

# **“Construction Disputes at the Crossroads”**

## **Day 1**

### **Panel : Overview of Dispute Resolution in Turkey**

#### **Answers to the Moderator’s Preliminary Questions**

***By Assoc. Prof. Dr. Yalçın TEZCAN PhD, MSc (Eng) Arch***

***(The Engineer)***

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

**Answer 1.** Based on the experience of the Presenter, the most commonly used method in resolving disputes in nationally financed construction projects of Turkey's public sector is **litigation**. In private sector construction projects, **litigation** is again the most commonly used method, regardless of the nationality of the finance or the promoter.

Even in some internationally financed construction projects of public sector, **litigation** is also used. An example is given.

This sub-clause is quoted from the contract of a major project for post-earthquake rehabilitation and reconstruction of Erzincan city, hit by a devastating quake in 1992. The project was financed by the **World Bank** and in every sub-projects, traditional **FIDIC Red Book** model form of contract was used with substantial amendments.

### ORIGINAL VERSION

#### Settlement of Disputes Engineer's 67.1 - Decision

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

### AMENDED VERSION

#### Settlement of Disputes Engineer's 67.1 - Engineer's Decision

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award or **a judgement**.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention, **if the Contractor is a foreign firm or a joint venture whose Partner in Charge is a foreign firm**, to commence arbitration, as hereinafter provided, as to the matter in dispute. **If the Contractor is a Turkish Contractor or joint venture whose Partner in Charge is a local firm, then the notice referred to above shall**

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

### Engineer's 67.2 - Settlement

Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

**be a notice by either party to the other to commence litigation before the Ankara Courts.** Such notice shall establish the entitlement of the party giving the same to commence arbitration **or litigation**, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, **neither** arbitration **nor litigation** in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration **or litigation**, as the case may be, as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notices as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

### Engineer's 67.2 - Amicable Settlement

Where notice of intention to commence arbitration **or litigation**, as the case may be, as to a dispute has been given in accordance with Sub-Clause 67.1, arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Provided that, unless the parties otherwise agree, arbitration **or litigation** may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration **or litigation** of such dispute was given, whether or not any attempt at amicable settlement thereof has been made.

As shown here, the resolution method and the venue differ depending on the nationality of the Contractor in this FIDIC Contract. If the Contractor or Partner in Charge of a joint venture is Turkish, then he has to go to Ankara Courts.

The Contractors of this Project, who are Turkish, have had recourse to this contractual provision and sued the Employer for reimbursement of liquidated damages. The Presenter was witness to all these litigation processes as his firm was an intervener in the same side with the Employer. These long-lasting cases will be mentioned again in the Answer to 2nd Question.

**Question 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?

**Answer 2.** Significant problems are encountered in administering or getting to a resolution of disputes in litigation process in Turkey:

- To achieve a result in the courts takes very long-time. 10 years, 15 years or more.
- In Turkey, almost in every case, the courts depend on the opinions of expert witnesses. Especially in the disputes of construction projects, the courts appoint a committee of 3 expert witnesses, consisting of two engineers and one jurist. The impartiality, integrity, knowledgeable, competency, comprehensibility, diligentness or recklessness of the expert witnesses as well as the conduct of the courts and especially the Supreme Court play a very important role in achieving just judgements.
- As a matter of fact, major flaws in expert opinions have caused serious legal errors and even conflicting judgements from the Supreme Court. At present FIDIC law in Turkey, has retrograded for more than 10 years due to the conflicting judgements of the Supreme Court resulted from wrong and misleading opinions of expert witnesses.

In order to substantiate the above statements three examples are given from the same housing project, mentioned in the first answer. This post-earthquake project consisted of 3 contract packages, totalling USD 50 329 111, financed by the **World Bank**:

- Contract I: Reconstruction of 588 Dwelling Units for Public Officials
- Contract II: Reconstruction of 464 Dwelling Units for Public Officials
- Contract III: Repair, Rehabilitation, Retrofitting and Reconstruction of 1132 Apartment Units

The Project, when was inaugurated by the then President and Prime Minister, this housing project was admired by the media as “**Erzincan Miracle**”. The said housing project has been referred to as a reference in the subsequent earthquakes.



26 October 1996



30 August 1999



However, the **Miracle** has not prevented the 3 Contractors from suing the Employer. These Contractors were not well equipped and not well organized to complete the constructions within such a very short Time for Completion of 7 months. Therefore they always tried to find reasons or pretexts for time extensions.

However, these were not simple lawsuits for asking money, but, in fact, were the battles of the contractors to get away from the strict preconditions stipulated in the FIDIC contracts for bringing a dispute to arbitration or litigation.

It will be useful to discuss these disputes one by one. Because the role played by the expert witnesses in the lawsuits will be understood better.

### **2.2.1 Contract Package III: Repair, Rehabilitation, Retrofit or Reconstruction of 1132 Apartment Units**

The Contractor filed a lawsuit in one of the Ankara Courts against the Employer on 22 March 1996 to ask additional time extension and reimbursement of liquidated damages deducted. However his claims had not sufficient grounds under the Contract.

The expert committee designated by the Court was impartial, knowledgeable and competent. The conduct of the Court was in strict accordance with the legal procedures. As a result, the Court rejected the case of the Contractor on 30 June 1998. The Contractor who lost his case in the local Court did not appeal to the Supreme Court. Although this case was a straightforward lawsuit, to come to the end has taken two years. This was the quickest one among others.

### **2.2.2 Contract Package I: Reconstruction of 588 Dwelling Units for Public Officials**

The Contractor filed a lawsuit in another one of the Ankara Courts against the Employer on 16 August 1996, claiming time extension and return of liquidated damages deducted from him. Although his claims had no grounds under the Contract and the Contractor had been in culpable delay; the local Court, depending on the opinions of the Expert Committee, decided to accept the main and additional cases of the Contractor on 12 July 2000; thus it seemed that the Contractor had won his cases at the local Court.

However, the Employer (Defendant) and the Engineer (Intervener) appealed to the Supreme Court against the judgement of the local Court. The Civil Court of Appeals for the 15th Circuit overturned the said judgement of the local Court on 26 February 2001 and then rejected the request of the Contractor to set aside its ruling, which had been given in favour of the Employer and the Engineer. As a result, the trial started again and the local Court, on 19 December 2001, came to a decision to reject both cases of the Contractor, in line with the ruling of the Supreme Court. Thus the Contractor ultimately lost his case.

As far as it is known, the judgement dated 26 February 2001 was the first ruling of the Supreme Court for FIDIC contract disputes in Turkey. The following quotation is taken from the said judgement:

**Court of Appeals for the 15th Circuit dated  
26.02.2001, E 2000/4429, K.2001/1032**

*“Söz konusu sözleşmenin 44.maddesinde süre uzatımı verilmesi gereken haller ve bu konudaki talebin nasıl yapılacağı açıklanmıştır. Maddenin 1.fıkrasında; hangi hallerde süre uzatımına hak kazanılacağı 2. fıkrada ise süre uzatımı verilebilmesi için yüklenicinin 28 gün içerisinde durumu Mühendise bildirmesi ve bir kopyasını da iş sahiplerine gönderilmesi, belge ve kanıtların da süre uzatım talebine ekleneceği belirtilmiştir. Aynı sözleşmede çalışılmayan dönem diye bir tanıma yer verilmemiş ve istisnaî hava şartlarının 44.1 maddesinde değerlendirilmesi öngörülmüştür...”*

*“In Clause 44 of the said Contracts, the events giving rise to time extension and the procedure for making such claim are explained. In the first sub-clause, the events, which entitle time extension, are described. The second sub-clause provides that, in order to be granted any time extension, the Contractor must have first notified the Engineer of the event within 28 days with a copy to the Employer, and that the time extension claim must have been followed by the exhibits and evidences. In the said contract, any definition for “non-working period” is not provided, but exceptional weather conditions are provided to be evaluated under Sub-Clause 44.1.*

*(FIDIC) inşaat sözleşmelerinde süre uzatımı talepleri uluslararası yeknesaklığı sağlamak amacıyla sıkı kurallara bağlanmıştır. Süre uzatımında muhtemel haksızlıkların önlenmesi bakımından taleplerin zamanında yapılması ve delillendirilmesi önem arz etmektedir. Bu nedenle davacının süresinde sözleşmeye uygun talepte bulunmaması ve belgelendirmemesi nedeniyle süre uzatımı taleplerinin Mühendis firmaca reddedilmesinde sözleşmeye aykırı bir tutum ve davranış yoktur.*

*With the aim of ensuring international uniformity, time extension claims are tied down by strict rules in FIDIC construction contracts. Regarding the avoidance of possible injustices in time extension, to make claims in time and to substantiate them in time are essential. For that reason, there is not any misconduct or misbehaviour under the contract in rejection by the Engineer of the time extension claims, due to the fact that the Claimant has **not** made claims in compliance with the Contract and **not** substantiated them.*

*Davacının davadaki alacak talepleri süre uzatımına hak kazanmasına bağlı olup, ortada davacıya verilmesi gereken süre olmadığına göre davanın tümüyle reddi yerine kabulü doğru olmamıştır.”*

*The additional payment claims of the Claimant are bound by his entitlement to time extension; and as there is not any time extension required to be given to the Claimant, it has not become right to have accepted the case, instead of rejecting it totally.*

In this lawsuit, to reach a just resolution has taken a time of 5.5 years. The main reason of the court battle to drag on for years was the quality (!) of the Expert Committee Reports.

The reversal of the Supreme Court demonstrated that the Expert Committee had showed a complete (even reckless) disregard for the preconditions of the FIDIC Contract to claim a time extension under Clause 44 and thereafter to go to the litigation (or arbitration) under Clause 67. It was also revealed that the Expert



Committee had been totally unaware of criteria for Test of Entitlement, concurrent and culpable delay concepts in the doctrine.

However, it is an interesting point that the Expert Committee Report bore the signatures of an engineer, proposed by the association representing FIDIC and an academician, proposed by a renowned university.

The members of the Committee, who were so unaware of the following jurisprudence of the Supreme Court:

**Yargıtay 4.HD T.03.03.1977  
K.220/2429**

**Court of Appeals 4th Circuit dated  
03.03.1977 K.220/2429**

*“Yapılmış olan sözleşmelerde yanların sözleşme sırasında birbirlerini Usulün 287. maddesinde öngörüldüğü üzere sınırlamaları Anayasa’ya uygun olup bu sınırlamanın Anayasa’ya aykırı olduğu ileri sürülemez.”*

*It is in compliance with the Constitution, if the parties, in the signed contracts, restrict each other in accordance with Article of 287 of the Code of Civil Procedure; therefore it cannot be alleged that such restriction is contrary to the Constitution.*

that, they put forward the following statement in their Report of 1999:

*“Şayet, davalının “Mühendis kararı olmadan mahkemeye gidilemez” yolundaki görüşüne itibar edilecek olursa, müteahhidin “HAK ARAMA HÜRRİYETİ” 3.bir şahsın takdirine bırakılmış olmaktadır. Bu durum, özel konulardaki özel dava şartları hariç Anayasanın 36. Maddesinde de belirtildiği gibi hak arama hürriyeti sınırlandırılmaz ifadesine de aykırıdır... Dosya kapsamı davacının, bu uyuşmazlık doğduğunda (Madde 67’deki) hükümlere uygun yollara başvurmadığını ortaya koymaktadır. Ancak davacının bu yollara başvurmamış olması, inceleme konusu olayda, YARGI YOLUNA BAŞVURMASINI engelleyen bir hüküm değildir.”*

*In case the Defendant’s view relating to that “it cannot be brought to the court without the decision of the Engineer” is regarded, then the Contractor’s FREEDOM TO SEEK JUSTICE has been left to the discretion of a third person. This case is contrary to the expression of “the freedom of seeking justice cannot be restricted” in Article 36 of the Constitution, except special litigation terms in special subjects. The content of the file revealed that the Claimant had not invoked the provisions in (Clause 67) when the dispute had arisen. However, the failure of the Claimant in invoking such provisions is not a doom preventing the Claimant from taking a legal action.*

One of the signatories of the aforesaid Expert Report has played an important role in the following case.

### 2.2.3

#### **Contract Package II: Reconstruction of 464 Dwelling Units for Public Officials**

Also this Contractor filed a lawsuit in one of the Ankara Courts against the Employer on 16 May 1996, alleging similarly to the previous case that he had been entitled to a considerable time extension and therefore to the reimbursement of the whole of the liquidated damages deducted from him.

This lawsuit is almost the same as the previous case. Most of the Contractor’s claims had no grounds under the Contract. The difference between them was that the Contractor had fulfilled the FIDIC litigation prerequisites in only 3 out of 7 groups of

his claims. Therefore this case was anticipated that it would be also concluded against the claimant.

However, this lawsuit, at 14th year, ended in tragedy for the Employer and the Engineer. It will not be wrong to say that this tragedy consisted of 4 acts:

### FIRST ACT 1996 - 2003

**Opening Scene:** In spite of the above facts the local Court, on 11 November 1999 depending on the opinions in the Expert Committee Report, decided to accept the case and all the claims of the Contractor, granting him such a huge time extension longer than the original Time for Completion and reimbursing all the liquidated damages in the exact amount as claimed by the Contractor. This stage took 3 years.

**Scene 2:** The Employer (Defendant) and the Engineer (Intervenor) appealed to the Supreme Court against this unfair and unjust judgement of the local Court. The Civil Court of Appeal for the 15th Circuit reversed the judgement of the local Court, first on 16 December 2000 due to procedural reasons; and then on 17 September 2002 overturned it on merits. This stage took another 4 years.

The following quotation is taken from the said judgement of the Supreme Court:

#### Yargıtay 15.HD T.17.09.2002 E.2001/5595 K.2002/3931

*"... FIDIC sözleşmelerinde süre uzatım istemlerinin sıkı şekil şartlarına bağlandığı, süre uzatım incelemelerinin ancak bu şartlara uyulması halinde yapılabileceği bilinen bir gerçektir. Nitekim, taraflar arasındaki sözleşmenin 44, 53 ve 67. maddeleri yanlarca HUMK.nun 287. maddesinde yazılı **delil sözleşmesi** olarak kabul edilmiş bulunmaktadır. ... Uyuşmazlığın tüm sözleşme yanında özellikle yukarıda kısaca sözü edilen 44, 53 ve 67. maddeler çerçevesinde çözümü gerekmektedir."*

*"Somut olayda davacı yüklenicinin süre uzatımı verilmesini gerektiren neden olarak ileri sürdüğü ve dava dilekçesinin 1.A1, 1.A2 ve 1.5 sıralarında yazılı süre uzatım talepleri ile ilgili olarak mühendise başvurusunun bulunduğu, diğer sebepler bakımından ise bir başvurusunun **olmadığı** anlaşılmaktadır."*

*Hal böyle olunca davacının ilk taleplerinin sözleşmenin 44. ve 53/3 maddeleri, bildirimde bulunmadığı taleplerinin de sözleşmenin 53/4 ve 67.maddesi hükmünce irdelenip değerlendirilmesi gerekir. Bundan ayrı, yanlar arasındaki sözleşmede çalışılmayan süreye ilişkin bir hüküm bulunmadığından bunun süre uzatımı nedeni olarak değerlendirilmesi zorunludur."*

*"... It is a common fact that, in FIDIC contracts, time extension claims are tied to strict terms and conditions and that such claims can be assessed only if these terms and conditions are complied with. As a matter of fact, Clauses 44, 53 and 67 of the Contract have been accepted as "**Agreement on Evidence**" by the parties in accordance with Article 287 of Code of Civil Procedure. The dispute is required to be resolved especially under Clauses 44, 53 and 67, as well as under the whole of the Contract."*

*"In this present case it is understood that there had been notices given by the Contractor to the Engineer for his time extension claims, listed in the 1.A1, 1.A2 and 1.5 nos of his statement of claim as being alleged events giving rise to time extension; but there had been **no** notices for other claims therein."*

*Therefore these first (three) claims of the Claimant are required to be scrutinized and evaluated under Clause 44 and 53/3 of the contract and the other claims, for which **no** notices were given, are required to be examined under Clause 53/4 and 67 of the contract. Apart from this, as there is not any provision for non-working period in the contract between the parties, it is mandatory that such period is **not** to be considered as a delaying event."*



“... O halde mahkemece; konusunda **uzman** kişilerden oluşturulacak bilirkişi kuruluna istem, az yukarıda çizilen çerçevede incelettirilmeli, Yargıtay denetimine elverişli ayrıntılı ve gerekçeli rapor alınarak dava hakkında sonucuna uygun bir hükme varılmalıdır. Bütün bu yönler bir yana bırakılıp, sözleşmeye uygun düşmeyen incelemeye dayalı bilirkişi raporuyla bağlı kalınarak davanın yazılı şekilde kabulü doğru olmamıştır...”

“... As a result, the claim should be made to be examined carefully by the expert committee to be formed by the persons, who are **specialized** in this subject, within the frame stated above; and it should be arrived at a verdict, appropriate to the conclusion for this lawsuit, by obtaining a detailed and reasoned report, suitable for the review of the Supreme Court. It has not become right to accept the lawsuit in such a manner, by leaving aside all these important points, but by sticking to the expert report based on an examination which was non-compliant to the contract...”

In order to understand well the jurisdiction of the Supreme Court, let us look at the following table, quoted from the petition of the Intervener, which formed a basis for the above judgement the Supreme Court. The Contractor on 30 October 2002 appealed to the Supreme Court to set aside the said judgment, alleging that there had been a lot of notices given by him. However, the Court of Appeals for 15th Circuit rejected this request of the Contractor on 30 June 2003 **because there had been no notices given under Sub-Clause 67.1 and 67.2 for the Claims other than 1.A1, 1.A2 and 1.5, as shown on the following table.**

NUMBER AND TITLE OF THE CLAIM IN THE CLAIMANT'S PETITION TO THE COURT	CONTRACTOR'S NOTICES & DETAILS TO THE ENGINEER FOR DETERMINATION ON TIME EXTENSION					PRE CONDITIONS FOR COMMENCING LITIGATION				
						CONTRACTOR'S NOTICE TO THE ENGINEER FOR DECISION		CONTRACTOR'S NOTICE TO THE EMPLOYER FOR AMICABLE SETTLEMENT		RESULT
	Clause 44.2 (a)		Clause 44.2b (b)			CLAUSE 67.1		CLAUSE 67.2		
Submitted?	In time?	Submitted?	In time?	Sufficient?	Submitted?	Valid?	Submitted?	Valid?		
1.A1 Delay in Hand Over	Yes	No	Yes	No	Yes	Yes	Yes	Yes	Yes	YES
1.A2 Affect of Economic Crisis	Yes	No	Yes	No	Yes					
1.2A Revisions and Variations in Electrical Drawings for the Buildings	Yes	Yes	Yes	No	No	No	None	No	None	NO
1.2B Revisions and Variations in Electrical Drawings for the Main Site	Yes	Yes	No	None	None	No	None	No	None	NO
1.2C Revisions and Variations in Electrical Drawings for the Additional Sites	Yes	Yes	No	None	None	No	None	No	None	NO
1.3 Miscellaneous Variations	No	No	No	None	None	No	None	No	None	NO
1.4 Variations requested by the Turkish Electricity Authority	Yes	Yes	No	None	None	No	None	No	None	NO
1.5 Delay in connection of Municipal Water Supply	Yes	Yes	No	None	None	Yes	Yes	Yes	Yes	YES

**Evaluation of the Contractor's claims regarding the notices required for him to be entitled to commence litigation.**

## SECOND ACT 2003 - 2007

**Scene 3:** After the reversal of the Supreme Court, the case was retried at the same local Court starting from 13 November 2003. At that hearing of 13 November 2003, **the Judge decided to abide by the award of the Supreme Court, thus the procedurally vested rights were established for the Employer and the Engineer.** However, to find and appoint specialist experts in line with the order of the Supreme Court took a long time. Finally, the expert committee was designated. Two members of it had been proposed by the same association representing FIDIC, from its past presidents. It was supposed that their report would be in compliance with the order of the Supreme Court (But unfortunately **not**).

**Scene 4:** For them to prepare their report took almost a year. The Committee submitted its report on 10 September 2006. Unfortunately this report, prepared by the experts who were supposed to be specialized in FIDIC contracts, was incredibly amateurish, superficial and partial in a degree which could not be expected from their personalities and positions. It was totally contrary to the judgment of the Supreme Court (in violation of the vested rights of the Defendant and Intervenor), to the preconditions set forth in the FIDIC contracts, to the criteria of “Test of Entitlement” established for time extension claims in the doctrine, and to the then actual situation at the job site.

**This report showed that even after 10 years, the expert witness institution had been marking time.**

Both the Employer (Defendant) and the Engineer (Intervenor) challenged this Report on 16 November 2006. In view of these objections, the local Court concluded that the Expert Committee should prepare an additional report.

**Scene 5:** To receive the Additional Report from the Committee took again another year. Unfortunately in their new Report dated 28 September 2007, the Committee insisted on their previous statements, disregarding the objections of the Defendant and the Intervenor. In summary:

- They kept insisting on their non-compliance with the reversal judgement of the Supreme Court
- They contradicted themselves with their opinions contrary to FIDIC conditions of contract and Turkish law
- They discounted the violation of the vested rights of the Defendant and the Intervenor

The views and opinions set forth in this new Report demonstrated that the essentials of the reversal judgment of the Supreme Court had not been comprehended by the Expert Committee at all, and that the Committee had not grasped the preconditions set forth in FIDIC contracts for time extension notices under Clause 44 and for litigation notices under Clause 67; had not been aware of the criteria for the “Test of Entitlement” in the doctrine.

**It means that even after 11 years, the expert witness institution has been still on the same spot.**

## THIRD ACT 2007 - 2008

**Scene 6:** At the hearing of 11 December 2007, where all the objections of the Defendant and Intervenor to the above said Report were heard, the Judge gave an interim decision that the parties should submit their new lists for expert witnesses within 10 days. Although the Defendant and the Intervenor nominated in time the specialists, who were well versed in FIDIC contracts, lecturing in the universities and conducting training courses on this subject, and meeting the qualifications required by the Supreme Court, the Judge **-for unknown reasons-** suddenly went back on his interlocutory judgment and selected the new experts on his own initiative.

The Supreme Court in his judgment of reversal had ruled that the Committee must be formed by the experts specialized in this subject. However, one of the new experts was the same university member, who had been a signatory of the expert report which had been **severely criticized** by the Supreme Court in the lawsuit of the previous Contract Package I. The second one was another academic person, working at the same university department but her specializations were totally irrelevant to this case.

The side of the Contractor remained silent to this designation. However, the Defendant and Intervenor submitted to the Court their petition in opposition to this suspicious designation on 04 January 2008, but the Judge, at the hearing of 04 March 2008, decided to wait for the Report from these new expert witnesses.

**Scene 7:** The new Expert Report dated 26 March 2008 proved that the Defendant and the Intervenor had been so right in their concerns expressed in their petitions of opposition dated 04 January 2008.

These new experts, who realized that the previous report had been discredited due to the fact that the way taken by the previous experts (namely to extend the Clause 67 notices of a certain claim to the other irrelevant claims) had been so amateurish and so contrary to FIDIC, put forward their scenario depending on an allegation that there had been a material error (!) in the jurisdiction of the Supreme Court dated 17 September 2002. Whereas, the Claimant had already tested this allegation 6 year before and made a plea in 30 October 2002, but the Supreme Court had rejected this petition at the judgment of 30 June 2003.

So this scenario which had been tested and rejected 6 years before was being tested again in this new expert report of 26 March 2008.

In spite of the fact that the Contractor, for his claims other than 1.A1, 1.A2 and 1.5 nos, had **not** fulfilled the **preconditions for litigation**, namely the Contractor had given **neither** sub-clause 67.1 notice to the Engineer **nor** sub-clause 67.2 notice to the Employer, the expert witnesses presented the Clause 44 notices given by the Contractor for this claims of 1.2A, 1.2B, 1.2C and 1.4 as if they were Clause 67 notices for these claims and thus they alleged again there had been a material error (!) in the jurisdiction of the Supreme Court of 17 September 2002.

Based on this false allegation, they attempted to assess (!) the Contractor's claims 1.2A, 1.2B, 1.2C and 1.4 under Clause 44, by infringing the order of Supreme Court of 17 September 2002. They also disregarded the following "Test of Entitlement" criteria in the doctrine:

- (1) **The actual progress of the Contractor on the Works (namely on the whole of the works) must have been delayed because of this event. The Contractor's planned and programmed progress is irrelevant. It is his actual, not his planned progress, which is relevant.**
- (2) **If there is more than one cause of delay (namely concurrent delays), this event must be the actual or dominant cause of the delay in the whole of the Works. Where there was more than one cause of a delay the extension had to be granted for the dominant reason. The actual or dominant reason is the one critical to completion of the actual progress.**
- (3) **The Contractor must have taken all reasonable measures to avoid or minimize the delay to progress.**
- (4) **The Contractor must show that the delay was caused by this event and not his own faults or problems.**

And generously granted to the Contractor a time extension amounted to 221 days, by **adding the 121 day non-working period** to the 100 days appraised (!) by the first expert witnesses for only the Claim 1.2B, although the Contractor had been working during the winter period.

In addition to that, they appraised (!) 37 days for the Claim 1.2C and added a slack of 31 days, as if the Contractor had not worked during that time (in fact he had been working well at that time to complete the construction).

And despite the fact that there had been **no casual link** between nos 1.2B and 1.2C claims and despite the obvious obstacle for the retrospective extensions of time in FIDIC Red Book for the events occurred after the original completion date has passed, they combined these two time extensions to increase the generous extension to 276 days.

However, if the actual progress of the Contractor is reviewed, then it will be realized that the Contractor had been **in culpable delay** in his all work groups due to his own defaults, and the only work group, which the Contractor finished earliest, had been the LV power distribution works, for which variation orders had been issued, and therefore time extension had been claimed by the Contractor. Therefore, the **actual** or the **dominant cause** of his delays was definitely not the variation orders in LV power distribution works, but his own faults in all work groups.

Also the Contractor had not taken any measure to avoid or minimize the delay to the progress of LV power distribution works caused by the variations. Instead, he had insisted on not proceeding with any external electrical works, despite the Engineer's instruction "to proceed these works without waiting for any variation order". But, he had still completed all the external electrical works earlier than the other work groups.

**Scene 8:** In addition to the Employer, the Engineer challenged this report on 15 May 2008 with a petition of opposition of 99 pages with the exhibits of 150 pages, demanding that either an additional report be requested from the existing experts or a new committee be designated. The Judge, in order to review the petitions of the Defendant and the Intervenor postponed the hearing to the date of 15 July 2008.

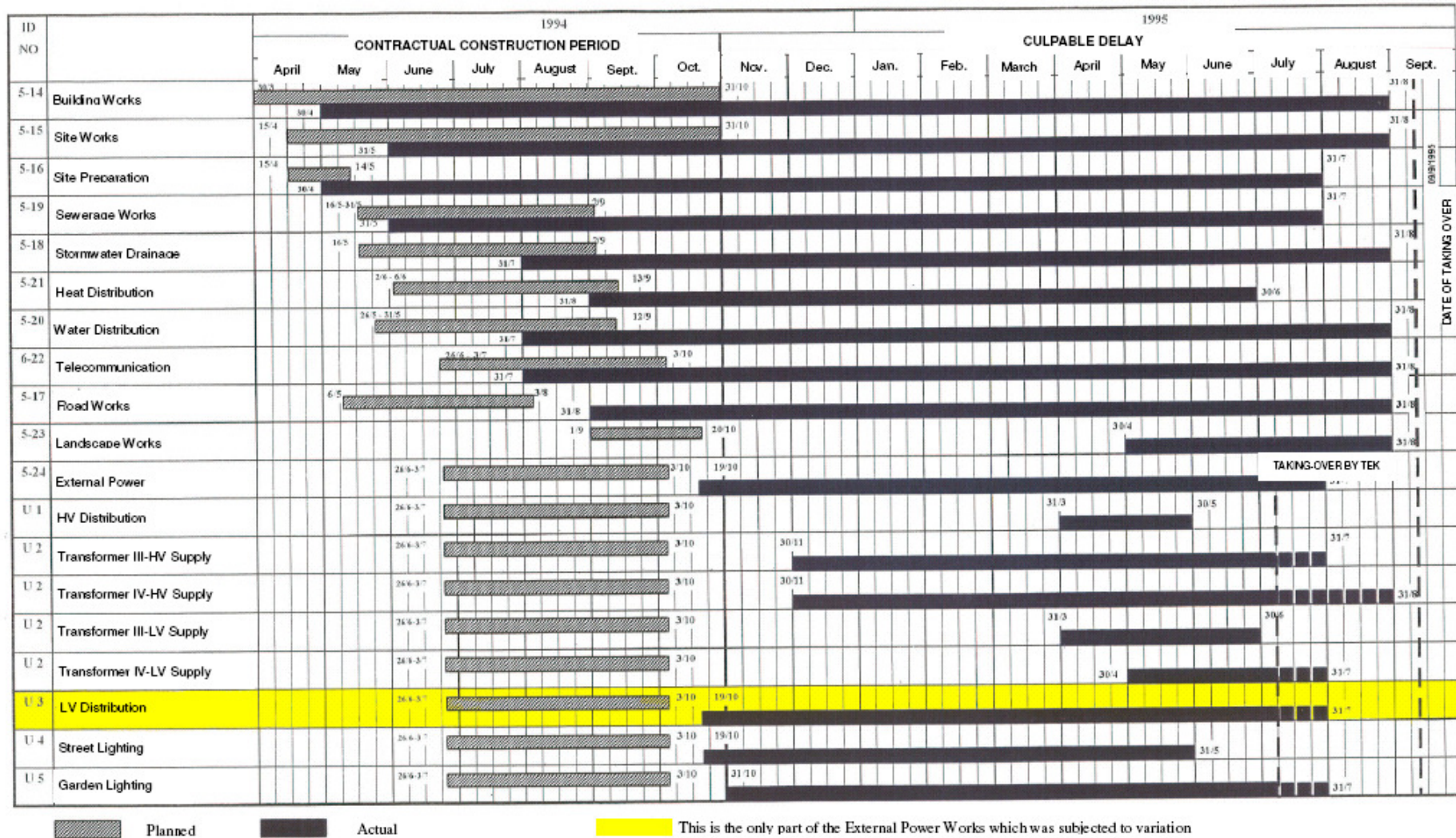
**Scene 9:** At the hearing of 15 July 2008, the Judge declared his surprising decision to the parties. It was understood that the Judge had disregarded the objections raised in the petitions of the Employer and the Engineer and that he had **neither** elected to ask additional report from the Expert Committee **nor** to designate new expert witnesses; and given a decision totally opposite to the reversal judgement of the Supreme Court, despite his interlocutory decision to abide by the same at the hearing of 14 November 2003.

So, it was also understood that the Judge took up seriously the Report of the expert witnesses whom he had designated on his own initiative. Although the experts in their report had left the door open and suggested the following two options:

1. To take into consideration the vested rights of the Defendant and the Intervenor and to limit the Court decision to Claim No.1.A1, 1.A2 and 1.5;
2. To take up the allegation regarding the so-called material error in the reversal judgement of the Supreme Court and to follow the (misleading and partial) opinions raised in the Report.

the Judge, preferring the second option, accepted the case of the Claimant and bestowed the same generous time extension of 276 days upon the Contractor, as proposed by the expert witnesses.

PLANNED & ACTUAL PROGRESS OF THE CONTRACTOR



**FINAL ACT 2008 – 2010**

**Scene 10:** According to the Intervenor, **there were four gross errors** in the decisions of the local Court, based on the so-called material error (!) in the jurisprudence of the Supreme Court, alleged by the Expert Witnesses:

1. The local Court mixed up the PRE-CONDITIONS to claim for a time extension (to the Engineer) with the PRE-CONDITIONS to file a lawsuit (at the court).
2. The local Court surmised that if the Contractor makes a claim for a time extension (to the Engineer), then he is **automatically** entitled to such a time extension. For the local Court “Test of Entitlement” criteria had not had any meaning.
3. The local Court surmised that if the Contractor makes a claim for time extension, then he is automatically entitled to commence litigation, without waiting for the determination of the Engineer under Clause 44, and without giving notices under Clause 67.
4. The local Court disregarded the following very strict PREREQUISITE to commence litigation or arbitration set-forth in the third paragraph of the amended version of sub-clause 67.2 of FIDIC Red Book:

**If either the Employer or the Contractor be dissatisfied with any decision of the Engineer... either the Employer or the Contractor may... give notice to the other party, with a copy for information to the Engineer, of his intention, if the Contractor is a foreign firm or a joint venture whose Partner in Charge is a foreign firm, to commence arbitration, as hereinafter provided, as to the matter in dispute. If the Contractor is a Turkish Contractor or joint venture whose Partner in Charge is a local firm, then the notice referred to above shall be a notice by either party to the other to commence litigation before the Ankara Courts. Such notice shall establish the entitlement of the party giving the same to commence arbitration or litigation, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, neither arbitration nor litigation in respect thereof may be commenced unless such notice is given.**

Whereas, it was a deniable fact that **neither** sub-clause 67.1 notice to the Engineer, nor sub-clause 67.2 notice to the Employer required to be given by the Contractor did exist for his claims nos 1.2A, 1.2B, 1.2C and 1.4.

For the above reasons, the local Court which took seriously the misleading allegations of the Expert Witnesses regarding the “so-called material error” and gave such a decision totally contrary to the Contract, to the actual progress of the Contractor at site and to the jurisprudence of the Supreme Court of 17 September 2002.

The decision of the local Court was notified formally to the Employer and the Engineer on 11 September 2008.

**Scene 11:** In addition to the Defendant, the Intervenor lodged on 22 September 2008 a very strong appeal and asked an oral pleading at the Supreme Court against the decision of the local Court. In the petition of opposition, all the arguments and allegation raised in the Expert Report were refuted. It was also proved once more that there had been nothing in respect to the notices required to be given to the Engineer under Sub-Clause 67.1 and to the Employer under Sub-clause 67.2 for the time extension disputes of regarding claim nos: 1.2A, 1.2B, 1.2C and 1.4.

It was once more clearly demonstrated by the bar chart diagrammes showing the actual progress of the Contractor that the Contractor had been in culpable delays in all work groups due to his own faults and therefore he had not been entitled to any time extension for the claims 1.2A, 1.2B, 1.2C and 1.4.



Namely, it was once more showed that the delay of 276 day had been resulted from his own faults but not from the alleged events.

Apart from these, it was also clearly demonstrated once more in the bar chart diagrammes that the 121 day non-working period and the 31 day irrelevant working period had been concealed in this generous 276 day time extension bestowed to the Contractor.

Thus, all the reasons to reverse the decision of the local Court were presented to the attention of the Supreme Court one by one.

**Scene 12:** The parties attended the hearing of Supreme Court on 10 February 2009, where the arguments and reasons of the Defendant and the Intervenor as to why the decision of the local Court to be reversed were also heard at the oral pleading within the short time allowed.

**Scene 13:** The lawyers of the Employer and the Engineer were quite confident that the Supreme Court would overturned this judgment of the local Court which was totally opposite to the reversal jurisdiction of the Supreme Court dated 17 September 2002. They trusted the Supreme Court to disallow such a gross injustice. Because, the jurisdictions of the Supreme Court (Court of Appeals for the 15th Circuit) dated 26 February 2001 and 17 September 2002, where the strict preconditions and strict time limits in FIDIC contracts were recognized, inspired confidence that, thereafter, the FIDIC disputes would be settled also in Turkey similar to the ones in Europe and America.

Unfortunately, and surprisingly the Supreme Court approved the judgment of the local Court with its standard form of jurisdiction on 26 February 2009.

**Scene 14:** The Employer and the Engineer, on 20 April 2009 appealed to the Supreme Court for correction of its jurisdiction, which was received on 13 April 2009. In the petition, it was clearly explained that there had been **no** “material error” in the jurisdiction of the Supreme Court dated 17 September 2002, but instead, the judgment of the local Court, which alleged that the Supreme Court had ruled mistakenly on 17 September 2002, was completely wrong.

**Closing Scene:** Almost one year later, the Supreme Court’s jurisdiction dated 29 January 2010 was received by the Intervenor’s lawyer. With this jurisdiction, the Supreme Court rejected the request of the Employer and the Engineer for correction of its ruling dated 20 April 2009. Namely, the Supreme Court **admitted** hereby that it had been **in error** in its reversal judgment of 17 September 2002 in spite of the fact that this jurisdiction had been free from any error. Thus, this 14 year case has ended in tragedy for the Employer and the Engineer.

It means that at this lawsuit the local Court first and then the Supreme Court **have been misled by the expert witnesses**, Thus it may be said that FIDIC law in Turkey has retrograded for 10 years due to these conflicting judgements of the Supreme Court resulted from the misleading decision of the local Court based on the wrong, misleading, partial opinions of the expert witnesses.

The Employer and the Engineer are certain that **in this lawsuit the justice has not been served due to the expert witnesses**. It is obvious that this manifest injustice will have serious implications in the resolution of FIDIC contract disputes in Turkey.

**Question 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?*

**Answer 3.** This question is twofold. Therefore the answer is given in two parts.

**Answer 3-1** **Regarding the first part of the question**, the following 2 projects, where Dispute Adjudication Board (DAB) and Adjudicator were established respectively, are presented:

- BUSKI - Greater Bursa Water Supply Network SCADA System Construction, Installation and Operation Project, Bursa
- İTÜ - ARI TEKNOKENT Office Building Construction Project, Istanbul

**1. BUSKI-Greater Bursa Water Network Scada System Construction, Installation and Operation Contract**

In 2005 and 2006, the Conditions of Contract was prepared by the Presenter as the Contract Specialist, on the basis of Traditional FIDIC Form of Contract For **Design-Build and Turnkey** (which is informally titled the **Orange Book - 1995**), as so requested by the Client for this **European Investment Bank (EIB)** funded project.

In the other editions of the traditional FIDIC forms of contract, which are informally titled the Red and Yellow Books, there is an "Engineer" who is required to issue decisions on disputes referred to him, and who is required to act impartially in this (and other) actions. Under the Orange Book, there is no impartial "Engineer" available to make these pre-arbitral decisions. However, in Orange Book there is "Employer's Representative", who is a personnel of the Employer, and therefore who is expected to be fair but not impartial. In Orange Book, the authority to issue decisions is vested in a Dispute Adjudication Board (DAB). According to FIDIC Orange Book Users' Guide, *the decisions of DAB could form a vital ingredient in preventing minor problems escalating into major disputes, and in encouraging economic resolution of all disputes.* We will see later if this statement is applicable or not in Turkey.

Unlike the Orange Book, Traditional FIDIC Red and Yellow Books include a requirement that any dispute must first be referred to the Engineer. Only after the Engineer had made a decision on the dispute under clause 67, could it be referred to an outside dispute resolver for amicable settlement or arbitration, or even litigation (if the Contract so provides).

The 1996 Supplement to the Red Book introduced an option for a DAB and in the 1999 New Red and Yellow Books, the DAB is the standard procedure.

As to the SCADA Contract, BUSKI, which has adopted textually Sub-Clause 20.1 **Procedure for Claims** and Sub-Clause 20.2 **Payment of Claims** of **Orange Book**; has amended totally Sub-Clause 20.3 **Dispute Adjudication Board**, and has been using this amended Sub-Clause since the early 2000. For that reason, the BUSKI-SCADA System Conditions of Contract had to be prepared in accordance with the instructions of our Client BUSKI.

### 20.3 Dispute Adjudication Board

#### ORIGINAL

Unless the member or members of the Dispute Adjudication Board have been previously mutually agreed upon by the parties and named in the Contract, the parties shall, within 28 days of the Effective Date, jointly ensure the appointment of a Dispute Adjudication Board. Such Dispute Adjudication Board shall comprise suitably qualified persons as members, the number of members being either one or three, as stated in the Appendix to Tender. If the Dispute Adjudication Board is to comprise three members, each party shall nominate one member for the approval of the other party, and the parties shall mutually agree upon and appoint the third member (who shall act as chairman).

The terms of appointment of the Dispute Adjudication Board shall:

- (a) incorporate the model terms published by the Federation Internationale des Ingenieurs-Conseils (FIDIC),
- (b) require each member of the Dispute Adjudication Board to be, and to remain throughout the appointment, independent of the parties,
- (c) require the Dispute Adjudication Board to act impartially and in accordance with the Contract, and
- (d) include undertakings by the parties (to each other and to the Dispute Adjudication Board) that the members of the Dispute Adjudication Board shall in no circumstances be liable for breach of duty or of contract arising out of their appointment; the parties shall indemnify the members against such claims

The terms of the remuneration of the Dispute Adjudication Board, including the remuneration of each member and of any specialist from whom the Dispute Adjudication Board may require to seek advice, shall be mutually agreed upon by the Employer, the Contractor and each member of the Dispute Adjudication Board when agreeing such terms of appointment. In the event of disagreement, the remuneration of each member shall include reimbursement for reasonable expenses, a daily fee in accordance with the daily fee established from time to time for arbitrators under the administrative and financial regulations of the International Centre for Settlement of Investment Disputes, and a retainer fee per calendar month equivalent to three times such daily fee.

The Employer and the Contractor shall each pay one-half of the Dispute Adjudication Board's remuneration in accordance with its terms of remuneration. If, at any time, either party shall fail to pay its due proportion of such remuneration, the other party shall be entitled to make payment on his behalf and recover it from the party in default.

The Dispute Adjudication Board's appointment may be terminated only by mutual agreement of the Employer and the Contractor. The Dispute Adjudication Board's appointment shall expire when the discharge referred to in Sub-Clause 13.12 shall have become effective, or at such other time as the parties may mutually agree.

### Sub-Clause 20.3 Dispute Adjudication Board

#### AMENDED

The Dispute Adjudication Board shall be established in accordance with the rules of procedure for arbitration under Turkish Law, including International Arbitration Act No. 4686 of the Republic of Turkey:

Any dispute surrendered to the Dispute Adjudication Board shall not entitle the Contractor to stop or slow down the execution of work.

The Dispute Adjudication Board shall be composed of three members. Each party shall appoint one member, and the two members shall appoint the third member. The party wishing to submit the matter to the Dispute Adjudication Board shall inform the other party in writing through a Notary Public by giving the name and address of the arbitrator he selects and shall request the other party to select his arbitrator within 15 days, and shall at the same time clearly inform the second party in writing of the points at issue and his claims and demands concerning the problem forming the basis of the dispute.

Should the other party fail to respond or if they cannot agree on the third member within 28 days the second and third members shall be selected by the Courts in Bursa.

As soon as the Dispute Adjudication Board is formed and its chairman is selected, the chairman shall inform both parties of the formation of the Board in writing and the Dispute Adjudication Board shall exchange views with both parties in writing at 15 day intervals. The Board at its discretion may extend the 15 day period for the respondent. Each member of the Board will receive a copy of the application from each party.

Within 60 days from receiving an application from both parties the Board shall meet in Bursa. At its first meeting, legal and technical advisers representing each party shall be present. The Board will conclude its meeting and announce its final decision within 6 months after their first meeting in Bursa. Otherwise the dispute will be resolved at the Courts in Bursa. However the period of 6 months can be extended by the agreement of both parties.

In order to cover the fees and expenses of the Dispute Adjudication Board, the claimant shall deposit in advance 5% of the amount subject to dispute to a bank in Bursa specified by the Dispute Adjudication Board within 15 days following the date of the request made by Board. The fees to be paid to the arbitrators shall be established by the parties, and each party shall pay half such fees. In the event of disagreement, the amount of the fees to be paid to the arbitrators will be established by the Turkish Court in Bursa.

“If, at any time, the parties so agree, they may appoint a suitably qualified person to replace (or to be available to replace) any or all members of the Dispute Adjudication Board. The appointment will come into effect if a member of the Dispute Adjudication Board declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. If a member so declines or is unable to act, and no such replacement is available to act, the member shall be replaced in the same manner as such member was to have been nominated.

if any of the following conditions apply, namely:

- (a) the parties fail to agree up on the appointment of the sole member of a one-person Dispute Adjudication Board within 28 days of the Effective Date,
- (b) either party fails to nominate an acceptable member, for the Dispute Adjudication Board of three members, within 28 days of the Effective Date,
- (c) the parties fail to agree upon the appointment of the third member (to act as chairman) within 28 days of the Effective Date, or
- (d) the parties fail to agree up on the appointment of a replacement member of the Dispute Adjudication Board within 28 days of the date on which a member of the Dispute Adjudication Board declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

Then the person or administration named in the Appendix to the Tender shall, after due consultation with the parties, nominate such member of the Dispute Adjudication Board, and such nomination shall be final and conclusive.

It is clear that BUSKI’s DAB is ad-hoc, while FIDIC’s DAB is permanent. Namely, in SCADA Contract, DAB will be formed if and when a dispute arises between the Employer and the Contractor.

On the other hand, as per BUSKI’s amendment, the formation of DAB shall be made in accordance with the Turkish Law, including International Arbitration Act No. 4686 of Turkey.

## 2. **ITU - Istanbul Technical University ARI Techno-city Office Building Construction Contract**

The 11 floor office building, having 21 500 m<sup>2</sup> built-up area was constructed in ITU Maslak Campus by a Turkish Contractor between 2003 and 2005. In this **World Bank** funded project, the model form of **WB Smaller Works Contract** was used and the Presenter was appointed as the **Adjudicator** in the Contract.



The designation was made in accordance with the standard Clause 24 of the WB Contract:

- |                                       |             |  |
|---------------------------------------|-------------|--|
| <b>24. Dispute</b>                    | <b>24.1</b> | If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager's decision.  |
| <b>25. Procedure for Disputes</b>     | <b>25.1</b> | The Adjudicator shall give a decision in writing within 28 days <b>for Disputes</b> of receipt of a notification of a dispute.   |
|                                       | <b>25.2</b> | The Adjudicator shall be paid by the hour at the rate specified in the Bidding Data and Contract Data, together with reimbursable expenses of the types specified in the Contract Data, and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding. |
|                                       | <b>25.3</b> | The arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and in the place shown in the Contract Data.  |
| <b>26. Replacement of Adjudicator</b> | <b>26.1</b> | Should the Adjudicator resign or die, or should the Employer and the Contractor agree that the Adjudicator is not functioning in accordance with the provisions of the Contract, a new Adjudicator will be jointly appointed by the Employer and the Contractor. In case of disagreement between the Employer and the Contractor, within 30 days, the Adjudicator shall be designated by the Appointing Authority designated in the Contract Data at the request of either party, within 14 days of receipt of such request.   |

**Answer 3-2** Regarding the second part of the question, the effectiveness in the avoidance and/or resolution of disputes could not be tested in these two projects. The reasons are almost the same, with some differences:

**1. BUSKI-Greater Bursa Water Network Scada System Construction, Installation and Operation Contract**

In response to the queries of the Presenter, Client (the Employer of the Contractor) said that there had not been any major dispute during the course of Contract, and that minor disputes had been resolved between the Employer and the Contractor. The Client also agreed with the Presenter that the Contractors might be hesitant about referring any dispute to a new committee to be formed by totally new third persons who were not known to them up that time. We also agreed that it had been easy and cost-free for the Contractors to refer to any dispute to the Engineer whose attitude had been known to them, and therefore there might be an effect of DAB in avoidance of **escalating** the disputes.

## 2. **ITU - Istanbul Technical University ARI Techno-city Office Building Construction Contract**

In response to the queries of the Presenter, the Contractor said that, despite his 1 milyon USD loss, he had not referred the disputed matter to the Adjudicator, due to fact that he had also graduated from the ITU. He had not wished to be in dispute with his University. He had tried to resolve his problems directly with the University, and at the end he had obliged to endure loosing such a big amount.

The Contractor was also hesitant to go arbitration, due to his unfavourable experience in a major water supply project. He had some doubts about the impartiality of the foreign or local arbitrators in that EC funded project.

**CONCLUSION:** As a result, it may be concluded that the DABs might have an effect in the avoidance of **escalating** the disputes. However, the effectiveness in the resolution of disputes has not been tested so far. Therefore, it is not possible to comment on this specific matter.

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

**Answer 5.** The business integrity, impartiality, competency and knowledgeableness of the members will play an important role in the effectiveness of any Dispute Board (DB) or Dispute Adjudication Board (DAB). DB is a standard clause of “Harmonized Contract” and DAB is a standard provision of new FIDIC construction contracts.

In Turkey, most probably the DB or DAB members will be elected from the expert witnesses.

However, for 15 years, the Presenter has been struggling against the deterioration of the institution of court expertness in Turkey. It is an undeniable fact that some court cases have resulted in legal errors due to the partiality, incompetency or amateurishness of the expert witnesses. The Presenter has met with impartial and honest expert witnesses, but has never seen any expert, who is well versed in the delay and disruption related provisions of FIDIC construction contracts, in the prerequisite conditions to go to arbitration or litigation and, who is well aware of the criteria for “Test of Entitlement”, concurrent and culpable delays, and “Dominant Cause Approach “etc. in the doctrine.

Whether the expert witnesses hold important positions in their professions or not, the result does not change.

If such persons, who are supposed to be competent or who suppose themselves to be competent, but in fact who are incompetent, are appointed to the DB/DAB memberships, or such persons, who are supposed to be impartial, but in fact who are partial, are assigned to this position, then there will not be any use of such dispute resolution boards. If the members act in the same manner with the expert witnesses, whom the Presenter has mentioned now, the decisions of the Boards will be unavoidably unfair and unjust.

Therefore, in the opinion of the Presenter, firstly, to upgrade, to reorganize, to train and clean up the expert witness institution is crucial in Turkey.