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PANEL - 1

Answers to
the Moderator's
Preliminary Questions

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ANSWERS TO THE MODERATOR PRELIMINARY QUESTIONS

1- Based on your experience, what are the traditional methods (or most commonly used methods) in resolving disputes in construction projects in Turkey?

This question should be split into a couple of paragraphs.

- Disputes between State Agencies and Contractors
 - Before the tender
 - After the tender
- Means for amicable solutions between State Agencies and Contractors
- In General
- In private entities

A- Disputes between State Agencies and Contractors

a) Before the tender

In Turkey, acts of state agencies performed before the tender are considered as “**Administrative Acts**”.

Before 2003, disputes arising out of such actions were directly resolved by administrative courts as administrative disputes.

The current Public Tender Law came into force in 2003.

According to this Law, disputes that arise before the tender shall be resolved by way of applying the following in the same respect;

- Employer
- Public Tender Board
- Courts (as the last resort).

b) After Signing the Contract

From this point on, relationships are governed by Civil Law.

Construction Works General Specification is the appendix of the construction contracts made between Public Institutions and Domestic Contractors.

The Engineer in this Specification is the person who physically controls the construction. He is not tasked with contract management as in FIDIC.

According to this Specification, should a conflict arise between the Controller Engineer and the Contractor during the execution of work regarding New Unit Prices or Progress Payment, Contractor shall notify the Employer in writing regarding the reasons of conflict within 15 days.

This claim shall be forwarded to the Ministry of Public Works. Such claims are examined by the High Science Board (HSB) or the Public Works Board (PWB) which are in the body of the Ministry of Public Works. HSB decisions are of advisory nature whereas the PWB decisions are binding. However, since this Board is not an arbitration tribunal, Contractor's right to file a lawsuit in civil courts shall remain.

PWB shall decide in two months. While making a decision, the Board shall not consult with the Contractor or seek a resolution. This is not mediation.

If the PWB does not decide within two months or the given decision does not satisfy the Contractor, Contractor shall exercise its contractual rights. In other words, the Contractor will take the dispute to the civil courts.

Some courts may suspend the litigation until the PWB procedures have been complied with.

PWC's decision is, in my opinion, an unnecessary procedure since it does not end the conflict. However, it can become influential over the courts.

This Specification is used in construction works which are subject to Public Tender Law.

This Specification does not include arbitration. Construction works where foreign contractors participate in are not subject to Public Tender Law.

For such construction works, FIDIC Contract Conditions are often implemented.

FIDIC conditions of contract include two-step arbitration and Amicable Settlement.

However, there is also an open door for public entities to resolve disputes by way of amicable settlement.

Ministries that such public entities are related with may choose to settle amicably up to an amount (1.500.000 TL, approximately 1.000.000 USD for the year of 2010) set out annually in the Budget Law.

For resolutions exceeding the amount set out by the Budget Law, Employer shall apply to the State Council. If the State Council's opinion is affirmative, amicable settlement becomes final with a decree of the Ministry of Finance. Settlements against the opinion of the State Council are subject to a Governmental Decree.

It must be borne in mind that it would not be an easy and practical way.

Public entities generally do not desire to use the monetary authority vested in them since they fear any responsibility which might be placed on them by the Audit Court or Inspector General. It is because the money belongs to the State. Even if courts decide on considerable amounts, officials of such public entities shall not be responsible.

On the other hand, I believe it should be kept in mind that the persons who work in public entities as Quasi Arbitrators, and therefore supposed to be impartial, are still personnel of the related Ministry.

I would like to state briefly that, disputes regarding construction works in relation to public entities are usually resolved directly in courts.

- **Private Entities**

It is seen that Investors resort to the written dispute procedures in relation with the contracts made with contractors as a last resort.

Investor's target is to begin the amortization of the project as soon as possible.

Therefore investors do not always enforce the strict conditions of the contract but rather compromises to a reasonable extent. Money belongs to the investor.

If the investor fails to settle the dispute amicably and is forced to enforce his legal rights as the last resort, dispute procedures written in the contract are excellently enforced by the assistance of lawyers.

Government has drafted a “**Mediation Law**” to be used in disputes between private entities. However, this draft law has been seriously criticised by lawyers. Currently it is standing still.

2- Among the methods as you specified, what are the common problems you encountered in administering as well as in getting to a resolution of the disputes?

In legal cases which are subject to arbitration procedure, parties generally nominate lawyers, whom they trust, as arbitrators even if the subject matter is technical. Arbitrators of lawyer origin call upon experts for their assistance on the subject. The question is; are those experts really competent?

For instance, during an arbitration proceeding that I was also involved in, an expert who claimed to be an expert on FIDIC stated, without the knowledge of the fact that only Associations of Consulting Engineers can become members of FIDIC, that he is a member of FIDIC. Also he did not even know that “**Provisional Sum**” is a contractual provision of Bill of Quantities.

3- Have you ever been involved in a project where Dispute Board (DB) was established? What was your experience in this project as to the DB’s effectiveness in the avoidance and/or resolution of disputes?

Yes I have. I, however, would like to draw attention to an important distinction. When speaking of dispute Boards, “Dispute Review Board” (DRB) must be separated from “Dispute Adjudication Board” (DAB).

DRB shall provide a non-binding recommendation in the first place and it shall become a binding decision if one of the parties does not provide a notice of dissatisfaction to the other party and a copy to DRB within the time limit stated in the contract.

Whereas in a Dispute Board formed as DAB, DAB’s decision is “binding” even when a notice of “dissatisfaction” is given.

Unless and until it shall be revised in an amicable settlement or an arbitral award, parties shall promptly comply with DAB’s decision.

I have discussed the Public Entities’ authorities regarding amicable settlement within the first question.

However how effective DAB is?

First of all, let us discuss the existence of DAB.

Governing Law takes place in FIDIC Contract Conditions. The governing law can be the local law or *lex situs*, depending on the country.

Arbitration in Turkey is a subject of Civil Procedure Law.

In FIDIC Contract Conditions, arbitration is a two-step procedure.

“**Engineer’s Decision**”, which was the first step in the previous FIDIC Contract Conditions, has been replaced by “**DAB Decision**” in 1999 editions. A claim shall not be considered as a dispute. Application of the first step would constitute a dispute.

I would like to explain the following interpretation of the Turkish Court of Appeal on this matter;

“Engineer’s decision is not binding. Whether the engineer is approached for decision or not, it does not overrule the arbitration clause”.⁽¹⁾

Accordingly, a claim can be subject to arbitration without becoming a dispute.

In some cases, arbitration is being suspended in order to fulfill the first step, however arbitrators often reject the claim due to lack of jurisdiction because the dispute has not yet arisen.

Would DAB become unnecessary since Turkish Courts neglect the first step of the arbitration?

We can list the advantages of DAB as follows;

- Parties appoint Board member(s) by mutual approvals.
- DAB has knowledge about the subject since the beginning,
- It is speedy,
- Parties refrain from acrimonious correspondence since disputes would be taken to DAB,
- Because of timely payments to be made to the Contractor, it gives the opportunity to the Contractor to control its cash-flow and the Employer to monitor its budget in the project.

⁽¹⁾ Civil Law Chamber 15 of Turkish Cassation Court, dated 15.9.1994, 1854/4946

We can also add the ease of investigation and advantages of psychological approach into this list.

4- What are the problems you observed in the establishment, process, decision delivery, implementation of decisions of the Dispute Boards?

FIDIC recommends that DAB members are selected among technical persons and the chairman to be a lawyer.

However, lawyers are usually not desired in DAB hearings. Still, the governing law of the contract should not be forgotten.

In a Silver Book implementation which I worked as the consultant of the Employer who is a public entity, I saw that three foreign members of DAB interpreted the legal opinion which I provided according to the Turkish law, in accordance with the English law.

It would of course be unfair to expect a foreign DAB to be qualified to comment on local law.

However in such a situation, I believe that DAB should ask for a local lawyer's opinion as an Expert.

5- What is your opinion as to whether the Dispute Board process can effectively work in projects in Turkey?

I believe it is beneficial that DAB procedure be implemented in projects in Turkey.

Despite the broad interpretation on the existence of “**dispute**”, the first step of arbitration, the above quoted decision of the Turkish Court of Appeal leaves me hesitant.

6- Does your answer change if the project is domestic or international?

The domestic or international nature of the project depends on the legal perception of the Employer.

In order for a construction project to be considered as of international nature, conditions such as different nationalities of the Employer and the Contractor and restriction on the transfer of foreign currency will be searched for.

A tender can be conducted under international procedures.

Domestic or foreign contractors can make bids.

If the foreign contractor's bid is accepted, then the Contract will be international and in case of the opposite, it will be domestic.

For these reasons, I have witnessed unfair situations during the bidding period.

For instance, in a Contract where FIDIC Red Book 4. Edition was implemented, a condition was imposed for the application of the Sub article 67.1 which stated that ICC Arbitration procedure would be followed if the Contractor is foreign, however; Arbitration proceedings would not be followed should it be a local contractor and disputes would have to be resolved in Ankara courts.

This disadvantaged situation would lead to unfair competition during the tender process.

Interpretations of a Turkish court which is inexperienced in FIDIC implementations would yield a disadvantaged situation for the Contractor when compared to the interpretations of an international Arbitration Tribunal which is an expert on FIDIC implementation.

7- If your answer to Q-5 is Yes, what are your expectations for the future? In other words, in order to expand the use of DB process, what needs to be done and by whom?

Major investments in Turkey are usually done by public entities in order to meet public needs. Technical personnel and lawyers in those entities must be trained to understand what a Dispute Board, how it works and its advantages.

For this purpose, I am of the opinion that private seminars must be held and opportunities for the examination of DB's method of operation need to be provided.

I also believe that specialist courts must be established where judges to serve in such courts must also be trained. Organization of such a structure would be the responsibility of the Ministry of Justice.

8- If your answer to Q-5 is No, please elaborate as to why. What are the stumbling blocks and what needs to be done to change the status quo?

Non-Applicable