

Section: Compare & Contrast: DBs under Civil Law and Sharia Law

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Subject: DBs under Turkish Law

Summary of the Presentation

1. Introduction

1.1. Background of Turkish Law and its Connection with the Islamic Rules.

Familiarity with the Islamic Rules. Turkey is contemporarily a country of European Continental law system. However, Turkey is one of the regions where the practitioners of law are rather familiar with Islamic law and therefore *Sharia* due to territorial and historical grounds. Prior to the Turkish legal reform in result of the foundation of the Turkish Republic in 1923, Islamic law had reigned in the territory for centuries. Turkey has adopted the Swiss Federal Code of Obligations and Civil Code in 1926. Before that date, till the end of 19th century Islamic rules were applied in Ottoman regime. In 1876, the *Mejella* was compiled by the Ottoman Empire as an Islamic civil law codex. This code is the first codifying activity in the Ottoman legislature¹.

1.2. Current Structure of the Turkish Legal System – A Very Brief Overview

Relevance of the Islamic Rules. Turkish legal system is a continental and codified legal system. Following the modern codification with the establishment of the Turkish Republic, the relevance of the Islamic rules arises only when there is no legislation on a specific issue and the customary rules are referred for interpretation purposes. However, we cannot imply a direct application of Islamic Rules by Turkish courts. They can only have a limited effect as a reference to determine the content of customary rules on a specific matter.

Role of the Courts. As set forth by Article 9 of the Turkish Constitution, the competence of solving the disputes between the real or legal entities in Turkey is attributed

¹ E. Adal, Fundamentals of Turkish Private Law, p.47, Legal, 2005.

solely to the independent courts. The Turkish Constitution however, provides the exception that the parties may refer to arbitration and alternative dispute resolution methods for the settlement of private law disputes in case it is expressly permitted by law.

2. Arbitration and Alternative Dispute Resolution Methods under Turkish Law

A. Legal Context and History of Arbitration and ADR methods

Although a domestic arbitration option existed since 1926 within the scope of the Former Civil Procedure Code in Turkey, it may be fair to mention that arbitration and alternative dispute resolution methods especially in an international level became available only after the constitutional changes in late 90s and with the entry into force of international arbitration code. Turkish international arbitration law, enacted in 2001, is the main legislation in Turkey regarding international arbitration². This law took primarily the example of UNCITRAL model law with some little modifications. Besides, the legislator enacted a very recent law on mediation of private law disputes on 7 June 2012. These examples demonstrate the intention to support and to favor international arbitration and ADR methods as a legal policy.

However, with the analysis of the legal culture in Turkey, we can observe a rather conservative approach for arbitration and ADR methods. Generally, in case of a dispute, parties are easily head to a legal authority instead of negotiating and to find a peaceful solution. Traditionally, parties bring suit before national courts, because they don't see arbitrators or other ADR tribunals as an appropriate authority to resolve the dispute with efficiency. For this reason, Turkish companies had difficulties to become familiar with this "*private methods of justice*" in international context. However, even if some jurisprudence has still a hostile approach against international arbitration and arbitral tribunals, we can also argue that a certain period of adjustment is terminated for actors of international commerce with the popularity and the use of international arbitration. Concerning ADR methods, Dr. Yesilirmak argues that these methods are not functional in practice because of the legal

² Y. Cetinel, A. Aydin, Legal Framework and main institutions of arbitration in Turkey, Young Arbitration Review, n°4, Jan. 2012, p.22.

culture in Turkey³. In this view, the recent law efforts are not sufficient to improve the efficiency of ADR methods. Specific educational programs must be realized and a public opinion must be created to implement this legal culture, friendly with arbitration and ADR methods⁴.

B. Current Situation in Turkey

In light of these legislative efforts, applicability of alternative dispute resolution methods under Turkish law and Turkey's ever-growing attempt to enhance and improve such methods is beyond doubt. With its modern international arbitration law and recent mediation law, Turkey shows a very friendly approach to arbitration and ADR methods. Execution of certain recognized multilateral treaties as well as bilateral treaties goes hand in hand with the internal codifications in Turkey. Furthermore, we can also predict that Turkey will take more substantive steps to attract international arbitration. Currently, there are three principal arbitration institutions in Turkey⁵. In this context, it's being planned to inaugurate the Istanbul Arbitration Center to attract international actors, especially from the region. It's a long process to establish a legal culture friendly with arbitration and ADR methods but Turkey shows clearly its will to improve the use and the efficiency of these methods.

As a result, we can assert that the Republic of Turkey is now in an era where the institutionalization of alternative dispute resolution methods is flourished more than ever. It would also be fair to derive that the positive consequences of such approach has manifested themselves given that today, Istanbul is considered among one of the leading financial headquarters mainly in the Middle East and not only that, but also domestic and international arbitration as well as mediation are codified under each specific pieces of legislation.

³ A. Yesilirmak, *Dogrudan gorusme, arabuluculuk, hakem-bilirkisilik ve tahkim: sorunlar ve cozum onerileri*, 12 levha, 2011, p.23.

⁴ A. Yesilirmak, *Dogrudan gorusme, arabuluculuk, hakem-bilirkisilik ve tahkim: sorunlar ve cozum onerileri*, 12 levha, 2011, p.185.

⁵ Arbitration Court of Istanbul Chamber of Commerce, Arbitration Court of Turkish Union of Chambers and Exchange Commodities and Arbitration Court of Izmir Chamber of Commerce ; Y. Cetinel, A. Aydin, *Legal Framework and main institutions of arbitration in Turkey*, *Young Arbitration Review*, n°4, Jan. 2012, p.24.

3. DB Practice in Turkey and Practical Considerations

In parallel with the use of ADR methods in last decade, we can attest that the same discreet attitude existed concerning the DAB method. It is difficult to find a frequent exercise in national law. However, this method is generally used in international contracts and in important construction projects where the State entity takes part. In practice, the 4th edition of FIDIC rules is used in construction contracts between Turkish parties⁶. The reason is simple. Parties can find an edition in Turkish for these rules. However, in tenders presented by foreign authorities or in projects financed by international credit corporations, the 1999 edition of FIDIC rules are used.

If we analyze now the DAB provisions edited in FIDIC rules, we can note that a specific method of dispute resolution is designed for the specific needs of construction disputes. A board is nominated by both parties, from the very beginning of the project. Board members are in the majority of cases professionals with an engineering background. They follow closely the project from its start and they have two principal objectives: to avoid and to resolve disputes between parties. In a case of dispute, they should try to find the best way to resolve it with the less expense and rapidly⁷. For this reason, a very practical procedure is organized in FIDIC rules. According to the article 20.4 of FIDIC rules, DAB shall give its decision in 84 days and Parties can give a notice of dissatisfaction within 28 days after receiving DAB's decision. However, the legal effect of the DAB decision is limited. Parties have always the possibility to refer the dispute to an arbitral tribunal after the period of 56 days after the day on which notice of dissatisfaction was given.

In conclusion, it seems that the DAB method could be an efficient dispute resolution method if the parties have the intention to settle. With the characteristics of construction projects, it is important that parties could maintain their contractual relation as long as the project. In case of a dispute, bringing a suit before tribunals or national courts will generate considerable delays on the project. Also, litigation will be much more costly than DAB method. Therefore, the DAB method is an important alternative to other dispute resolution methods. However, it could be effective only if the parties are conscious of its utility and they have an intention to settle.

⁶ T. Koksal, *Ul. Insaat sozlesmeleri is ortakligi sozlesmeleri ve uyusmazliklarin cozum yollari*, p.177, Adalet, Ankara 2009.

⁷ G.-S. Hoek, C. G. Erbas, *Uluslararası Insaat Hukuku*, p.99, Adalet, Ankara 2009,.

[Illustrations from Practice – both DBs in Turkey and Turkish Contractor’s Experience with DBs in Arabic Countries]

4. Conclusion

Although a distant approach existed in Turkey against arbitration and ADR methods, they became much more popular in recent years. There is also a considerable political ambition to develop these methods in Turkey by establishing an international arbitration center in Istanbul. The DAB method becomes more popular among Turkish State and companies. However, this method could gain its full efficiency if the parties understand its utility. This could be possible only if the legal culture becomes friendlier with ADR methods.