official Journal of the EU on 26 February 2026,[11] compliance with these directives has become even more complex.

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[5] *Responsibilities and Obligations of States with respect to Climate Change in the Context of the United Nations Convention on the Law of the Sea*, International Tribunal for the Law of the Sea, ("ITLOS Advisory Opinion") Advisory Opinion dated 21 May 2024; *Climate Emergency and Human Rights*, Inter-American Court of Human Rights, Advisory Opinion OC-32/24 dated 9 January 2025; *Obligations of States in respect of Climate Change*, the International Court of Justice, ("Climate Change Advisory Opinion") Advisory Opinion dated 23 July 2025.

[6] Climate Change Advisory Opinion, para. 250-252.

[7] ITLOS Advisory Opinion, para. 236.

[8] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting ("CSRD").

[9] Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards ("ESRS").

[10] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 ("CSDDD").

[11] Directive (EU) 2026/470 of the European Parliament and of the Council of 24 February 2026 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting requirements and certain corporate sustainability due diligence requirements ("Omnibus 1 Directive").

Similarly, the Carbon Border Adjustment Mechanism (CBAM)[12] imposes direct financial obligations on exporters whose emissions exceed designated thresholds. Formally adopted on May 2023, CBAM is legally characterized as the extension of the EU Emissions Trading System Directive, an instrument designed to equalize the carbon costs between EU products and imports. Considering that the exports to the EU accounted for 41% of Türkiye's total export volume in 2024,[13] the impact of EU law is paramount, whether Turkish companies are directly regulated or indirectly affected as part of a European chain of activities.

This article examines climate litigation cases in Europe and its direct implications for Turkish companies within the framework of EU sustainability directives. The first section provides an analysis of the CSDDD and the CSRD in light of the Omnibus 1 Directive, focusing on how these instruments expand civil liability and create new evidentiary risks. The second section explores the CBAM, highlighting its potential to trigger commercial disputes and international trade law challenges. Finally, the article investigates the EU Taxonomy and the Green Claims Directive, assessing the rising tide of greenwashing litigation and its impact on corporate accountability. By synthesizing these regulatory developments, the article concludes with strategic recommendations for Turkish businesses to navigate this new era of mandatory compliance and 'litigation-ready' risk management.

Climate Change Regulation in the EU and Climate Litigation Implications

A. Civil Liability under the CSDDD After Omnibus 1

1. Scope and Content

In essence, the CSDDD requires companies to manage their chain of activities, and conduct comprehensive due diligence to detect, mitigate and remedy the adverse environmental and human rights impacts arising from their operations.[14] These

[12] Turkish Republic Ministry of Trade, "EU Carbon Border Adjustment Mechanism", https://ticaret.gov.tr/dis-iliskiler/yesil-mutabakat/ab-sinirda-karbon-duzenleme-mekanizmasi, ("Turkish Ministry of Trade on CBAM") accessed 07 March 2026.

[13] Esra Hamamcıoğlu, Argun Karamanlıoğlu, "İklim Değişikliği ve Ortaklıklar Hukuku Kesişiminde CSDD Yönergesine İlişkin Bazı Tespitler" in *İklim Hukuku*, Prof. Dr. Başak Baysal, et al. (eds.), 1st edn, On İki Levha Yayıncılık, December 2025.

[14] Under the CSDDD Article 3(b), (c), and (d), "adverse environmental impacts" are specifically defined by reference to the Annex 1 Section 1 Point 15 and 16 to the Directive. These include, *inter alia*, violations of the prohibition on causing any measurable environmental degradation, such as soil change, water or air pollution, or harmful emissions that impairs the natural basis for the preservation and production of food or denies a person access to safe drinking water.

obligations extend beyond the company's immediate activities, to encompass its subsidiaries and their third-party business partners involved in its chain of activities. The transposition deadline for the CSDDD, as modified by the Omnibus 1 Directive, is set for July 2028, providing Member States with additional time to align their national legislation. The resulting compliance obligations for in-scope companies will subsequently take effect in July 2029.[15]

The CSDDD, as amended by the Omnibus 1 Directive, operates through a dual-layered applicability framework that effectively projects EU standards onto the global market. While the Directive's direct application targets only large EU and non-EU companies, a much wider group of global companies, including Turkish companies, becomes indirectly subject once they take part in the chain of activities of a company subject to CSDDD. This structure significantly broadens the CSDDD's extraterritorial reach.

Category	Thresholds
EU Companies (Direct Application of the CSDDD)	• With over 5,000 employees • €1.5 billion in net worldwide turnover.[16]
Non-EU Companies (Direct Application of the CSDDD)[17]	• €1.5 billion in net turnover in the EU markets.[18]
Franchisors and licensors (EU & Non-EU)	• Net turnover surpassing €275 million in the EU, and • Royalty earnings above €75 million.[19]
Non-EU Companies that do not reach the turnover thresholds of the CSDDD (Indirect Application of the CSDDD)[20]	• they take part in the chain of activities of a company subject to CSDDD, either an EU or non-EU company.[21]

[15] ClientEarth, "Sustainability Due Diligence after Omnibus: Legal Implications for the CSDDD", February 2026, https://www.clientearth.org/media/rpfkpapv/client-earth-legal-analysis_v3.pdf, ("ClientEarth Report") accessed 07 March 2026, p.2.

[16] ClientEarth Report, p.5.

[17] The Danish Institute for Human Rights, "The Corporate Sustainability Due Diligence Directive for non-EU stakeholders: Businesses", https://www.humanrights.dk/files/media/document/CSDDD-for-non-EU-stakeholders_Businesses_EN-a.pdf, ("DIHR Report") accessed 07 March 2026, p.1, 4.

[18] *Id.*

[19] ClientEarth Report, p.5.

[20] DIHR Report, p. 4.

[21] *Id.*

Key implications for a Turkish company that will be subject to the direct application of the CSDDD can be summarized as follows:

- It is required to map its full value chain, identify and monitor risks in its chain of activities under CSDDD Article 8.[22]
- Where it identifies any adverse impacts under Article 8, it must (i) prevent potential adverse impacts, (ii) bring an end to actual adverse impacts and (iii) remediate if it causes or contributes to harm.[23]
- For such a company, Omnibus 1 narrows liability by clarifying that companies are not liable for harm to which they are merely linked, for example, harm caused by an indirect supplier over which the company had no direct involvement or control. While this limits the scope of legal liability, it does not remove the duty to identify and mitigate risks.
- While proactive engagement with indirect suppliers is no required under Omnibus 1, a Turkish company within the scope must still act in good faith to ensure that their direct suppliers implement effective due diligence practices throughout their own chain of activities.[24]
- It must establish and maintain a complaints mechanism that is accessible, transparent and responsive for all affected stakeholders, including workers, trade unions, local communities, and civil society organizations. These mechanisms must enable individuals to raise concerns or report harms related to human rights or environmental impacts linked to the company's operations or value chain.[25]

2. Litigation Implications

Article 4(20) of the Omnibus 1 Directive introduces major amendments to the civil liability framework previously established by the CSDDD, especially due to its removal of paragraphs (1) and (7) of Article 29 of the CSDDD.[26] Such modifications will likely create uncertainty and increase litigation exposure for both EU and non-EU companies.

The removal of paragraph (1) of Article 29 of the CSDDD eliminates the previously planned single, harmonized EU-wide civil liability regime.[27] As a result, each Member State must enact its own national civil liability regime for CSDDD-related claims, provided that minimum requirements, such as the obligation to ensure the protection of victims against human rights violations and environmental harm resulting from business operations and to make available full compensation for victims, are met.[28]

[22] CSDDD, art. 8

[23] CSDDD, arts. 10, 11, 12.

[24] Omnibus 1 Directive, preamble para. 44.

[25] CSDDD, art. 14.

[26] Omnibus 1 Directive, art.4(20).

[27] *Id.*

[28] Omnibus 1 Directive, art.4(20), preamble para. 49.

When the deletion of paragraph (1) of CSDDD is read together with the deletion of paragraph (7), the divergence in the civil liability regime becomes even more apparent. Article 4(20) of Omnibus 1 removed paragraph (7) of Article 29 of the CSDDD, which had required Member States to treat their implementation of the CSDDD as overriding mandatory law.[29] This provision served as an important safeguard for legal certainty, especially in cases where the applicable law would otherwise be that of a third state. With its removal, EU courts may now be obliged to apply non-EU law instead of the CSDDD's agreed standards, particularly when damages occur in third states.

As a consequence of the absence of a uniform, EU-wide liability standard, Turkish companies integrated into EU supply chains will be vulnerable to a multi-jurisdictional litigation threat. The Omnibus leaves companies exposed to a multijurisdictional 'patchwork', not merely of 27 national systems, but potentially more than 200 applicable civil liability regimes worldwide, further compounded by the regional divergences within them.[30] Considering that plaintiffs in European climate change litigation are not limited to European residents, but increasingly include affected communities by corporate emissions from regions as far as Indonesia[31] to Bonaire,[32] the CSDDD represents not only compliance obligations for Turkish companies, but also a significant issue in terms of cross-border dispute resolution under private international law.

B. Sustainability Reporting Under the CSRD After Omnibus 1

1. Scope and Content

The scope of the CSRD has significantly changed following the adoption of the Omnibus 1 Directive. Initially, the CSRD was designed to encompass a broader range of entities, focusing on large undertakings meeting at least two of three criteria: 250 employees, €50 million net turnover, and €25 million total assets.[33] However, to minimize the administrative burden on mid-sized entities and focus on high-impact actors, the Omnibus 1 Directive significantly raised these thresholds. The revised framework now targets EU companies with at least 1,000 staff and €450 million in

[29] CSDDD, art. 29(7).

[30] Geert Van Calster, "Legal opinion: how the Omnibus creates uncertainty on civil liability for companies", Business and Human Rights Centre, ("Van Calster Legal Opinion") 2025, p.1, 5.

[31] *Asmania et al. v. Holcim*, Zug Cantonal Court, ("Asmania v. Holcim") Interim Decision dated 17 December 2025, unofficial English translation https://callforclimatejustice.org/wp-content/uploads/Asmania-et-al-vs-Holcim_Decision-Cantonal-Court-Zug_17.12.2025_ENG.pdf, accessed 11 March 2026.

[32] *Greenpeace Netherlands and 8 citizens of Bonaire v. The Netherlands*, First Instance Decision dated 28 January 2026, unofficial English translation https://www.climatecasechart.com/document/greenpeace-netherlands-and-8-citizens-of-bonaire-v-the-netherlands_8731, accessed 11 March 2026.

[33] CSRD, art. 1(3).

revenue.[34] Non-EU parent companies are also included if they generate net turnover exceeding EUR 450 million within the EU, with an EU subsidiary or branch generating net turnover exceeding EUR 200 million.[35] The transposition deadline for the CSRD for Member States is set for March 2027. Effectively, mandatory reporting starts on 1 January 2027.[36]

The European Commission is set to formalize the revised ESRS by 18 September 2026, following the Omnibus 1 Directive. The ESRS incorporates internationally recognized classifications, namely the World Resources Institute Greenhouse Gas Protocol (GHG Protocol),[37] that categorize emissions as Scope 1, Scope 2, and Scope 3. Reporting and disclosing emissions in all three scopes is required under the CSRD Article 29b(2)(a).[38]

Scope	Definition	Reporting Obligations
Scope 1	Refers to direct greenhouse gas emissions that occur from assets under a company's ownership or operational control.[39]	a. the gross Scope 1 GHG emissions in metric tons of CO2eq; and b. the percentage of Scope 1 GHG emissions from regulated emission trading schemes.[40]
Scope 2	Accounts for emissions resulting from the production of purchased electricity used by the company.[41]	a. the gross location-based Scope 2 GHG emissions in metric tons of CO2eq; and b. the gross market-based Scope 2 GHG emissions in metric tons of CO2eq.[42]
Scope 3	Encompasses all other indirect emissions that arise from the company's broader activities, but occur at sources managed by third parties.[43]	GHG emissions in metric tons of CO2eq from each significant Scope 3 category.[44]

[34] Omnibus 1 Directive, art. 2(1)(a).

[35] Omnibus 1 Directive, art. 2(2).

[36] Omnibus 1 Directive, preamble para. 4.

[37] World Resources Institute, "Greenhouse Gas Protocol, A Corporate Accounting and Reporting Standard (Revised Edition)", https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf, ("GHG Protocol") accessed 11 March 2026.

[38] CSRD, art. 29b(2)(a).

[39] GHG Protocol, p.25

[40] European Financial Reporting Advisory Group, "European Sustainability Reporting Standards E1 Climate Change", European Financial Reporting Advisory Group, https://www.efrag.org/sites/default/files/media/document/2024-08/ESRS%20E1%20Delegated-act-2023-5303-annex-1_en.pdf ("ESRS E1"), accessed 11 March 2026, paras. 44, 45, 48.

[41] GHG Protocol, p. 25

[42] *Id.*

[43] *Id.*

[44] *Id.*, paras. 44, 51.

In-scope Turkish companies, (with net turnover exceeding EUR 450 million within the EU, or with an EU subsidiary or branch generating net turnover exceeding EUR 200 million) are required to report not only on information necessary to understand the undertaking's development, performance and position, but also how their operations affect environmental, social, and labor issues, as well as human rights and anti-corruption efforts. This framework introduces a "double materiality" reporting obligation: companies must disclose both their outward impact on society and the environment, and the inward impact that sustainability factors have on the company's efforts and own financial health.[45]

Although the CSRD does not itself prescribe fines or penalties for non-compliance, Member States are under the obligation to provide "*effective, proportionate and dissuasive*" penalties in their national provisions.[46] Further, Member States are required to set an upper limit on corporate penalties, capping them at 3% of a company's total global revenue.[47]

2. Litigation Implications

Alongside penalties in case of non-compliance with the reporting obligations, sustainability reporting also carries substantial litigation implications associated with reporting. Recent case law illustrates how companies' own disclosures, and particularly Scope 3 emissions, shape courts' assessments of duty of care, attribution, and causality.

a. Scope 3 Emissions and Expanded Corporate Responsibility:

The inclusion of Scope 3 emissions, where relevant, significantly alters how courts characterize major emitters.

In the 2024 Appeals Judgment of *Milieudefensie et al. v. Royal Dutch Shell plc*, the Hague Court of Appeals found that global Scope 3 emissions were both relevant for an evaluation of a company's duty of care and within the jurisdictional scope of the court.[48] Under Shell's own GHG Protocol based reporting, 95% of its total reported emissions were categorized as Scope 3.[49]

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[45] CSRD, preamble para. 29.

[46] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, art. 51; Omnibus 1 Directive, preamble para. 48.

[47] Omnibus 1 Directive, preamble para. 48.

[48] Phillip Paiement, "Towards a Bundle of Duties, Shell v. Milieudefensie Confirms Major Developments in Climate Change Liability", Verfassungsblog, 15 November 2024, https://verfassungsblog.de/shell-milieudefensie-climate-obligations/, accessed on 11 March 2025.

[49] *Milieudefensie et al. v. Royal Dutch Shell plc.*, The Hague Court of Appeal Decision dated November 2024, unofficial English translation https://www.climatecasechart.com/documents/milieudefensie-et-al-v-royal-dutch-shell-plc-judgment_7bfb, accessed 11 March 2026, para. 3.24.

By accepting corporate obligations for Scope 3 emissions, the Court effectively shifted the burden of responsibility for end-user emissions back to major corporations, recognizing that these actors possess the decision-making authority necessary to mitigate the systemic environmental impacts of their respective sectors.

A similar approach is echoed in the 2025 Admissibility Decision of the Zug Cantonal Tribunal in *Asmania et al. v. Holcim*. In response to Holcim's (Defendant) argument that it should not be held liable for emissions generated by its legally independent subsidiaries, the Court found the Defendant liable because "*it sets out the climate strategy for the entire group in a binding manner.*"[50]

b. Use of Sustainability Reports as Evidence in Climate Litigation:

Companies' sustainability reports are widely used as evidence, especially with regards to attribution and the assessment of causality.

In the Appeals Judgment of *Milieudefensie et al. v. Royal Dutch Shell plc*, the Hague Court of Appeals, highly relied on Shell's sustainability reports, strategy documents, initiatives and sales declarations, and production projections.[51]

Similarly, in the Admissibility Decision of the Zug Cantonal Tribunal in *Asmania et al. v. Holcim*, the Court effectively treated the company's own reports as "binding evidence", limiting the company's ability to raise certain legal defenses. The Court also noted that because Holcim used GHG Protocol's Scope 1, Scope 2, Scope 3 definitions in its annual reports and set percentage-based reduction targets, it could not claim that these terms were unclear.[52]

Additionally, in response to Holcim's argument that the relief was not enforceable as it was insufficiently specific, the Court observed that since the Defendant's emissions data were third-party verified, they constitute a reliable factual basis for legal enforcement.[53] In other words, they could be used to assess compliance. Consequently, the company's own verified disclosures function as undisputed evidence, stripping Holcim of the ability to challenge the technical feasibility of court-ordered monitoring.[54]

[50] Asmania v. Holcim, para. 6.5.2.

[51] *Id.,* paras. 3.24-3.54.

[52] *Id.,* para. 6.5.1.

[53] *Id.,* para. 6.3

[54] *Id.,* para. 6.5.1

C. The Carbon Border Adjustment Mechanism

1. Scope and Content

As an extension of the EU Emissions Trading System (EU ETS), the EU has adopted measures to limit "carbon leakage", a term that refers to "*the transfer of CO2 emissions from one country to another when, due to strict climate policies, companies relocate their production to countries with weaker emission constraints.*"[55]

In short, under the Regulation establishing the Carbon Border Adjustment Mechanism (CBAM) 2023/956, entered into application in 2023 (transitional phase), carbon-intensive goods entering the EU will be priced reflecting a cost equivalent to the carbon price formed in the EU ETS.[56] Entities importing more than 50 tons of CBAM-regulated goods into the EU, whether directly or through indirect customs representatives, must obtain the status of authorized CBAM declarants. These declarants must purchase certificates from the relevant national authorities in their country of establishment, with the value of certificates tied to the EU ETS prices.[57] The CBAM definitive period started on 1 January 2026, and the first CBAM certificate price will be published on 7 April 2026.[58]

The CBAM is applied to specific products in the iron-steel, aluminum, cement, fertilizer, electricity, and hydrogen sectors.[59]

A key provision for Turkish exporters involved in CBAM sectors is the Regulation Article 9. This article allows authorized declarants to reduce the number of CBAM certificates they must surrender by deducting any carbon price effectively paid in the country of origin. To benefit from this reduction, the declarant must maintain detailed records of the paid price and prove that this was an "effective payment".[60] Turkish exporters will be able to rely on this mechanism once the ETS established by the Turkish Climate Law.[61]

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[55] European Commission Energy, Climate Change, Environment, "Carbon Leakage", https://climate.ec.europa.eu/eu-action/carbon-markets/eu-emissions-trading-system-eu-ets/free-allocation/carbon-leakage_en, accessed 11 March 2026.

[56] European Commission Taxation and Customs Union, "Carbon Border Adjustment Mechanism", https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en, accessed 11 March 2026.

[57] *Id.*

[58] *Id.*

[59] Turkish Ministry of Trade on CBAM.

[60] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, art. 9.

[61] Turkish Law No. 7552 dated 09 July 2025, Turkish Climate Law.

2. Litigation Implications

The CBAM introduces significant litigation implications for non-EU exporters, arising from different carbon-pricing mechanisms existing in different national emission trading systems.

The core of this litigation risk lies in the fundamental divergence between the "absolute cap" and "intensity-based cap" models.[62] While recently introduced emissions trading systems increasingly rely on intensity-based cap model,[63] EU operates an absolute cap model: a fixed total emissions limit that declines annually, regardless of economic growth, ensuring a predictable environmental outcome but creating a rigid price floor.[64] In contrast, the Turkish proposal for the Climate Law largely adopts an "intensity-based cap" model, where the total allowance pool is ex-post adjusted based on actual production output or energy efficiency benchmarks.[65] Although the litigation risks that will be explained below are not necessarily "climate litigation" by definition, they are disputes that arise from corporate emissions, and therefore fall under the scope of this work.

a. Commercial Disputes

The EU Commission may exercise its discretionary powers to partially disallow the deduction of Turkish carbon payments if the market price does not reflect the marginal abatement cost envisioned by the EU due to the discrepancy between the absolute cap and intensity-based cap. The resulting financial burden may raise questions as to who bears such burden, and claims of *force majeure*, hardship, or breach of warranty regarding the "CBAM-compliance" of the goods between EU importers and Turkish exporters.

b. International Trade Law and Treaty Arbitration

The refusal to grant full credit for domestic carbon costs may be construed as a violation of the General Agreement on Tariffs and Trade, specifically the national treatment and most-favored-nation principles. Furthermore, affected entities may seek redress under bilateral investment treaties, arguing that the discriminatory application of CBAM methodologies constitutes indirect expropriation or a failure to

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[62] Angela Sun, "East Meets West, Linking the China's and EU ETS's", Kleinman Center for Energy Policy, June 2022, https://kleinmanenergy.upenn.edu/wp-content/uploads/2022/06/KCEP-Digest46-East-Meets-West.pdf, ("Linking the China's and EU ETS's") accessed 11 March 2026, p. 5; OECD, "Effective Carbon Rates 2025: Recent Trends in Taxes on Energy Use and Carbon Pricing", OECD Series on Carbon Pricing and Energy Taxation, https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/11/effective-carbon-rates-2025_a578dc11/a5a5d71f-en.pdf, accessed 11 March 2026, p. 53.

[63] *Id.*

[64] Linking the China's and EU ETS's, p. 4.

[65] International Carbon Action Partnership, "Turkish Emission Trading System", https://icapcarbonaction.com/en/ets/turkish-emission-trading-system, accessed 11 March 2026.

provide fair and equitable treatment by imposing double taxation on the same unit of carbon.

D. EU Taxonomy and Green Claims Directive

1. Scope and Content

The EU Taxonomy Regulation 2020/852/EU[66] establishes a harmonized, science-based classification system for determining the extent to which an investment can be characterized as environmentally sustainable.[67] It applies to EU-level or Member State measures that impose requirements on financial market participants or issuers regarding financial products or corporate bonds marketed as environmentally sustainable.[68] Further, it directly regulates entities that offer financial products within the EU and, importantly, extends to all companies required to publish non-financial statements under the CSRD.[69] While the Taxonomy Regulation primarily targets financial market participants,[70] its impact on Turkish companies manifests through access to sustainable finance. As EU-based banks and investment funds are required to align their portfolios with Taxonomy criteria, they increasingly demand compliance from their non-EU borrowers and investees.

For an activity to qualify as "Taxonomy-aligned", it must (i) substantially contribute to at least one of six environmental objectives; (ii) do no significant harm to any of the other objectives, and (iii) comply with minimum social safeguards.[71] The six environmental objectives are:

- climate change mitigation,
- climate change adaptation,
- the sustainable use and protection of water and marine resources,
- the transition to a circular economy,
- pollution prevention and control; and
- the protection and restoration of biodiversity and ecosystems.[72]

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[66] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ("Taxonomy Regulation").

[67] *Id.*, preamble para. 6.

[68] *Id.*, art. 1.

[69] *Id.*

[70] *Id.*, preamble para. 10-11, 13.

[71] *Id.*, art. 18.

[72] *Id.*, preamble para. 23, art. 9.

Complementing the Taxonomy Regulation, the European Commission adopted the proposal for a Green Claims Directive in March 2023.[73] The proposal aims to regulate corporate environmental communication. It targets greenwashing by requiring companies to substantiate their environmental claims with robust, independent evidence. If adopted, any voluntary environmental claim made by a company in business-to-consumer communications will have to be verified by an accredited third-party and based on a lifecycle assessment methodology.[74] However, its legislative future remains uncertain as the European Commission announced its intention to withdraw the proposal and paused the legislative process as of June 2025 leaving the timeline for adoption unclear.[75]

2. Litigation Implications

a. Rising Greenwashing Litigation

Even if the Green Claims Directive is not yet adopted, and may even be withdrawn, greenwashing litigation will still be on the rise in Europe. Effectively, it is reported that in most of these cases, the plaintiffs succeed against companies, with an estimated 81% success rate,[76] even when claims were brought primarily under customer protection laws. This trend demonstrates that the EU courts have already manifested judicial inclination toward enforcing more demanding standards for validating green claims.

b. Landmark Case: Greenpeace France and Others v. TotalEnergies

A landmark precedent in European greenwashing litigation was established with the *Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*, a case initiated in 2022 before the 34th Chamber of the Paris Judicial Court.[77] In this case, the plaintiffs relied on the French Consumer Code and Environment Code, to challenge the company's rebranding campaign, which featured claims such as "*ambition to achieve carbon neutrality by 2050*" and positioning itself as a "*major player in the energy transition.*"[78]

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[73] Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims COM (2023) 166 final 2023/0085(COD).

[74] Tappr, "EU Green Claims Directive: Latest Guide", 1 July 2025, https://www.usetappr.com/regulation/green-claims-directive#:~:text=Latest%20Update:%20Green%20Claims%20Directive,before%20this%20pause%20was%20announced, accessed 11 March 2026.

[75] *Id.*

[76] Nicolas J.S. Lockhart, Michele Tagliaferri, Anna-Shari Melin, Eva von Mühlenen, "Heightened Scrutiny of Green Claims in the European Union and Switzerland", Sidley LLP, 3 April 2025, https://www.sidley.com/en/insights/publications/2025/03/heightened-scrutiny-of-green-claims-in-the-european-union-and-switzerland, accessed 11 March 2026.

[77] *Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*, Paris Judicial Tribunal 34th Chamber Decision dated 23 October 2025.

[78] *Id.*, para. 5, 8.

The court's reasoning pivoted the factual inconsistency between TotalEnergies' public net-zero narrative and its simultaneous expansion of fossil fuel projects, concluding that the company has misled consumers' economic behavior. The Court, in reaching its conclusion, mainly relied on the customer protection laws applicable in France and in the European Union. Although the Green Claims Directive was inapplicable during the rendering of the decision, the Court relied on customer protection laws in France and in the EU. It also took into consideration the Empowering Consumers Directive EU 2024/825.[79] Notably, even though Directive 2024/825 was not yet in force when the decision was rendered, the Court treated this forthcoming Directive to be a legal benchmark in its application of and the interpretation of the existing law.

c. Unfair Competition Law to Challenge Green Claims:

Another strategy used by plaintiffs filing greenwashing claims is to rely on laws regulating unfair competition rather than consumer protection laws. In the 2022 *Higher Regional Court of Frankfurt am Main's decision on climate neutral claims regarding detergents*, the Court found that labeling a product or company as "climate neutral" significantly influences consumer behavior.[80] It stated that the term "climate neutral" would be understood as a "balanced balance sheet", and would be reached through emission reduction and compensation measures.[81]

A central aspect of the ruling concerned the treatment of Scope 3 emissions.[82] The Court found that consumers naturally assume that all significant pollution was being accounted for.[83] In this case, because the company ignored its Scope 3 emissions and did not warn the public about this omission, the Court ruled the advertisement was misleading and illegal.[84]

d. Continued Litigation Risks under the Taxonomy Regulation:

With the Taxonomy Regulation further clarifying the scientific and technical benchmarks for what is actually "green" and "sustainable", litigation risks will persist for companies, not only in relation to their business-to-consumer communications, but also with respect to their underlying economic activities.

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[79] *Id.*, para. 46-48.

[80] *Higher Regional Court of Frankfurt am Main's decision on climate neutral claims regarding detergents*, Regional Court of Frankfurt am Main dated 2022, unofficial English summary https://www.climatecasechart.com/document/higher-regional-court-of-frankfurt-am-mains-decision-on-climate-neutral-claims-regarding-detergents_5803, accessed 11 March 2026.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

Conclusion

The legislative landscape of the EU has undergone a fundamental transformation, evolving from a framework of voluntary sustainability goals into a sophisticated and comprehensive regime of mandatory, enforceable legal obligations. For Turkish companies, the entry into force of the Omnibus 1 Directive in early 2026 and the definitive implementation of the CBAM signify that climate change has officially migrated from the realm of corporate social responsibility into the domain of high-stakes litigation.

In this emerging era of strategic litigation, compliance with EU directives becomes a core pillar of legal risk management for Turkish companies. To mitigate these risks, entities must move beyond mere reporting toward a robust "litigation-ready" posture, ensuring the accurate value chain mappings, reliable carbon footprints data and a clear understanding of the private international law implications inherent in EU sustainability law.

Ultimately, the ability of Turkish businesses to maintain their competitiveness in the EU market will depend on their capacity to navigate these regulations while preempting the inevitable wave of climate change lawsuits.

Bonds in Construction Projects and Dispute Resolution

Tolga Bayrak

Introduction

Risk management is a critical aspect of international construction projects. One of the key tools used to manage risk in this context is the provision of bonds. It is common industry practice for employers to require contractors to provide bonds as security for potential risks and various obligations. This practice is also reflected in standard form construction contracts, such as those issued by the International Federation of Consulting Engineers (FIDIC), the New Engineering Contract (NEC) and the Joint Contracts Tribunal (JCT), which include provisions addressing different scenarios in which bonds may be provided.

In general, bonds take the form of a third party's written promise to pay a specified amount of money upon the occurrence of a defined event. Bonds are typically issued by banks or other financial institutions. This arrangement creates a tripartite relationship between the employer, the contractor and the issuer.[1] The relationship between the employer and the contractor is based on the construction contract, while the contractor enters into a separate arrangement with the bank to procure the bond. Once issued, the bond is delivered to the employer, who may call on it by applying to the issuer and demonstrating that the event specified in the instrument has occurred.

The validity and terms of bonds are determined by the law governing the instrument. This choice of governing law influences not only the interpretation of the terms but also the conditions under which the instrument may be called and the defences

[1] For ease of reference, this article refers to the beneficiary of the bond as the employer and the principal as the contractor, reflecting the typical roles of the parties in construction contracts.

available to the parties involved. Parties should also pay attention to ensure that there are not inconsistencies between the terms of the bond and the underlying contract.[2]

Types of Bonds in Construction Projects

Given the range of risks that may arise in a construction project, various types of bonds have been developed to address specific categories of risk. The most commonly used instruments and their purposes are explored below.

A. Advance Payment Bonds

Employers often make advance payments to contractors at the outset of a construction project to help cover initial costs, such as mobilisation expenses. To safeguard the repayment of these advances, employers require contractors to provide advance payment bonds.

It is common for the value of an advance payment bond to match the amount of the advance paid by the employer. The contractor typically repays the advance through deductions in interim payment certificates as the project progresses. Correspondingly, the amount secured by the bond is reduced over time to reflect the outstanding balance of the advance. This gradual reduction benefits the contractor in two ways: it lowers the fees charged by banks, and it frees up the contractor's credit line, allowing greater flexibility to secure financing for other purposes.

B. Performance Bonds

A key priority for employers is ensuring that contractors carry out and complete the works in a timely manner and in accordance with the agreed specification. To mitigate the risk of non-performance, employers commonly require contractors to provide a performance bond, which usually covers 10 per cent of the contract price.[3] If the contractor fails to complete the works in accordance with the contract terms, the employer may call on the performance bond and use the proceeds to complete the outstanding works either directly or by contracting a third party.

The value of performance bonds may be adjusted in certain circumstances, such as when the contract price increases or decreases significantly owing to the introduction of variations.[4]

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[2] See *Simon Carves Ltd v. Ensus UK Ltd* [2011] EWHC 657 (TCC) ("*Simon Carves v. Ensus UK*") (holding that the terms of the underlying contract prevailed in case of inconsistencies concerning the expiry of a bond).

[3] Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice*, 5th ed., Informa, 2009 ("Baker et al."), para. 7.192.

[4] Leo Grutters and Brian Barr, *FIDIC Red, Yellow and Silver Books: A Practical Guide to the 2017 Editions*, 1st ed., Sweet & Maxwell, 2018, p. 103.

C. Retention Bonds

In the construction industry, it is common practice for employers to withhold a percentage of payments otherwise due to the contractor as security for the proper completion of the entire project or a specific section of the works.[5] This practice is known as 'retention'.

Instead of withholding retention sums, the employer may agree to release those sums and receive a retention bond from the contractor. This arrangement allows the contractor to receive full payment without deductions, while still providing the employer with financial security. If the contractor fails to complete the works, the employer may call on the bond to recover the retention amount.

An important consideration in relation to retention and retention bonds is compliance with applicable legal requirements. For example, under German law, parties are permitted to use retention mechanisms and related bonds; however, the retained amount or the value secured by the retention bond must not exceed 10 per cent of the total contract price.[6]

D. Other Types of Bonds

In addition to the more commonly used bonds in international construction projects, parties may also choose to use other forms of security instruments tailored to specific risks, such as payment bonds, tender or bid bonds, defects liability bonds, and maintenance bonds.

Dispute Resolution and Arbitration Practice

This section examines common disputes involving the use of bonds in construction contracts, including disputes over liability under conditional bonds, resisting or challenging calls on on-demand bonds, seeking the return of bonds and related damages and pursuing remedies after encashment.

[5] Baker et al., para. 7.217.

[6] Götz-Sebastian Hök and Henry Stieglmeier, 'Germany', in Donald Charrett (ed.), *The International Application of FIDIC Contracts: A Practical Guide*, Informa, 2020, p. 191.

A. Conditional Bonds: Proving Breach of Underlying Contract and Damages

Conditional bonds require the beneficiary to satisfy certain conditions before the bond can be called.[7] To trigger payment, the party calling on the bond must prove that the condition specified in the bond has been met, such as a breach of contract or a failure to perform, resulting in a loss or damage. If the required condition is not fulfilled, the bank is entitled to reject the payment demand. This is because an unjustified payment under a conditional bond may expose the bank to a claim for compensation by the party that originally provided the bond. To mitigate this risk, banks generally require clear and adequate evidence that the condition has been satisfied before honouring the demand. In practice, this often means the bank will require the employer to present a binding court judgment or arbitral award establishing both liability and quantum of damages before agreeing to honour the bond.

As conditional bonds are not autonomous instruments, they are closely tied to the underlying contract. This can give rise to jurisdictional and procedural complexity, particularly where the bond and the construction contract contain different dispute resolution or governing law provisions. For instance, the underlying contract may be subject to arbitration, while the bond may provide for litigation, which can lead to parallel proceedings before different fora.

English courts have refused to stay proceedings commenced under a bond, even where parallel arbitral proceedings are ongoing under the underlying construction contract, thereby creating a risk of inconsistent decisions.[8] To mitigate this risk, parties should ensure consistency between the dispute resolution and governing law provisions in their construction contracts and related security instruments.

B. On-Demand Bonds: Resisting a Call

On-demand bonds are payable upon presentation, meaning that once the bank receives a demand in the form specified in the bond, it must pay the stated amount without requiring proof of any breach, underlying default, loss or damage. The beneficiary does not need to demonstrate that any conditions have been fulfilled or that the other party has failed to perform.

In certain circumstances, a contractor may seek injunctive relief to resist a call on an on-demand bond, making such application one of the most common types of disputes involving on-demand bonds.

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[7] See *Trafalgar House Construction (Regions) Ltd v. General Surety & Guarantee Co Ltd* [1996] 1 AC 199.

[8] *Autoridad del Canal de Panama v. Sacyr SA and others* [2017] EWHC 2337 (Comm); *Deutsche Bank Ag v. Tongkah Harbour Public Company Ltd* [2011] EWHC 2251 (Comm).

Typically, the contractor must apply to the local courts to obtain an injunction preventing either the employer from making the call or the bank from honouring it. The procedural requirements and likelihood of success for such relief vary across jurisdictions. While injunctive relief is difficult to obtain in many jurisdictions, some are comparatively more permissive. The approaches taken by courts in England and Wales, Switzerland and Turkey are outlined below for comparison.

In addition to seeking relief from national courts, contractors may also pursue interim measures through arbitration when the underlying contract contains an arbitration clause. Arbitral tribunals, once constituted, generally have the power to order interim measures restraining a party from calling or enforcing an on-demand bond. Furthermore, where urgent action is required before the tribunal is formed, many arbitral institutions offer emergency arbitration procedures that allow parties to request expedited injunctive relief. The availability and effectiveness of these remedies are discussed below.

1. Practice of English courts

Under English law, it is difficult to obtain an injunction restraining a bank from paying out under an on-demand bond, provided that the employer's call complies with the bond's formal requirements.[9] To succeed, the contractor must establish that the employer's call is fraudulent and that the bank is aware of the fraud.[10] English courts are generally reluctant to find fraud in the absence of clear and compelling evidence.[11] This high threshold reflects the courts' consistent view that on-demand bonds are akin to cash.[12]

In light of this, a contractor may try to seek an injunction restraining the employer from making a call on the bond in the first place. This remedy is viewed as more attainable – albeit still exceptional – than restraining the bank post-call. English courts have granted such injunctions where the contractor can demonstrate that the employer's call is expressly precluded by the terms of the underlying contract.[13] English courts require a high threshold, generally requiring the contractor to 'positively establish' that the employer's call would not comply with the mechanism agreed in the underlying contract.[14]

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[9] See *Franz Maas (UK) Limited v. Habib Bank AG Zurich* [2001] Lloyd's Rep 14.

[10] *Edward Owen Engineering v. Barclays Bank International* [1978] 1 QB 159 ("*Edward Owen v. Barclays*"), p. 171.

[11] See *Alternative Power Solution Ltd v. Central Electricity Board and another (Mauritius)* [2014] UKPC 31.

[12] *Edward Owen v. Barclays*, p. 170.

[13] *Sirius International Insurance Co v. FAI General Insurance Ltd* [2003] EWCA Civ 470; *Simon Carves v. Ensus UK*.

[14] *Permasteelisa Japan v. Bouyguesstroi and Banca Intesa SpA* [2007] EWHC 3508, para. 51; *MW High Tech Projects UK Ltd & Anor v. Biffa Waste Services Ltd* [2015] EWHC 949 (TCC).

Although the threshold for restraining an employer's call is somewhat lower than the fraud test applicable to restraining the bank, the fact that contractors are often not notified before the employer makes the call constitutes a practical obstacle. Nonetheless, in *Shapoorji Pallonji v. Yumn*, the English High Court confirmed that it had the power to grant an injunction requiring the employer to reverse a prior call.[15] This development may offer a more viable post-call remedy for contractors, avoiding the need to establish fraud.

2. Practice of Swiss courts

Under Swiss law, a court may restrain an employer from calling on an on-demand bond if the contractor or the issuing bank (guarantor) can establish that the prerequisites for the call were not fulfilled and that the employer was aware of this failure. The applicant must demonstrate that the demand constitutes a manifest abuse of rights by the employer. This is a high threshold, and Swiss courts consider such relief to be an exceptional remedy, granted only in narrow circumstances, such as when the secured obligation has clearly been performed or the demand is evidently fraudulent.[16]

Swiss courts generally adhere to the principle of 'pay first, litigate later', which reflects their strong commitment to upholding the autonomy and reliability of on-demand bonds. Accordingly, judicial intervention is rare and only granted where the abuse is both clear and substantiated with persuasive evidence.

3. Practice of Turkish courts

Under Turkish law, a court may grant an interim injunction to restrain a bank from paying out under an on-demand bond,[17] provided that the contractor demonstrates that the employer's call constitutes an abuse of right and that irreparable or serious harm would result from payment, among other general requirements for interim injunctions.[18] Turkish courts often base their reasoning on the principle of good faith codified in Article 2 of the Turkish Civil Code, and, in recent years, they have tended to grant such injunctions with relatively greater ease compared to other jurisdictions.

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[15] *Shapoorji Pallonji & Company Private Ltd v. Yumn Ltd & Anor* [2021] EWHC 862 (Comm).

[16] Judgment of the Zurich Commercial Court, Case No. HG180051-O, 8 May 2019, para. 3.3.4.

[17] Turkish Court of Cassation, General Assembly of Civil Chambers, Case No. 2007/852, Decision No. 2007/892, dated 28.11.2007.

[18] See Turkish Code of Civil Procedure No. 6100 dated 12 January 2011 ("Turkish Code of Civil Procedure"), arts. 389-392.

Turkish courts are also empowered to issue interim injunctions before or during arbitration proceedings, including in cases where the arbitration is seated abroad;[19] however, where an interim injunction is granted before the commencement of arbitration, the applicant must initiate arbitration within a statutory time limit to preserve the injunction's effect. This period is 30 days for international arbitrations[20] or two weeks for domestic arbitrations.[21]

4. Arbitral Tribunals' Power to Issue Interim Measures

Most arbitration rules expressly empower arbitral tribunals to grant interim measures.[22] For example, the ICC Rules provide that the arbitral tribunal may order "*any interim or conservatory measure it deems appropriate*", which may take the form of either an order or an award.[23] The UNCITRAL Rules empower tribunals to grant interim measures, including measures to prevent the taking of any action that is likely to cause current or imminent harm or prejudice to the arbitral process.[24] In a similar vein, the ICSID Rules also provide that an ICSID tribunal may recommend provisional measures to preserve a party's rights.[25]

In the context of on-demand bonds, a tribunal may issue an interim measure restraining a party from calling or enforcing such a bond, provided that the relevant requirements – such as urgency, necessity and risk of irreparable harm – are met.[26]

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[19] Turkish International Arbitration Law No. 4686 dated 21 June 2001 ("Turkish International Arbitration Law"), art. 6; Turkish Code of Civil Procedure, art. 414.

[20] Turkish International Arbitration Law, art. 10(A)(2).

[21] Turkish Code of Civil Procedure, art. 426(2).

[22] See, e.g., Arbitration Rules 2020 of the London Court of International Arbitration ("LCIA Rules"), art. 25.1; Arbitration Rules of the Singapore International Arbitration Centre 2025 ("SIAC Rules"), rule 45.1; 2024 Hong Kong International Arbitration Centre Administered Arbitration Rules ("HKIAC Rules"), art. 23; Stockholm Chamber of Commerce Arbitration Rules 2023 ("SCC Rules"), art. 37; Istanbul Arbitration Centre Arbitration Rules ("ISTAC Rules"), art. 31.

[23] International Chamber of Commerce 2021 Arbitration Rules ("ICC Rules"), art. 28.

[24] United Nations Commission on International Trade Law Arbitration Rules 2021 ("UNCITRAL Rules"), art. 26.

[25] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), art. 47; ICSID Arbitration Rules 2022 ("ICSID Rules"), rule 47.

[26] ICC Commission on Arbitration and ADR, "Emergency Arbitrator Proceedings" (2019) ("ICC Report on Emergency Arbitrator Proceedings"), www.iccwbo.org/wp-content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf, accessed 4 March 2026, paras. 138-140.

A key limitation, however, is that arbitral tribunals cannot issue binding orders against third parties,[27] such as the issuing bank, unless the bond itself is subject to the arbitration agreement. Where an injunction is sought against the bank (*e.g.*, to prevent payment under an on-demand bond), the appropriate forum is usually the local courts, not the arbitral tribunal.

Another practical constraint arises when urgent relief is required before the constitution of the arbitral tribunal. To address this, many leading arbitral institutions have introduced emergency arbitration procedures.[28] These mechanisms enable a party to seek interim relief on an expedited basis from an emergency arbitrator, appointed specifically for that purpose. For instance, under the ICC Rules, a party may apply for emergency measures before the formation of the tribunal.[29]

Emergency arbitration can serve as a useful alternative to domestic courts in disputes involving on-demand bonds, particularly where a call on the bond is imminent and immediate relief is needed; however, the effectiveness of emergency arbitration may depend on whether courts at the seat of enforcement recognise and enforce emergency arbitrator decisions, which is a matter that remains jurisdiction-specific.[30] Additionally, the requirement to provide notice to the opposing party in emergency arbitration may reduce its utility in situations where *ex parte* relief is needed and could otherwise be obtained from a national court.

C. Return of Bond and Damages Claims

In construction projects, bonds are typically held for a defined period or until the occurrence of specific milestones, such as the expiry of the defects liability period or the final acceptance of the works. Upon fulfilment of these conditions, the employer is generally under an obligation to return the bond; however, disputes may arise regarding the timing of the bond's return. If the bond is not returned when due, the contractor may seek return of the bond, as well as compensation for the damage caused by the prolonged withholding, which may include the cost of maintaining the security, losses arising from the contractor's inability to issue further securities and lost opportunities, and reputation damages.

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[27] However, the arbitral tribunals can issue interim measures requiring the parties to the dispute to ensure that a third party take or refrain from taking certain actions. For instance, in *Bayindir v. Pakistan (I)*, the ICSID tribunal granted a provisional measure recommending that Pakistan take "*whatever steps may be necessary*" to ensure that National Highway Authority, a Pakistani corporate body with separate legal personality, does not enforce any final judgment it may obtain from the Turkish courts with regard to mobilisation advance guarantees. See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 55.

[28] LCIA Rules, art. 9B; SIAC Rules, rule 12.1 and schedule 1; HKIAC Rules, schedule 4; SCC Rules (2023), appendix II; ISTAC Rules, art. 31.1 and ISTAC Emergency Arbitration Rules.

[29] ICC Rules, art. 29 and appendix V.

[30] ICC Report on Emergency Arbitrator Proceedings, paras. 182-191.

Whether the claims succeed depends on the specific terms of the bond, the underlying contractual framework and the applicable law.

D. Post-Encashment Remedies

Once a bond has been wrongfully encashed by the employer, the contractor may seek damages against the employer on the basis of breach of contract or unjust enrichment, depending on the applicable law. Recoverable damages may include reimbursement of the full amount paid by the issuing bank, interest on that amount, increased financing costs and compensation for any resulting loss of bonding capacity or reputational harm. The success of the claims depends on the specific terms of the bond, the underlying contractual framework and the applicable law.

Conclusion

Bonds play a crucial role in international construction projects as key risk management instruments. The inherent complexity of these projects has given rise to a wide variety of bonds employed by both employers and contractors. Their wording, governing rules and expiry dates require careful attention, as they are often decisive in shaping the rights and obligations of the parties.

Because bonds are called on when the underlying risks materialise, they frequently become the subject of arbitral and judicial disputes. In recent years, there has been a notable increase in parties seeking intervention from courts and arbitral tribunals to prevent calls on bonds. Looking ahead, further decisions are expected in this area, which will provide more guidance to parties on the steps they should take before a dispute arises. This evolving landscape may also give rise to more complex instruments and innovative contractual terms governing bonds.

Shareholder Activism in Turkish Law

İlker Demirtaş

The Concept of Shareholder Activism

The concept of shareholder activism is defined as activities carried out by shareholders to influence a company for various purposes.[1] In this regard, shareholder activism may be conducted for a variety of purposes, such as influencing, directing, altering or improving a company's shareholding and management structure, decision-making mechanisms, activities, policies, operations, strategies and performance; having a say in these matters; ensuring the company's oversight and supervision; increasing the company's market value; and strengthening its environmental, social and corporate governance (*ESG*) practices.[2] To achieve these objectives, Activist shareholders typically advance various requests, including removal of directors and appointment of new ones, detailed examination of financial statements, annual reports and audit reports, rejection of the release of directors and initiation of liability proceedings against directors, provision of information by

[1] Semih Sırrı Özdemir, *Halka Açık Anonim Şirketlerde Pay Sahibi Eylemciliği (Aktivizmi)*, Yetkin Yayınları, 2023 ("Özdemir"), pp. 1, 12-16; Cansu Cindoruk, "Kurumsal Yatırımcıların Pay Sahibi Aktivizmi: Hedef Şirketlere Yönelik Fayda ve Sakıncalar", Sakarya Üniversitesi Hukuk Fakültesi Dergisi, Vol. 13, No. 1, 2025 ("Cindoruk"), pp. 332-333; Ekrem Solak, "Birleşik Krallık ve Avrupa Birliği Hukukları Kapsamında Pay Sahibi Aktivizmi Düzenlemeleri", Yeditepe Üniversitesi Hukuk Fakültesi Dergisi, Vol. 16, No. 2, 2019 ("Solak"), pp. 130-132, 135; Beyza Nur Bilen, *Minority Shareholder Activism in Turkey*, Unpublished Master's Thesis, 2023 ("Bilen"), pp. 28-31, 64-65; Emre Ergin ve İlkay Ejder Erturan, "Shareholder Activism: Telecommunication Industry In Turkey", Marmara Üniversitesi İktisadi ve İdari Bilimler Dergisi, Vol. 39, No. 1, 2017 ("Ergin / Erturan"), p. 105; Yavuz Selim Günay, *Hukuki Yönleriyle Girişimciliğin Finansmanı ve Girişim Sermayesi (Venture Capital),* On İki Levha Yayıncılık, 2024 ("Günay"), p. 381, fn. [1426].

[2] Özdemir, pp. 1, 12-16, 31 *et seq*; Cindoruk, pp. 332-337; Solak, pp. 130-135; Bilen, pp. 28-40; Ergin / Erturan, p. 104; Günay, p. 381, fn. [1426]; Çiğdem Yatağan Özkan, "Anonim Şirketlerde Pay Sahibi Anlayışındaki Değişimler ve Kısa Vadecilik Akımına Bir Çözüm Önerisi Olarak Sadakat Payları", Banka ve Ticaret Hukuku Dergisi, Vol. 32, No. 3, 2016 ("Yatağan Özkan"), p. 180.

the company regarding specific activities and investments, reduction of the remuneration of the company's board of directors and senior executives as well as other operational expenses, adoption of certain policies by the company, distribution of dividends, buyback of shares by the company, improvement of the company's compliance with corporate governance principles, and exit from the company; or they may resort to other means to exert pressure on the company's board of directors or controlling shareholder.[3]

By its very nature, shareholder activism is carried out by one or more shareholders who do not possess the power to control the company on their own.[4] Furthermore, whilst the target of shareholder activism is often publicly listed companies, it can also arise in the context of privately held companies, although this may be relatively more challenging to do.[5] Dispersed and numerous nature of the shareholding structure, size of the accessible audience and the activist movement's potential for growth, presence of shareholders with diverse characteristics such as institutional investors, capital market and stock exchange regulations applicable to publicly listed companies, availability of additional tools conducive to activism, and opportunity to benefit from the positive outcomes of activism due to the trading of company shares on the stock exchange could be listed among the reasons why shareholder activism generally finds application in publicly listed companies.

Shareholder Activism in Türkiye

Whilst it is difficult to say that shareholder activism is a common practice in Türkiye, it can be stated that it is a subject of considerable importance and is highly open to development.[6] In particular, in light of factors such as ongoing and expanding mergers and acquisition (*M&A*) transactions, foreign investments, significantly increasing number of initial public offerings (*IPOs*), joint ventures, start-up companies, venture capitals and angel investors in Türkiye, we assess that shareholders are adopting a more conscious and strategic approach to corporate activities, and that shareholder activism may consequently increase.

[3] Özdemir, pp. 31-32, 112 *et seq*; Cindoruk, pp. 335-336; Solak, p. 133; Bilen, pp. 36-39, 44; Ergin / Erturan, p. 108.

[4] Özdemir, p. 1.

[5] Özdemir, pp. 92, 229-230; Cindoruk, p. 339.

[6] Özdemir, pp. 7-8, 249; Bilen, p. 64; Ergin / Erturan, pp. 107, 114.

Available Rights and Tools under Turkish Law within the Framework of Shareholder Activism

Shareholders engaging in shareholder activism may exercise their statutory shareholder rights, as well as undertake activist activities through public statements, social media platforms or other communication channels, or by engaging directly with the company.[7] This article focuses primarily on certain rights and tools provided to shareholders under the Turkish Commercial Code ("TCC"). It should also be noted that the subject is addressed specifically in the context of joint-stock companies.

A. General Rights of Shareholders

1. The Right to Attend General Assembly Meetings and Cast Votes

Shareholders have the right to attend general assembly meetings, and to speak, express their views, make proposals and cast votes on agenda items during such meetings. Consequently, the most fundamental way for shareholders to play an active role in the company's activities is to attend general assembly meetings, express their views on agenda items and cast their votes.

General assembly meetings are, as a rule, convened with shareholders holding at least 25% of the share capital, and decisions are taken by a majority of the votes cast by those present at the meeting, in accordance with the principle of majority rule. However, certain matters may be subject to qualified quorum requirements under the TCC or the company's articles of association. Examples include amendments to the articles of association, creation of preference shares, restrictions on the transfer of registered shares, and wholesale of a significant portion of the company's assets. Accordingly, in respect of certain specific resolutions requiring a qualified quorum, activist shareholders who do not hold a majority but possess a sufficient number of votes may be in a position to influence whether such resolutions are adopted or not.[8]

With regard to voting rights, particular attention must be paid to cases of exclusion from voting and suspension of voting rights. Pursuant to Article 436 of the TCC, which governs exclusion from voting, certain situations involving a conflict of interest result in the deprivation of voting rights. Accordingly, a shareholder may not vote on agenda items relating to a personal transaction or business between themselves, their spouse, their lineal descendants or ascendants, or companies in which they are a shareholder or controlling person on the one hand, and the company in question

[7] Özdemir, pp. 22, 132 *et seq*; Solak, pp. 132, 135; Cindoruk, pp. 332, 339; Bilen, p. 32.

[8] Günay, pp. 380-381; Abdurrahman Kayıklık, "Anonim Şirkette Azınlığın Korunması: Kim İçin, Neden ve Nasıl Bir Koruma?", İstanbul Hukuk Mecmuası, Vol. 80, No. 2, 2022 ("Kayıklık"), p. 430.

on the other. Furthermore, board members who are also shareholders are excluded from voting on agenda items concerning their own release.

As for the suspension of voting rights, this concept refers to situations where a shareholder's voting rights cannot generally be exercised, irrespective of the specific agenda item. To give a few key examples:

- In companies forming a group of companies, where a share transfer causes a shareholder's direct or indirect shareholding to reach or fall below the thresholds of 5%, 10%, 20%, 33%, 50%, 67% or 100%, the relevant transaction must be notified to the trade registry pursuant to Article 198 of the TCC, and such notification must be registered and published. If this notification is not made within the statutory time limits, the voting rights attached to the relevant shares are suspended.
- Furthermore, companies in a cross-shareholding relationship within a group of companies may, pursuant to Article 201 of the TCC, exercise only 1/4 of their voting rights, and all other shareholder rights of these companies, except for the right to acquire bonus shares, are suspended.
- Where a company acquires its own shares, such shares are not taken into account in the calculation of the meeting quorum pursuant to Article 389 of the TCC, and the voting rights attached to these shares are suspended.

In conclusion, among the fundamental actions that can be taken from the perspective of shareholder activism are actively participating in general assembly meetings and casting votes. With regard to meeting and decision quorums, shareholders must separately examine and take into account scenarios where voting rights are suspended or where shares may be deprived of voting rights.

2. The Right to Bring Legal Action Against General Assembly Resolutions

a. Action for Annulment

An action for annulment may be brought against resolutions of the general assembly that contravene the provisions of the law or the articles of association, and in particular the principle of good faith. For a shareholder to bring an action for annulment against a general assembly resolution, they must have been present at the general assembly meeting, voted against the resolution, and had their dissent recorded in the minutes. In addition, shareholders who allege that the invitation was not issued in accordance with the proper procedure, that the agenda was not duly published, that persons or representatives without the authority to attend the general assembly meeting participated and casted votes, that they were unjustly denied the right to attend the general assembly meeting and cast a vote, and that the aforementioned irregularities were influential in the adoption of the relevant general assembly resolution, may also bring an action for annulment regardless of whether

they were present at the meeting or voted against the resolution. Such shareholders must file the action for annulment with the competent court within 3 months from the date of the resolution.

Accordingly, activist shareholders may file an action for annulment against general assembly resolutions that contravene the law, the articles of association or the principle of good faith, by casting a negative vote and having their dissent recorded in the minutes; and they may also request a stay of execution against the relevant resolution. Certain points must be observed regarding the recording of dissent in the minutes. Firstly, the dissent must be recorded in the minutes in a manner that leaves no room for doubt. Consequently, merely casting a negative vote or expressing an opinion against the decision is not deemed sufficient.[9] Furthermore, the dissent must be stated and recorded in the minutes after the discussion of each relevant agenda item and the adoption of the resolution, and not pre-emptively.[10]

b. Non-Existence and Nullity

Decisions taken at a meeting that cannot be classified as a general assembly meeting are deemed non-existent. For example, decisions where the meeting or decision quorum has not been met, or decisions taken without the presence of a Ministry of Trade representative, despite the requirement under the Regulation on the Procedures and Principles of General assembly meetings of Joint-Stock Companies and the Ministry Representatives to Be Present at Such Meetings ("the Regulation") that the meeting be held in the presence of a Ministry representative, are deemed non-existent.[11] On the other hand, pursuant to Article 447 of the TCC, shareholders may bring an action for nullity against general assembly meeting resolutions that, in particular: (i) restrict or eliminate participation in the general assembly meeting, minimum voting rights, litigation rights and other inalienable rights arising from the law; (ii) restrict the shareholder's rights to information, inspection and audit beyond the extent permitted by law; and (iii) undermine the fundamental structure of the joint-stock company or contravene the provisions on the protection of capital.

Actions for non-existence and nullity may be brought by all interested parties. Consequently, in cases of non-existence and nullity, activist shareholders may safeguard their interests by exercising their right to bring legal action against general assembly resolutions.

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[9] Ersin Çamoğlu (Reha Poroy ve Ünal Tekinalp), *Ortaklıklar Hukuku I*, 14th ed., Vedat Kitapçılık, 2019 ("Çamoğlu (Poroy / Tekinalp), *Ortaklıklar I*"), p. 608; Hasan Pulaşlı, *Şirketler Hukuku Şerhi*, Vol. II, 5th ed., Ankara, 2025 ("Pulaşlı"), pp. 1170-1173

[10] Çamoğlu (Poroy / Tekinalp), *Ortaklıklar I*, p. 608; Pulaşlı, pp. 1177-1179.

[11] Çamoğlu (Poroy / Tekinalp), *Ortaklıklar I*, p. 594; Pulaşlı, pp. 1072-1074.

3. Right to Information and Inspection

Every shareholder has the right to obtain information from and inspect the company under Article 437 of the TCC. At least 15 days prior to the general assembly meeting, financial statements, consolidated financial statements, the activity report, the audit report and the dividend distribution proposal may be inspected by shareholders at the company's headquarters and branches. Of these documents, the financial statements and consolidated financial statements must be kept available for inspection at the company's headquarters and branches for a period of 1 year. Furthermore, shareholders may request copies of the income statement and the balance sheet, at the cost of the company.

Shareholders also have the right to obtain information and conduct an inspection at the general assembly meeting. During the general assembly meeting, shareholders may request information from the board of directors on the company's affairs and from the auditors on the audit matters. The information provided in response to such a request must be diligent and truthful in accordance with the principles of accountability and good faith. The provision of the requested information may only be refused if it constitutes a trade secret or involves another corporate interest worthy of protection. However, if information has been provided to any shareholder outside the general assembly meeting, the same information must be provided upon a shareholder's request at the general assembly meeting, even if it is unrelated to the agenda or constitutes a trade secret. This issue may arise in particular in situations where a majority or controlling shareholder who effectively controls the company possesses superior information compared to a minority shareholder.

Shareholders may also request the board of directors outside the general assembly meeting to inspect the company's commercial books and correspondence in connection with questions raised at the general assembly meeting. For such an inspection to take place, a resolution of the board of directors on this matter is required.

If a shareholder's request for information or inspection is left unanswered, unjustly rejected or postponed, the shareholder who is unable to obtain the desired information may apply to the competent court within 10 days of the rejection or, in other cases, within a reasonable period of time.

There is a general information asymmetry between shareholders and company management regarding the company's activities. From the perspective of shareholder activism, access to such information may be necessary for these activities to be carried out.[12] Consequently, activist shareholders may play an active role in the company's operations by exercising their rights to obtain information and conduct inspections on matters such as the activities, accounting, financial position and

[12] Özdemir, pp. 57-60.

performance, reports prepared, and related-party transactions of the company and its subsidiaries, and may direct their activist efforts in light of the information obtained. Where a request for information is unjustly refused, they may aim to ensure the company's supervision and oversight by bringing a claim before the competent court.

4. Liability Claims Against Board Members

As the company's governing body, the board of directors is subject to duties of care and loyalty and must perform its duties in the interests of the company. In this regard, activist shareholders may bring a liability claim against board members for damages caused by their fault. For shareholders to be entitled to bring a liability claim, they must not have voted in favour of the release of the relevant directors on the agenda at the general assembly meeting. It should also be noted that shareholders who acquire shares with knowledge of the release decision will lose their right to bring a claim.

5. Website

Companies subject to independent audit are required, pursuant to Article 1524 of the TCC, to establish a website and to publish the required notices and certain other content on that website within the time period specified in the TCC, if any, or, where no such period is specified, within a maximum of 5 days from the date of the relevant transaction or the date of registration and publication. Failure to comply with this obligation may result in the relevant decisions being voidable and may give rise to liability on the part of the directors.

B. Minority Rights

Shareholders holding 10% of the capital in non-public companies and 5% of the capital in publicly listed companies are classified as minority shareholders. Shareholders constituting a minority may exercise the various rights granted to them under the TCC.

1. Right to Add Items to the Agenda

Subject to statutory exceptions, the principle of adherence to the agenda applies to general assembly meetings under Turkish company law. Consequently, matters not included on the agenda cannot, as a rule, be discussed or decided upon at the general assembly meeting.

Minority shareholders may, under Article 411 of the TCC, request the board of directors to convene a general assembly meeting or, if a general assembly meeting is already to be held, to insert certain items on the agenda that they wish to have decided upon, by stating the compelling reasons and the relevant agenda items. This request must be submitted to the board of directors via a notary public.

If the board of directors accepts the request, the general assembly meeting shall be convened to take place within 45 days at the latest. Otherwise, the convocation may be effected by the applicants themselves. If the board of directors rejects the request or fails to provide a positive response within 7 working days, the minority shareholders in question may apply to the competent court for the convening of the general assembly meeting. If the court deems the request appropriate, it may appoint a trustee to prepare the agenda and issue the notice, and the trustee shall carry out the relevant procedures.

2. Right to Request the Appointment of a Ministry Representative

Minority shareholders may, pursuant to Article 35(3) of the Regulation, request the company to appoint a Ministry representative for general assembly meetings where the presence of a Ministry representative is not otherwise mandatory, by notifying the company of their reasons. The company is required to forward this request to the appointing authority. If a Ministry representative is appointed in this manner, any general assembly resolutions adopted in the absence of the Ministry representative shall be invalid.

3. Action for the Removal of the Auditor

Minority shareholders may, pursuant to Article 399(4) of the TCC, request the competent court to remove the auditor and appoint a replacement. For such a request to be admissible, there must in particular be legitimate doubt as to the auditor's impartiality or a just cause relating to the auditor personally.

4. Right to Postpone the Discussion of Financial Statements

Minority shareholders may, under Article 420 of the TCC, request the postponement of the discussion of financial statements and related matters during the general assembly meeting. No justification is required for this request.[13] It should be noted that, pursuant to Article 413 of the TCC, the removal of board members and the election of new ones are considered matters connected to the discussion of financial statements. Furthermore, agenda items concerning the board of directors' annual report, the auditor's report, the discharge of board members and the distribution of dividends are also linked to the discussion of financial statements.[14] Upon such a request by the minority, the general assembly meeting is adjourned by the chairperson of the meeting for 1 month without the need for any further vote or decision.

Minority shareholders may also request the postponement of the discussion of financial statements at the second general assembly meeting. However, for such a request to be made, it is a prerequisite that the parties concerned have not responded to the

[13] Pulaşlı, p. 1013.

[14] Çamoğlu (Poroy / Tekinalp), *Ortaklıklar I*, p. 571.

objected points in the financial statements that have been recorded in the minutes, in accordance with the principles of fair accounting.

5. Special Audit

Pursuant to Article 438 of the TCC, any shareholder may request that the general assembly order a special audit to clarify specific events, even if such matters are not on the agenda, provided that the exercise of shareholder rights necessitates it and the aforementioned right to information or inspection has already been exercised. This right to request a special audit may be exercised by all shareholders. If the general assembly meeting approves the request, the company or any shareholder may, within 30 days, apply to the competent court for the appointment of a special auditor.

However, if the general assembly rejects the request for a special audit, minority shareholders, or shareholders whose aggregate nominal share value amounts to at least one million Turkish Liras, may within 3 months apply to the competent court to request the appointment of a special auditor. In this regard, if the claimant convincingly demonstrates that the founders or the company's corporate bodies caused harm to the company or the shareholders by breaching the law or the articles of association, the court shall appoint a special auditor.

The appointed special auditor submits a detailed report to the court regarding the findings of the examination, whilst preserving company secrets; the court then serves the report on the company. Thereafter, the court evaluates the company's request as to whether the disclosure of the report would harm the company's secrets or other interests worthy of protection, and therefore whether it should not be disclosed to the applicants; it then delivers its decision and serves the report to the company and the minority shareholders who made the request in the manner it deems appropriate. At the conclusion of the relevant process, the board of directors presents the report and related assessments to the shareholders at the next general assembly meeting.

6. Prevention of Discharge of Liability Arising from Incorporation and Capital Increase

Pursuant to Article 559 of the TCC, the liabilities of founders, directors and auditors arising from the company's incorporation and capital increase cannot be discharged by way of settlement or release until 4 years have elapsed from the date of registration of the relevant act. Even after the expiry of this period, settlement and release may only become effective with the approval of the general assembly. However, if minority shareholders oppose the approval of this resolution, the settlement and release decision cannot be approved by the general assembly.

7. Dissolution for Just Cause

Minority shareholders may, pursuant to Article 531 of the TCC, request the competent court to order the dissolution of the company where just cause exists. Just causes may include, taking into account the specific circumstances of the case: the majority or controlling shareholders managing the company in breach of the principle of good faith; the improper use or transfer of company assets; the deprivation of minority shareholders of their dividends for an extended period of time without valid justification; the systematic violation of rights to information, inspection and other shareholder rights.[15] Dissolution of the company must be applied as a measure of last resort, and where possible, the continuation of the company's operations should remain the primary objective. In this regard, the court may, instead of ordering dissolution, decide to squeeze-out the minority shareholders or to adopt alternative solutions that are appropriate to the circumstances and acceptable to the parties.

C. Privileges

Privileges may be created by granting certain shares superior rights over others, provided this is regulated by the articles of association. Where an activist shareholder already holds privileged shares, they may utilise these rights to expand their shareholder activism activities.

Foremost among these is the privileged right of representation on the board of directors, as provided for in Article 360 of the TCC. Pursuant to this provision, the privileged right of representation on the board of directors may be granted by the articles of association to specific share groups, to shareholders forming a specific group by virtue of their characteristics and qualities, and to minority shareholders. Shareholders able to exercise this privileged right may access greater information regarding the company's activities and exercise greater influence through their representatives on the board of directors.[16] In addition, the rights arising from board membership may also be exercised vis-à-vis the board of directors.

Other privileged rights may also be granted to shares. For example, the right to request copies of documents within the scope of shareholders' rights to information and inspection may be expanded by granting privileged rights to specific shares,[17] or shareholders holding shares with voting privileges may be given a say in certain general assembly resolutions.

Finally, where a general assembly resolution regarding an amendment to the articles of association would violate the rights of shareholders holding privileged

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[15] Ünal Tekinalp (Reha Poroy ve Ersin Çamoğlu), Ortaklıklar Hukuku II, 14th ed., Vedat Kitapçılık, 2019 ("Tekinalp (Poroy / Çamoğlu), *Ortaklıklar II*"), pp. 352 *et seq;* Kayıklık, p. 437.

[16] Kayıklık, p. 440.

[17] Tekinalp (Poroy / Çamoğlu), *Ortaklıklar II*, p. 57.

shares, such a resolution cannot be implemented unless it is approved at the special committee of privileged shareholders. However, the board of directors may challenge the special committee's decision to withhold approval by bringing a claim on the grounds that the relevant general assembly resolution does not violate the rights of privileged shareholders.

D. Rights Arising from the Shareholders' Agreement

Where a shareholders' agreement exists among the company's shareholders, it may be possible to grant various rights to a shareholder in order to preserve the balance of power within the company.[18] In this regard, shareholders' agreements may regulate, from the perspective of the company's corporate governance: where, when and how meetings of the board of directors and the general assembly are to be held; the quorum requirements for meetings and decisions; the identification of specific transactions requiring a mandatory resolution; the structure of the board of directors and the organisation of the company's activities; voting agreements regarding specific resolutions to be taken at the general assembly meeting; shareholders' rights to information and inspection; put options or tag-along rights enabling exit from the company; and deadlock resolution mechanisms in the event of a corporate deadlock. Consequently, a shareholders' agreement to which an activist shareholder is a party may be structured from the outset to protect the interests of activist shareholders, or the rights available under the agreement may be exercised within the framework of shareholder activism.

Conclusion

The foregoing has outlined certain rights and tools that shareholders may utilise within the framework of shareholder activism. It must not be forgotten that these rights and tools are interrelated, may trigger one another, or may yield more effective results when used in conjunction. It should also be noted that other rights and tools not discussed in this article may equally be deployed in shareholder activism activities. Each individual case must, however, be examined on its own merits, and the exercise of such rights and tools must be subject to legal evaluation.

The primary benefits of shareholder activism include increasing the company's market value, improving corporate governance and performance, reducing excessive costs, and ensuring oversight and supervision.[19] However, the concern that

[18] Gül Okutan Nilsson, *Anonim Ortaklıklarda Paysahipleri Sözleşmeleri,* Çağa Hukuk Vakfı Yayınları, 2004, p. 77.

[19] Özdemir, p. 173; Cindoruk, pp. 340-342; Ergin / Erturan, p. 114; Serkan Ünal, "Serbest Yatırım Fonlarının Aktivist İşlemlerin Hisse Fiyat Performanslarının Analizi", Finansal Araştırmalar ve Çalışmalar Dergisi, Vol. 12, No. 23, 2020, pp. 672, 690.

shareholder activism carried out with the aim of short-term gain may adversely affect the company's long-term investments stands out as the most fundamental criticism levelled against shareholder activism.[20]

In this respect, maintaining an appropriate balance among the company's stakeholders would be beneficial for all parties. Establishing effective communication between activist shareholders and the company's board of directors and controlling shareholders, listening to constructive criticism and suggestions, objectively evaluating the measures requested, and taking into account both the company's short-term and long-term strategies will not only ensure the success of shareholder activism but also increase the value it adds for all of the company's stakeholders.

[20] Özdemir, p. 55; Cindoruk, pp. 342-344; Solak, p. 133; Yatağan Özkan, p. 180; Bilen, p. 37; Ergin / Erturan, pp. 103, 106. For detailed explanations on short-termism, see Yatağan Özkan, pp. 157 *et seq*.

An Introduction to Commodity Arbitrations: Examples of GAFTA and FOSFA

Lara Oranli

Introduction

A commodity is generally understood as any "*substance or product that can be traded, bought, or sold*".[1] From grain and oil to sugar, coffee, cocoa and spices, commodities form the backbone of global trade and supply chains.[2] Their pricing, distribution, and availability exert profound economic, social and political influence worldwide.[3]

Commodity trading is predominantly structured through standard-form contracts issued by industry trade associations and widely adopted in international practice.[4] These contracts typically contain arbitration clauses referring disputes to specialised tribunals operating under the auspices of the relevant trade association.[5] The scale, speed and volatility of commodities transactions, often involving multiple jurisdictions and complex contractual chains, making disputes an inherent feature of commodity trading, and arbitration the preferred mechanism for their resolution.

[1] Cambridge Dictionary, "Commodity", Cambridge University Press, https://dictionary.cambridge.org/dictionary/english/commodity, accessed 25 March 2026.

[2] Michael Swangard and Tamsyn Pickford, "The Arbitration Agreement and Arbitrability, Commodity Arbitrations", in Christian Klausegger et al. (eds.), Austrian Yearbook on International Arbitration, 2016, ("Swangard and Pickford"), p. 29.

[3] *Id.*

[4] Elena Trabaldo-de Mestral, "Arbitrating Commodity Trading, Shipping and Related Disputes", in Manuel Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide, 2nd ed., 2018 ("Trabaldo-de Mestral"), p. 1323.

[5] *Id.*

Commodities arbitration is one of the earliest forms of international commercial arbitration.[6] It became increasingly prominent as global trade expanded and leading trade associations, such as Grain and Feed Trade Association ("GAFTA") and Federation of Oils, Seeds and Fats Associations ("FOSFA"), London Metal Exchange ("LME") and London Rice Brokers Association (LRBA) emerged in the nineteenth century.[7] The standard-form contracts issued by GAFTA and FOSFA are now governing a substantial share of global trade in their respective sectors. Approximately 80% of global grain and feed trade is conducted under GAFTA standardform contracts.[8] In parallel, FOSFA contracts regulate around 85% of international trade in oils, seeds and fats.[9]

This article will outline the core features of commodities arbitration and explores how these characteristics are embodied in the arbitration rules of GAFTA and FOSFA. It will conclude with an overview of the main issues that businesses in Türkiye should be wary of.

Special Characteristics of Commodities Arbitration

While each trade association has their own set of rules, commodities arbitration as a type of arbitration has some defining characteristics. These common features, which will be explained in more detail below, reflect the practical needs of the international commodity trade with an emphasis on industry expertise and efficiency.

A. Commercial Industry Experience

A defining feature of commodities arbitration is the limited involvement of lawyers.[10] This general exclusion of lawyers aims to prevent the proceedings from becoming overly legalistic and ensuring that the system is conducted "*for the trade, by the trade.*"[11] Historically, only traders possessed the necessary knowledge to assess the quality of goods to decide on the disputes enabling them to push lawyers out

[6] Aceris Law, "Commodity Arbitrations", 1 March 2021, https://www.acerislaw.com/commodity-arbitrations/, accessed 25 March 2026.

[7] *Id.*; Trabaldo-de Mestral, pp. 1323-1324.

[8] GAFTA, "Contracts", https://www.gafta.com/contracts/, accessed on 25 March 2026.

[9] FOSFA, "FOSFA Contracts", https://www.fosfa.org/contracts/, accessed on 25 March 2026.

[10] Swangard and Pickford, p. 33.

[11] Ciarb, "The Essentials of Commodities Arbitration", 23 July 2024, https://www.ciarb.org/news-listing/the-essentials-of-commodities-arbitration/, accessed on 16 March 2026.

of the commodity arbitration sphere.[12] Despite some more room being allowed for lawyers, the tradition still persists today.[13]

In most cases, arbitrators are commercial individuals with substantial industry experience rather than legally trained professionals.[14]

Furthermore, many trade association rules expressly prohibit lawyers from participating in hearings.[15] This restriction is principally aimed at lawyers in private practice, such as those working in law firms or chambers.[16] As a result, parties commonly navigate the prohibition by appointing their inhouse counsel to represent them, relying on the notion that such individuals qualify as traders by virtue of their employment.[17] Nevertheless, formal legal representation remains the exception rather than the rule in commodities arbitration. However, despite the lack of formal legal representation, lawyers often assist parties behind the scenes by preparing written submissions.

GAFTA Arbitration Rules No. 125 ("GAFTA Rules") provide a strict framework for legal representation. Article 4.8 states that the parties shall not be represented "*by a solicitor or barrister, or other legally qualified advocate, wholly or principally engaged in private practice, unless legal representation is expressly agreed.*"[18] A similar prohibition applies at the appeals stage under Article 12.2.[19] Under these provisions, a party may only engage a lawyer in two specific situations: i) the lawyer is not wholly or principally engaged in private legal practice, or ii) the parties expressly agreed to allow legal representation.

In addition, GAFTA Rules restrict who may serve as an arbitrator. Only GAFTA Qualified Arbitrators may be appointed,[20] and while in-house lawyers working for GAFTA members can qualify, lawyers primarily engaged in private practice cannot.[21]

The FOSFA Rules of Arbitration and Appeal dated 1 April 2025 ("FOSFA Rules") adopt a similar approach. Parties may not "*have present or be represented by*

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[12] Iryna Polovets, Matthew Smith and Bradley Terry, "Gafta Arbitration is the Most Appropriate Forum for Disputes Resolution in Grain Trade", Arizona Journal of International & Comparative Law, Vol. 30, No. 3, 2013, p. 575.

[13] *Id.*, p. 576.

[14] Trabaldo-de Mestral, p. 1324.

[15] Swangard and Pickford, p. 39.

[16] *Id.*

[17] Laura Williams, "Arbitration in the Energy and Natural Resources Sector: What Can We Learn from Commodity Trade Association Arbitration?", in Carlos Gonzalez-Bueno (ed.), 40 Under 40 International Arbitration 2021, ("Williams"), p. 420.

[18] GAFTA Arbitration Rules No. 125 ("GAFTA Rules"), art. 4.8.

[19] GAFTA Rules, art. 12.2.

[20] GAFTA Rules, art. 3.7.

[21] GAFTA, "How to Become a GAFTA Qualified Arbitrator", https://www.gafta.com/arbitration/how-to-become-a-gafta-qualified-arbitrator/, accessed on 25 March 2026.

counsel, solicitor or any member of the legal profession wholly or principally engaged in private legal practice unless at the sole discretion of the Tribunal, the case is of special importance, and in such case the other party shall have the same rights."[22] A corresponding rule applies at the appeals stage, where the decisions rests exclusively with the appeal board rather than the tribunal.[23] FOSFA Rules also prohibit persons wholly or principally engaged in private legal practice from acting as arbitrators.[24]

The FOSFA framework differs from GAFTA in one significant respect: the parties themselves cannot agree to permit legal representation. The discretion solely lies with the tribunal at first instance and the appeal board on appeal.

B. Domicile Clause

The arbitration rules of trade associations generally provide for a domicile clause, designating London as the seat of arbitration and English law as the applicable law. This is the case even in the absence of any connection of the parties or the dispute to England.[25] The longstanding linkage that commodities arbitration has with the trade associations and England as a jurisdiction, remains to be one of its defining features. [26]

Both GAFTA and FOSFA Rules stipulate London, England as the seat of arbitration, and their standardform contracts incorporate domicile clauses specifying English law as the governing law.[27]

C. Speed and Efficacy

Arbitration rules of trade associations typically impose significantly shorter time limits for commencing claims compared to general statutory limitation periods.[28] This approach is designed to promote certainty and finality in trade.[29] In line with the emphasis on efficiency, first-tier arbitrations are commonly decided on a

[22] FOSFA Rules of Arbitration and Appeal dated 1 April 2025 ("FOSFA Rules"), art. 4(e).

[23] FOSFA Rules, art. 9(a).

[24] FOSFA Rules, art. 2(b).

[25] *See e.g.* FOSFA Rules, Preamble; GAFTA Rules, art. 1.2; LME Arbitration Regulations ("LME Regulations"), arts. 7.7, 16; SAL Rules and Regulations, arts. 126-127.

[26] Aceris Law, "Commodity Arbitrations", 1 March 2021, https://www.acerislaw.com/commodity-arbitrations/, accessed 25 March 2026; Swangard and Pickford, p. 46.

[27] FOSFA Rules, Preamble; GAFTA Rules, Art. 1.2. *See also* GAFTA, "Contracts", https://www.gafta.com/contracts/, accessed on 25 March 2026; and FOSFA, "FOSFA Contracts", https://www.fosfa.org/contracts/, accessed on 25 March 2026.

[28] Williams, p. 421.

[29] Trabaldo-de Mestral, p. 1325.

documents-only basis, without extensive disclosure of documents, enabling a faster resolution of the dispute.[30]

Under FOSFA Rules, parties must initiate arbitration for quality/condition claims within 90 consecutive days from either the discharge of the goods or the completion of the delivery, depending on the contractual framework.[31] All other claims must be initiated within one year from the expiry of contract period of shipment or of the date of final discharge of goods.[32]

GAFTA rules are even stricter; in case of quality and condition claims, arbitration must be commenced no later than 21 consecutive days after the completion of loading, delivery or discharge.[33] An exception applies to disputes arising under the "Rye Terms"[34] clause, where the time limit is shortened further to the 10th consecutive day following the final discharge.[35] All other claims must be initiated within one year from the defined dates depending on the contractual framework.[36]

These time limits are much shorter than the statutory limitation period defined under English law, which typically allows six years from the date the cause of action occurs for contractual claims.[37]

D. Multi-tier Arbitrations Incorporating Appeal Procedures

The arbitration rules of trade associations generally offer a multi-tier system.[38] Once the first-tier arbitration is concluded, the losing party may seek a review of the award through an appeal board constituted within the structure of the trade association, typically comprised of three to five arbitrators appointed directly by the association.[39] This appeal mechanism entails a *de novo* hearing, and permits the introduction of new evidence by the parties.[40] Moreover, whereas the first-tier is usually decided on a document-only basis, the appeal board will usually hold an oral hearing, ensuring the parties' right to present their case.[41] However, the losing party shall keep in mind

[30] Williams, p. 421.

[31] FOSFA Rules, art. 1(a).

[32] FOSFA Rules, art. 1(b).

[33] GAFTA Rules, art. 2.1.

[34] Rye Terms are specific contractual provisions found in certain GAFTA contracts that provide assurances to the buyer regarding the condition of the goods upon arrival.

[35] *Id.*

[36] GAFTA Rules, art. 2.2.

[37] English Limitation Act 1980, sect. 5.

[38] Swangard and Pickford, p. 36.

[39] *Id.*

[40] Jacques Covo, "Commodities, Arbitrations and Equitable Considerations", ASA Bulletin, Vol. 10, Issue 2, 1992, ("Covo") p. 140.

[41] Williams, p. 421.

that if the challenge concerns the jurisdiction of the tribunal, it must be raised before the English courts within the time limits prescribed by the English Arbitration Act 1996, and not with the appeal board.[42]

Both FOSFA and GAFTA Rules provide for appeal mechanisms.[43] Under the FOSFA Rules, an appeal must be lodged within 28 days from the date of the award, whereas under the GAFTA Rules, the appeal notice must be filed no later than noon on the 30th consecutive day following the award.[44] Both set of rules allow for a *de novo* hearing at the appeal stage.

E. Consolidation

In commodity trading, it is common for goods to be sold and resold while still aboard the vessel.[45] These successive transactions are typically entered into through contracts that are nearly identical, differing only in details such as dates, parties, and price.[46] Such chains of back-to-back contracts are referred to as '*string contracts*.'[47] When disputes, especially those from quality and condition of the goods, arise, conducting multiple parallel proceedings would be inefficient, and could result in inconsistent awards.[48]

To address this, some trade associations offer a special system called '*string arbitrations*.'[49] In these string arbitrations, the arbitration will be conducted between the first seller and the ultimate buyer and the ensuing awards will be binding and enforceable upon all the intermediary parties.[50] This mechanism designed with the realities of international commodity trading in mind, offers an efficient solution to the problem of parallel proceedings while also allowing to keep the costs to a minimum.

On the other hand, some trade associations offer more traditional consolidation powers in their arbitration rules providing broader discretion to the tribunal for consolidating arbitrations.[51] This could be due to common questions of law or fact, as well as the interconnectedness of the relief sought.[52] Tribunals may also enjoy

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[42] Swangard and Pickford, pp. 36-37.

[43] FOSFA Rules, art. 7; GAFTA Rules, arts. 10-12.

[44] FOSFA Rules, art. 7(a); GAFTA Rules, art. 10.1(a).

[45] Swangard and Pickford, pp. 40-41.

[46] *Id.*

[47] *Id.*

[48] *Id.*, Williams, p. 422.

[49] *See e.g.*, GAFTA Rules, art. 7.1; FOSFA Rules, art. 6(c). FOSFA and GAFTA Rules do not offer a separate consolidation mechanism, and in the absence of a 'string of contracts' the arbitrations will have to be conducted separately.

[50] Williams, p. 422 for consolidation powers.

[51] British Coffee Association London Arbitration Rules 2012, part 4; LME Regulations, sect. 11.

[52] *See e.g.*, LME Regulations, sect. 11.

broader discretion to decide when to consolidate arbitrations.[53] The consolidation mechanism could still be used to address the complexities arising out of the '*string contracts*'.

FOSFA Rules provide a special provision for disputes arising out of a string of contracts enabling the arbitration to be conducted between the first Seller and the last Buyer, provided that the dispute is related to the quality or condition of the goods.[54] The arbitration for other types of claims may also be conducted between the first seller and the last buyer if all of the parties in the string agree in writing and all the intermediate contracts are submitted to the tribunal, however, in such case the tribunal will make an award in respect of each contract.[55]

Similarly, GAFTA Rules provide that if the parties agree in writing, the tribunal may hold a single arbitration between the first seller and the last buyer, but the award will be binding on all of the parties in the string.[56] In the absence of an agreement in writing, the tribunal may still choose to conduct arbitral proceedings concurrently but shall issue separate awards.[57]

Both FOSFA and GAFTA allow for string arbitrations only when the contracts between the parties are identical on all material points, except for the names of the parties, the contract price and the date.[58]

F. Enforcement

Another distinctive feature of commodities arbitration is the supervisory role exercised by the relevant trade associations.[59] Many associations include 'defaulter provisions' in their arbitration rules, empowering them to monitor compliance with the award, and at their discretion publish the non-compliant award debtor in their defaulter lists.[60] Although this may appear as a modest sanction, it carries significant commercial consequences. Being listed exerts considerable pressure on the debtor to satisfy the award and may hinder their ability to enter into new business transactions, as other market participants may regard them as an unreliable business partner.[61]

At first glance, this mechanism may seem at odds with the confidential nature of the arbitration. However, the applicable arbitration rules expressly provide that, by

[53] See e.g., British Coffee Association London Arbitration Rules 2012, part 4.

[54] FOSFA Rules, art. 6(c).

[55] *Id.*

[56] GAFTA Rules, art. 7.1.

[57] *Id.*, art. 7.2.

[58] GAFTA Rules, art. 7.1; FOSFA Rules, art. 6(c).

[59] Williams, p. 422.

[60] Swangard and Pickford, p. 43.

[61] *Id.*

choosing to arbitrate under the trade association's rules, the parties have consented to such disclosures being made by the trade association.[62]

FOSFA Rules provide that if a party fails to pay an award within 28 consecutive days, FOSFA may, at its discretion, publish a notice of nonpayment on its notice board or circulate it to its members.[63] By agreeing to arbitrate under the FOSFA Rules, all parties are deemed to have consented to FOSFA taking such action.[64]

In the same vein, under the GAFTA Rules, if a party fails to abide by a final award, GAFTA may publish the default on the GAFTA Notice Board, its website, or circulate it among its members upon the request of the award creditor.[65] GAFTA Rules also provide that the parties are deemed to have consented to such action.[66] However, the GAFTA framework includes an important caveat: if the party requesting GAFTA to take this action is already listed as a Defaulter, it is prohibited from making such a request.[67]

Practical Implications for Traders in Türkiye

Türkiye is amongst the leading producers and exporters of various commodities, including olive oil, sunflower seed, cottonseed, barley and rye.[68] In light of the recent surge in global commodity prices driven by the ongoing conflict in the Middle East,[69] producers in Türkiye face a heightened risk of encountering a greater number of disputes with their global trading counterparts.

Against this backdrop, traders in Türkiye must be particularly mindful of the unique features of commodity arbitrations and should appreciate that they come with their own structural risks and constraints. As such, it is essential for them to understand the practical implications of resolving their disputes within GAFTA and FOSFA framework.

Firstly, while industry expertise unquestionably brings valuable technical insight to dispute resolution process, the relevant commodity markets have relatively small

[62] *Id.*

[63] FOSFA Rules, art. 11(c).

[64] *Id.*

[65] GAFTA Rules, art. 24.1.

[66] *Id.*

[67] *Id.*, art. 24.3.

[68] Foreign Agricultural Service U.S. Department of Agriculture, "Production - Turkey", https://www.fas.usda.gov/data/production?commodity=almonds, accessed 16 March 2026.

[69] Marketplace, "War in the Middle East is Pushing Up Agricultural Commodities' Prices", 9 March 2026, https://www.marketplace.org/story/2026/03/09/ag-commodities-prices-grow-as-war-in-middle-east-continues, accessed on 25 March 2026.

number of actors, meaning that the members of the arbitral tribunals may also be trading partners or opponents of the parties to the dispute, making it difficult to ensure impartiality of the arbitrators.[70]

Secondly, the absence of legal professionals from the proceedings may lead to inconsistent decisions, making it challenging to predict the outcome of the disputes.[71]

Moreover, while larger companies would have their internal counsel teams, smaller actors may find themselves at a disadvantage. Of course, the absence of legal representation, does not mean the complete absence of lawyers from the proceedings. Often, lawyers advise their clients from behind the scenes, assisting them with their written pleadings. In fact, GAFTA Rules Article 17.2, explicitly provides that parties are free to engage legal representatives for written proceedings. However, the costs of such representatives will not be recoverable, which may create a significant obstacle for the parties to engage legal representation, putting the companies who have internal legal counsel at a competitive advantage.

Traders in Türkiye must also pay close attention to the choice of English law under both GAFTA and FOSFA standardform contracts. Given the significant divergences between English and Turkish law, legal teams should be thoroughly familiar with the former to avoid unexpected complications during contractual performance or subsequent disputes.

As London is the designated seat of arbitration, GAFTA and FOSFA awards are not directly enforceable in Türkiye and must undergo enforcement proceedings under the New York Convention. By the same token, any potential setaside proceedings will fall under the jurisdiction of the English courts.

Parties trading under GAFTA and FOSFA frameworks must also pay close attention to the applicable time limits when initiating dispute resolution procedures. Failure to comply may result in the loss of their rights, even if the statutory limitation periods have not yet expired.

That being said, the arbitration mechanisms under FOSFA and GAFTA undeniably offer significant benefits for traders in the grain and feed, as well as the oil, fat and seed markets, ensuring swift and effective resolution of disputes and reinforcing compliance through commercial pressure. Their standardform contracts are also increasingly becoming the predominant, if not the only, framework for entering into international commodities transactions in their respective sectors, making their arbitration systems ever more integral to the global trade practice.

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[70] Covo, p. 139.

[71] Williams, p. 421; Swangard and Pickford, p. 39.

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