

# Promises to Transfer Mining Rights under Turkish Law

by Sedat Utku Dicleli

According to Article 168 of the Constitution of the Republic of Turkey (“**Constitution**”), natural assets and resources are under the authority and at the disposition of the state. Exploration and operation rights of such assets and resources belong to the state. The state may transfer such rights, for a specified period, to real or legal persons. Explicit permission of the law determines which natural asset and resource ventures are to be carried out directly by real or legal persons and which are to be carried out jointly with the state. In such cases, the conditions to be complied with by the real and legal persons and the principles and procedures regarding the supervision and control of the state and possible sanctions are set out in law.

Mining activities are mainly regulated under Mining Law no. 3213 (“**Mining Law**” or “**Law**”) and the regulations issued based on the Law, namely, the Regulation on the Application for Mining Activities (“**Application Regulation**”), Mining Activities Permit Regulation (“**Permit Regulation**”) and the Application Regulation Regarding Group I(A) Mines of the Mining Law.

In accordance with Article 168 of the Constitution, Article 4 of the Law specifies that mines are under the authority and at the disposition of the state and are not subject to the ownership of the land on which they are located. Furthermore, according to the said Law, the state provides mining rights such as exploration and operation rights to real or legal persons through licenses and permits granted by the Ministry of Energy and Natural Resources (“**Ministry**”) and the General Directorate of Mining Affairs (“**General Directorate**”).

## Transfer of Mining Licenses

According to Article 5 of the Law, shares cannot be created on the priority rights (antecedence, giving priority to the first applicant), exploration license, discovery rights or operation license rights established on a mine and each of these rights is subject to any transaction as a whole.

Mining licenses and discovery rights may be transferred. In order for the transfer process to be com-

pleted, it must be annotated in the Mining Registry. Transfer procedures are set out under the Application Regulation.

According to Article 80 of this Regulation, mining licenses and certificates may be transferred by the General Directorate to real or legal persons meeting the requirements regarding the use of mining rights as set out in Article 6 of the Law (As per Article 6 of the Law, mining rights shall be given to citizens of the Turkish Republic who are capable of enjoying civil rights and companies established according to the laws of the Turkish Republic, the statutes of which specifically indicate that they may conduct mining activities, state economic enterprises and institutions, their subsidiaries and affiliates and other public institutions, enterprises and administrations.) upon request.

The discoverer of a mine may transfer its discovery rights only with the relevant license.

For such transfers, the transferee and transferor apply to the General Directorate with the required documents, listed in Article 80 of the Application Regulation, and a petition, a sample of which has been provided as an attachment to the Regulation, which is to include a statement by the transferee to the effect that it accepts all rights and obligations arising from the Law relating to the license that it will acquire and the sanctions and liabilities applied to such license, and by the transferor to the effect

that it wishes to transfer its license with all its rights and obligations.

Hence, if a person wishes to acquire the mining license(s) of a license holder, such a transfer would only be valid after the abovementioned requirements have been completed (i.e. application to the General Directorate with the required documents/information and annotation of the transfer in the Mining Registry).

### Promise to Transfer

Having outlined the transfer process, the issue here is whether an option right or a promise provided by the parties in an agreement to transfer a mining license in the future is valid under Turkish law.

It should be noted that there is no provision regarding a promise to transfer mining rights under the Law or the relevant regulations. However, in one of its unified decisions, dated July 6, 1970 and numbered 1967/7 E., 1970/6 K. ("**Unified Decision**"), the Court of Appeal decided that promises to transfer mining rights are not valid. In summary, when reaching the said decision, the Court of Appeal discussed the following issues:

- The provision in the Constitution and the Mining Law stating that mines are under the authority and at the disposition of the state as a result of the sovereignty right of the state is intended to facilitate the administration and use of underground assets by the state in accordance with the public interest. The reason for this is that mines are deemed to be public assets and the operation of such assets is deemed to be a public service. Therefore, regardless of whether the exploration and operation of mines are carried out by the state or private enterprises, the above stated purpose does not change.
- Indeed, Article 39 of Mining Law no. 6309<sup>1</sup> ("**Abrogated Law**") laid out a specific format for the transfer of mining licenses. This format includes an official legal transaction to be conducted through integration of the wills of the transferee, transferor and the representative of the state on certain issues. Accordingly, the grant of licenses as well as the transfer of li-

censes to another person who accepts the same obligations as the transferee are issues that concern the state. The transfer of a mining license is subject to the approval of the Ministry in consideration of the public interest. The matter in question is a sui generis legal transaction, not a contract relationship that grants rights and imposes obligations, i.e. a grant of permission by the state for the exploration of a mine, the ownership of which belongs to the state. There is no doubt that, in terms of administrative law, such a form requirement is a validity requirement. Accordingly, a transfer transaction conducted without complying with the requirements of Article 39 shall not have any legal effect.

- Notaries are not authorized to prepare agreements promising to transfer mining licenses because, according to Article 44 of Notary Public Law no. 3456<sup>2</sup>, which regulates the duties of notaries, notaries may prepare all legal transactions explicitly stated in the said law, which are required by law to be officially prepared but the official authority to prepare is not specified. However, in the case of mining license transfers, the form and conditions of the transfer of such licenses and the authority to conduct such transfers are explicitly set out in the abovementioned Article 39.
- As notaries are not authorized regarding agreements promising transfer, the next question is whether such agreements may be made by the official mentioned in the above stated Law, based on the basic rule under Article 22/2 of the Turkish Code of Obligations ("**TCO**"). According to the said article of the TCO, "If the law subjects the conduct of an agreement to a specific form, that form shall also apply to the promise to enter into such an agreement". However, application of the said rule to all types of agreements, without any exception, is not possible. As mentioned above, transactions for the exploration and operation of mines are considered public services. Accordingly, in terms of state sovereignty and public interest, transactions regarding the acquisition and transfer of mining exploration and operation rights should be described as an administrative disposition conducted in accordance with Article 39 of the Abrogated Law.

<sup>1</sup> It should be noted that the said unified Court of Appeal decision was given at the time of Mining Law no. 6309. Under the current legislation, the corresponding provisions are regulated under Article 5 of the Mining Law and Article 80 of the Application Regulation.

<sup>2</sup> Under the current Notary Public Law no. 1512, the corresponding provision is set out in Article 60.

Therefore it is inconsistent to presume the intention of the legislature, which accepted a statute regarding ownership of mines that is completely different from the general rules of the Turkish Civil Code, was to solve this issue by a provision (namely Article 22/2 of the TCO) that is applied to private debt relationships. When the Abrogated Law is taken into account as a whole, it should be concluded that the legislature did not envisage the promise to transfer rights due to the nature and characteristics of the subject matter. Furthermore, the duty imposed on the relevant official is explicitly set out in Article 39 of the said Law and it is only related to transfer transactions. An official who has not been provided with the power to conduct a promise to transfer transaction may not conduct such a transaction. Therefore, it has been decided that a promise to transfer a mine exploration license is impossible and invalid, even if it is done before an authorized official.

As is shown, the Unified Decision was given in 1970, at the time of the Abrogated Law, and it addressed the transfer of exploration licenses, which was regulated under Article 39, but not that of operation licenses, which was regulated under Article 58 of the Law. However, in one of its decisions, dated November 6, 1981 and numbered 1981/3574E, 1981/4653K, the 11th Civil Chamber of the Court of Appeal stated that even though the Unified Decision relates to the transfer of exploration licenses regulated under Article 39 of the Abrogated Law, the decision may also be applied to disputes regarding the transfer of operation licenses as set out under Article 58 of the said Law due to the similarity of the said provisions.

It should also be noted that under the Mining Law, no distinction was made regarding the transfer of exploration licenses and that of operation licenses and the transfer of the said licenses has been made subject to the same procedures. Additionally, requirements regarding the transfer of exploration and operation licenses under the provisions of the Mining Law are almost the same as those under the corresponding provisions of the Abrogated Law, mainly because both the Mining Law and Abrogated Law permit licenses to be transferred by the relevant authority indicated in these laws upon the completion of an official procedure. Only, (i) while under the Mining Law the relevant authority who is authorized to conduct the transfer transaction is the General Directorate, under the Abrogated Law for exploration licenses the authority was the Ministry of Economy and Trade and for operation licenses the Ministry of Industry<sup>3</sup>; and (ii) while the Mining Law requires the annotation of such transfers in the Mining Registry, under the Abrogated Law, the transferor and transferee are required to sign a minute before the relevant official including the statements of the parties regarding the acceptance of the rights, obligations and sanctions relating to the transferred license by the transferee and the wish of the transferor to transfer its license with its all rights and obligations.

### Conclusion

Accordingly, taking into account the abovementioned Unified Decision of the Court of Appeal and the similarities of the provisions discussed in the decision with the corresponding provisions of the Mining Law, it may be stated that option rights or promises to transfer mining licenses are invalid under Turkish law.

<sup>3</sup> Currently these two ministries are combined under the name of the Ministry of Commerce and Industry.