

DISPUTE RESOLUTION BOARD
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**FIDIC Applications &
Dispute Resolution in Turkey**

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Topics

1. The Legal System in Turkey
2. The Laws Concerning Construction Contracts
3. Construction Industry in Turkey
4. FIDIC Applications in Turkey
5. Dispute Resolution in Turkey
6. Dispute Resolution Mechanisms in Turkey
7. Conclusions

(1) The Legal System in Turkey

- Based on Romano-Germanic System
- The Turkish Code of Civil Law took effect in 1926.
- The hierarchy of laws
 - 1- The Constitution
 - 2- Codes and Statues
 - 3- International Treaties
 - 4- Statutory Decrees
 - 5- Regulations
 - 6- By-Laws

(1) The Legal System in Turkey

- The Grand National Assembly has the sole authority to enact laws for application throughout Turkey.
- Judiciary is independent and the Constitutional Court supervises conformity of laws to the Constitution.
- The Turkish court system is comprised of courts of justice, administrative courts, the constitutional courts and military courts.
- The concept of jury does not exist in the Turkish court system.
- Verdicts are reached by judges or a panel of judges, who have to base their verdicts on the law and their conviction

(2) The Laws Concerning Construction Contracts

- There is no construction law as a single source of law.
- Laws as guidelines for contracts:
 - The Code of Obligations
 - Turkish Trade Law
 - Turkish Civil Code
 - Public Procurement Law
 - Public Procurement Contracts Law

(3) Construction Industry in Turkey

- According to ENR (Engineering News Record) Among the Top 225 International Contractors
 - 20 Turkish contractors in 2006
 - 22 Turkish contractors in 2007
 - 23 Turkish contractors in 2008
- Turkey ranked 3rd in 2008 in ENR's List after China and USA.

(3) Construction Industry in Turkey

Yearly Project Values undertaken *outside of Turkey* by the Turkish Contractors:

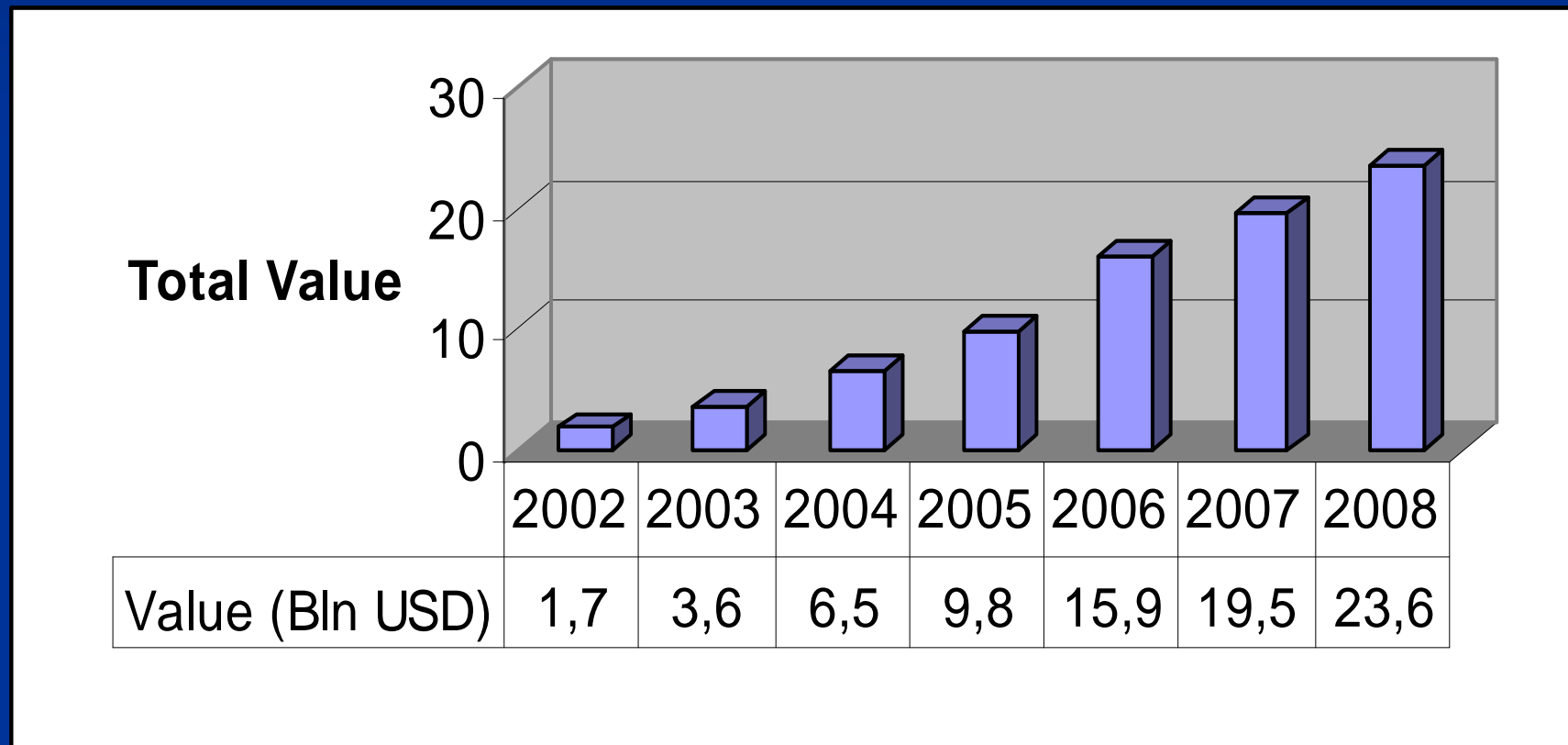


Chart by the Turkish Contractors Association (TCA)

(4) FIDIC Applications in Turkey

- The Association of Turkish Consulting Engineers and Architects (ATCEA)
 - Founded in 1980 - Member of FIDIC since 1987
- FIDIC Contracts in use in Turkey for more than a decade.
- Most commonly used:
 - Red Book (Old version most common)
 - Yellow Book
 - Orange Book

(5) Dispute Resolution in Turkey

■ Negotiation	98%
■ Expert Appraisal	30%
■ Courts	28%
■ Adjudication	22%
■ Mediation	22%
■ Executive Tribunal	18%
■ Arbitration	16%
■ DRB	8%

(5) Dispute Resolution in Turkey

- Why are some of these alternative dispute resolution methods not used so often?

DAB

DRB

Mediation

(5) Dispute Resolution in Turkey

- In general, people are not familiar enough with these methods
- People are not willing to use these methods

(5) Dispute Resolution in Turkey

- Some people who had previous experience with Dispute Boards, particularly on the employers' side, do not want others (DB members), who they described as incompetent and possibly partial, to intervene into their projects.
- Most municipalities as public employers use FIDIC contracts for their projects financed by the international funding agencies and amend the contract terms by cancelling the DAB and going directly to arbitrators or local courts as means of dispute resolution mechanism.

(5) Dispute Resolution in Turkey

- In resolving disputes between local contractors and local employers, particularly the public employers, the contractors tend to resolve disputes amicably and do not want to be in a controversial position with the state employers. Sometimes they prefer to shake hands with the public authorities at whatever cost.
- The general opinion among the parties is that the Dispute Board is an unnecessary cost item.

(6) Dispute Resolution Mechanisms in Turkey

- Local Projects
- International Projects
- As the word “local” suggests, the local projects are the ones where the contractors and the employers are of local origin and the projects are financed with local funds. For the local projects, the dispute resolution methods may vary depending on the procurement authority.
- Public authorities are the largest employers in Turkey

(6) Dispute Resolution Mechanisms in Turkey

- Some major Public Employers in Turkey.
- Ministry of Public Works and Settlement
 - General Directorate of Provinces
- Ministry of Transportation
 - General Directorate of Highways
 - General Directorate of Railways, Marine Ports and Airports Construction
 - Turkish State Railways
- Ministry of Energy & Natural Resources
 - Turkish Petroleum Corporation
 - Petroleum Pipeline Corporation
 - Turkish Electricity Transmission Company
 - Electricity Generation Corporation
- Ministry of Environment and Forestry
 - State Water Works General Directorate
- Housing Development Administration of Turkey
- Municipalities

(6) Dispute Resolution Mechanisms in Turkey

- Each of these Public Agencies has its own procurement system, but as they are being the Public Authorities, their procurement mechanisms are governed by certain laws. All public agencies are subject to:
 - **the Public Procurement Law (Law No.4734) enacted in 2002, (replaced the State Procurement Law of 1983)**
 - **the Public Procurement Contracts Law (Law No.4735) enacted in 2002**
- **Exceptions:** Those projects that are to be financed with foreign funds in accordance with international agreements and where different procurement procedures and principles are defined in financial agreements, are exempt from this requirement.
- This exemption makes it possible for public authorities to enter into a contract that is based on FIDIC or other international type contracts. But for those projects that do not qualify for this exemption, the public authorities have to follow the rules and regulations stipulated in the Public Procurement Law and the Public Procurement Contracts Law.

(6) Dispute Resolution Mechanisms in Turkey

- Traditional *Way* in Dispute Resolution
 - High Science Commission (HSC)
 - Public Works Commission (PWC)

(6) Dispute Resolution Mechanisms in Turkey

■ High Science Commission (HSC)

- Exists since 1920
- Members selected by the Minister of Public Works
- Resolves disputes particularly in technical issues, such as determination of new unit prices, valuation of works.
- Decisions non-binding, but regarded as credible
- Decisions given independently and impartially
- Approx. 2000 Decisions given in 2002.

(6) Dispute Resolution Mechanisms in Turkey

■ Public Works Commission (PWC)

- HSC members are also the members of PWC, with inclusion of managers of other subsidiary companies, a legal counsellor and three Ministry advisors.
- In contracts between contractors and state institutions which the Public Works General Conditions are made part of, it is mandated (per Article 20) that if there arises a dispute with the contractor in determining a new unit price, the state institution refers the dispute issue to the PWC within 30 days for a determination. The decision of the PWC shall be accepted by both parties. If the same dispute issue is brought to a court prematurely –meaning before a decision was sought from the PWC-, the court in most cases do not rule on the dispute, rather recommends that the dispute issue be first decided by the PWC.

(6) Dispute Resolution Mechanisms in Turkey

■ International Projects

- which contain a foreign element, meaning: either a foreign contractor alone or being the lead partner of a joint venture or consortium, or the financing of a project is provided by a foreign funding institution, or a foreign-origin private employer doing business in Turkey.
- Public Authorities can tender international projects and as long as the project is considered to have a foreign element, public authorities are not constrained by the Public Procurement Law or the Public Procurement Contracts Law.
- They can use different procurement procedures and principles as defined in the financial agreements by which the projects are to be funded; and then can make and enter into contracts, such as FIDIC or other international type contracts

(6) Dispute Resolution Mechanisms in Turkey

■ *CFCU – The Central Finance & Contracts Unit*

- Established by the Memorandum of Understanding between EU Commission and Turkish Government in 2002 which was subsequently ratified by the Grand National Assembly in 2003.
- The overall budgeting, tendering, contracting, payments, accounting and financial reporting aspects of all procurement in the context of the EU funded programmes in Turkey.
- As a central unit, operates as an independent body but is attached to the EU Secretariat General and the National Aid Coordinator.

(6) Dispute Resolution Mechanisms in Turkey

- The common dispute resolution methodology adapted by CFCU:
- During a contract administration, the parties should try to resolve differences between themselves on the basis of amicable settlement. If the parties can not reach an agreement amicably, one party submits his opinion on the disputed issue to the other
- Try to resolve differences on amicable settlement basis
- One party submits a position paper to the other party
- The other party should respond within 30 days
- Amicable settlement not reached in 120 days
- One party request the other to have a third party to resolve the issue (by conciliation)
- The other party should respond within 30 days expressing his consent for conciliation
- Settlement by conciliation not reached in 120 days
- It is deemed that the settlement by conciliation process has failed.
- After the failure of both the amicable and conciliation processes, the final process is usually the courts, provided that it is specified in the particular conditions of the contract.

- Consequence is that in the best case scenario, dispute resolution by conciliation may take up to 240 days, albeit it may be longer if the dispute goes to the court. This method therefore is not a preferable method as it takes too much time as opposed to having a DRB or DAB.

(6) Dispute Resolution Mechanisms in Turkey

- EU's common approach:

Use FIDIC-type contracts particularly for *Solid Waste* or *Waste Water Treatment Plant Facilities*.

- Consequently, if FIDIC-type contracts are used, then the relevant dispute resolution method is put into effect.
- Amicable Settlement → (No Amicable Settlement) → Referral to the DAB → DAB Decision → Dissatisfaction Notice → Arbitration (ICC)

CONCLUSIONS

- In light of the above:
- The use of Dispute Boards (DAB or DRB) are extremely limited, mainly due to lack of enough knowledge and/or willingness of people to use these boards,
- The contractors, willingly or unwillingly, tend to accept the Dispute Resolution mechanisms such as arbitration or courts as stipulated in the contracts, amid competitive market conditions,
- The Contractors tend to resolve disputes with public employers amicably and tend not to be in a controversial position with them.
- Since the decisions or recommendations of DABs or DRBs are not enforceable in the judicial system, the general conception is that their use is an unnecessary cost item. Arbitration is therefore thought to be cheaper and faster.

What can be done:

- Re-establish trust towards Dispute Boards
- Proper and Effective Training on Dispute Boards
- Establishment of Standards for Ethics for Dispute Board members
- Make known that Dispute Boards are not unnecessary cost items for the parties