

The Settlement Mechanisms of Disputes between the Parties According to FIDIC Conditions of Contract for Construction

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Abstract

Construction Industry needs alternative dispute settlement mechanisms which are able to solve rapidly the disputes relating to international construction projects especially, even in the construction site as far as they emerge. A modern tender system should begin with an efficient evaluation of the pre-qualification of applicants, and proceed with a tender procedure based on high quality tender documents, and carry on with the balanced conditions of contract which fairly distribute possible risks of future between the employer and the contractor.

Keywords: FIDIC, Conditions of Contract, Dispute Settlement, Employer, Contractor.

Introduction

In Turkey, both property developer contractors, who started their works by building apartments with some flats on lands of third parties/individuals, and international construction companies of Turkey which still create masterpiece engineering construction jobs all over the world by using the latest technologies, in a sense, being lumped together are called “contractors”. In this Article, settlement mechanisms of disputes which are provided for in the various editions of the FIDIC Conditions of Contracts, between the contractor and the employer, are examined comparatively.

1. Disputes Settlement Mechanism Provided for by the FIDIC 1987 Edition

The General Conditions of the Institute of British Civil Engineers (6th Edition) states that the parties would resort to arbitration according to the rules of the Institute. According to these general conditions, decision of the engineer is required prior to arbitration. Today, in almost all countries, international tenders are made for the constructions of industrial, commercial, touristic or infrastructure facilities which require new and high technology, expertness, and huge financial resources. Standard contracts of FIDIC are used to a considerable extent in drawing up the investment agreements called turnkey project contracts, in other words, in drawing up the contracts of highways, railways, harbors, airports, subways, sewage treatment plants, dams, industrial facilities and other investments. Today it's known that about 30 percent of the FIDIC rules are used in international investment contracts. The World Bank recommends the FIDIC Rules to the parties in realizations of the construction projects which are funded directly or lent by the World Bank.¹

International Chamber of Commerce (ICC) and FIDIC are preparing cooperatively a special arbitration code for the arbitration cases arising from FIDIC Contracts. This code, which is currently in preparation phase, aims to provide, through ICC arbitration, efficient settlement of disputes which shall arise from the FIDIC contracts. According to Clause 67 in FIDIC General Conditions of Contract (1987 edition), a dispute arising from a construction contract, whether related to the technical or legal matters, shall be assigned to the engineer prior to the arbitration procedure. Decision of the engineer is a typical temporary conciliation decision. However, when the parties not object to this decision within 70 days, decision of the engineer shall be binding for these parties; in other words, decision of the engineer shall constitute conclusive evidence for the judicial authority and the parties in terms of the subject disputes. In this regard the decision of an engineer which became final is such as to the decision of arbitrator expert. When both parties do not abide by the engineer's decision or when both sides do not participate in the settlement procedure initiated by the engineer, it is clear that there is a possibility of resorting to arbitration or court.²

¹ H.A. Dumont, “The FIDIC Conditions and Civil Law”, ICLR 1988, p. 43.

² Cemal Şanlı, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, Üçüncü Bası, (İstanbul: Beta, Haziran 2005), p. 386.

In the "Disputes Settlement" section of the General Administrative Conditions of the Contract of FIDIC, Clause 67 provides, in 4 Sub-Clauses, a detailed procedure for the settlement of any dispute between the parties arising from the construction contracts. Status of arbitration is a bit complicated in the construction contracts which are made in the FIDIC Contract form. Since the engineer, who is provided for by the FIDIC conditions of contract, undertakes a task to try to overcome technical and similar-featured difficulties that may arise in almost every day, as an official mediator or intervener incumbent without the title of arbitrator. If the employer and the contractor agree on every decision of the engineer to be made about technical and financial matters, the engineer shall fulfill reconciliation function indirectly. According to Karayalçın, between the employer and the contractor even between the engineer and the employer and the contractor emerging of a variety of different views and disputes are common in implementation of a major construction contract. The engineer will show the required effort to overcome differences of opinion and disputes between the parties, and he shall try to settle disputes with his vocational knowledge, experience and impartial attitude.³

If an agreement can not be reached between the parties, the employer or contractor may request the implementation of the procedure issued in Clause 67 of the FIDIC General Administrative Specification. This phase is the one that the dispute has become serious and one of the parties shall appeal to arbitration, if the dispute settlement can not be provided by the engineer according to this Clause.⁴ Not bringing to a successful conclusion of indirect conciliatory efforts of the engineer, in case of dispute becomes a serious matter; the procedure in Clause 67 shall be applied. Hereby, the engineer shall work directly as a conciliator.⁵ Within the framework of Clause 67 or if he is invited frankly to work as a conciliator by the employer, "Reviewing the procedures, the engineer could make new decisions without depending on the decisions previously made." is stated in Sub-Clause 2.6. This provision does not mean that the engineer could not review and change the decisions and opinions in case the procedure as per Clause 67 does not commence. Since the goal is to make the parties agreed at same point and to fulfill a task of buffer and safety valve between the parties, also in cases the procedure as per the second phase is not initialized, the engineer can review his proposal or decision before all else.⁶

In long-term contracts and in especially international construction contracts, the parties issue the principles in order to settle disputes, which may arise between the parties, with special provisions to be settled in the contracts. Settling disputes is preferred through arbitration instead of resorting to the state courts particularly in large construction contracts for various reasons. The parties involved in international construction contracts, also can make a choice in the mode of the implementation of regulations, which are related to the conciliation and arbitration, of national or international professional organizations.⁷ According to Clause 67 of FIDIC General Conditions of Contract, in the disputes settlement procedure, dispute between the parties passed to a serious phase is disclosed by specifying particularly that "the written application to be done to the engineer under Clause 67. This disclosure shows the subject party's intention of resorting to arbitration which is the last method."⁸ The contractor or the employer shall try to provide dispute settlement respectively in a three-step base. The General Conditions of Contract have issued the principle of resorting to arbitration of the party (the employer and the contractor) who is not satisfied with the decisions of the engineer.⁹

In case any dispute arises between the employer and the contractor, related to the opinion, instruction, determination, document and evaluation of the engineer, engineer shall be requested to make a decision on this dispute. The requesting party has to acknowledge that this application is done in accordance with Sub-Clause 67.1 of the Conditions of the Contract. The engineer also shall indicate in the requested decision that he made a decision in accordance with same Sub-Clause.¹⁰ The engineer shall give his decision within 84 days. The party, that is not satisfied with the decision, shall announce to the other party his/her intention to initiate an arbitration procedure which is related to dispute issues, within 70 days from the receiving date of the decision. If the engineer does not give the requested decision within 84 days, 70-day period shall begin the day after the last day of the 84-day period.

³ Yaşar Karayalçın, "FIDIC İnşaat Sözleşmesi Genel Şartlarında Mühendisin Hukuki Durumu", İnşaat Sözleşmeleri, (Ortak Seminer 18-29 Mart 1996), 2.Tıpkı Basım, Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2001, p. 298.

⁴ Ibid., p. 299.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid., p. 300.

⁸ Ibid., p. 301.

⁹ Ibid.

¹⁰ Ibid.

This notice to be made within 70 days shall establish the right of resorting to arbitration.¹¹ After completion of the procedure provided in Sub-Clause 67.1. “Amicable dispute settlement”, provided for in Sub-Clause 67.2, shall be applied. According to this Sub-Clause, 56-day period is granted to the parties to settle the issue in pais between them. The parties shall be able to resort to the arbitration procedure after only this 56-day period whether they come to agreement or not.¹² After passing two phases mentioned above, according to Sub-Clause 67.3, an arbitration procedure, which is subject to the Conciliation and Arbitration Regulations of the International Chamber of Commerce, shall be able to initiate.¹³ If the intention of commencing the arbitration is not declared within 70 days, the decision of the engineer shall be validity of a verdict and regardless of the periods in Sub-Sub-Clauses 67.1 and 67.2, the arbitration procedure shall be able to commence against to the party which does not implement the decision of the engineer.¹⁴

The periods, which are provided for in Sub-Clauses 67.1 and 67.2, facilitate to estimate the minimum period of a dispute which is aimed to be resolved quickly.¹⁵ According to Türegün, in case the periods are completely used, the legal phases shall take long years, such as following:

- 84 days for the decision of the engineer, 70 days notice of intending to arbitration, 70 days for conciliation attempt, so in total 210 days (30weeks)
- in addition to the commencing time of arbitration , within the rules of International Chamber of Commerce (ICC), establishment of the arbitration commission, to the ICC transferring application fees of litigation and the advances related to arbitration, also regarding that the first correspondence with the Secretariat of International Arbitral Tribunal may take approximately 12 weeks,
- after a period of 40-45 weeks under the best conditions even assuming 28-30 weeks per the decisions made by the arbitrators,
- control of the decision by the international arbitral tribunal and permitting to sign the decisions of the arbitrator,
- probably appealing the decision in the issued country according to the laws which are subject to the parties, opening an execution case where the decision would be ratified, appeal of the execution decision.¹⁶

According to the FIDIC Conditions of Contract, dispute procedure could be resorted for every decision of the engineer. The only provision, which ensures immediate implementation of the decisions of the engineer which influence the course of the work, and require urgent result, is the regulation of “The contractor certainly shall comply with the engineer's instructions in every respect” provided for in Sub-Clause 13.1 of the Conditions of Contract. Because of this regulation, in case a dispute arises on whether the work which the engineer wants to change necessarily or not or this change doesn't comply with the professional ability of the contractor, the contractor shall try to perform compulsorily the instruction of the engineer.

Every single scrap in a matter that goes beyond the contractor's professional ability; if the contractor wins the arbitration case after years, shall be a financial burden on the employer.¹⁷ In practice, the recommended way to solve the problem mentioned above is the following: With a special regulation to be settled in the second section of FIDIC (Special Implementation Conditions), in such cases be presented at work while the work is continuing, keeping a technical contract applicator who has become internationally famous, valid and whose charge shall be covered jointly by the employer and the contractor. And applying the provisional decisions to be made by him or applying to the procedure of International Expertise Centre of International Chamber of Commerce or the procedure of the Pre-Arbitral Arbitrator, the parties would apply exactly the decisions of them under the condition of reserving the right of resorting arbitration should be provided for.¹⁸ If there is no decision of an engineer regarding dispute settlement in accordance with Sub-Clause 67.2, and with the exception of the case mentioned in Sub-Clause 67.4, the arbiter shall not be able to work on the dispute which is submitted to him/her and thus the issue shall be referred to the court directly.¹⁹

¹¹ Ibid.

¹² Ibid., p. 302.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Necip Türegün, “FIDIC Açısından İnşaat Sözleşmeleri”, İnşaat Sözleşmeleri, (Ortak Seminer 18-29 Mart 1996), 2.Tıpkı Basım, (Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2001), p. 281.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid., p. 282.

It is not possible to claim that the regulation as “in case of complying with the dispute procedure, arbitration shall not commence” which is implied in Sub-Clause 67.1, closes up the way of justice. Because in this case, arbitration way shall be closed; however “the court option” shall be always available.²⁰

2. Criticism of Disputes Settlement Mechanism According to the FIDIC 1987 Edition

According to Sub-Clause 67.1, the employer and the contractor must put into effect the decisions of the engineer immediately in accordance with this Sub-Clause procedure, unless these decisions are revised in an amicable style or unless be revised or either until be revised by the arbitral board.²¹ It has been observed that this provision is usually applied only against the contractor in practice. In such a case, if the decision of the engineer is contrary to the opinion of the contractor, the contractor implements this decision exactly, as to not to dispute with the contract and generally at the end of the work or depending on the situation during the work, refers his claim to the arbitration or to the court.²² If the decision is against the employer's opinion, the employer rather than resorting to the procedure of disputes settlement in accordance with Clause 67, prefers to apply the decision of the engineer and also in this case, the contractor does not use the right, which is given him by Sub-Clause 69.1, to terminate the contract, in order not to risk letters of guarantee and performance bonds, cash guarantee in the hands of the employer and the machinery and equipment in the site, and this once transfers the right which is due and payable as a dispute to the authority determined by the contract again at the end of the work in general, rarely during the continuation of the work.²³

Because of this attitude of the employers, it is seen that the aim of ensuring the fair distribution of risks which are arising in practices of construction works with FIDIC Conditions of Contract are being alienated.²⁴ Delay in delivery of the projects to the contractor could be because of inability or incapacity of the engineer in work tempo and as well as if the same engineer is in question, can arise from his design errors. In this case the engineer shall try to hide his own faults from the employer. Because of the financial obligation arising, the employer has a right of recourse to the engineer. On the other hand, in case of an error caused by the fault of the employer, that whether and how much an engineer, who is appointed by the employer and receives his/her charge from the employer, would abide to the principle of neutrality provided in Sub-Clause 2.6 in FIDIC General Administrative Specification is also a doubt.²⁵ Instead of the procedure provided for in Clause 67, creating a constant and strong board of conciliation which may be more effective in reconciliation of the parties while signing a construction contract, if this board does not become successful in the settlement, resorting to arbitration forms a basis of the new solution offer. In this new method, the technical and financial tasks of the engineer shall continue again; if the parties find it beneficial, they shall be able to assign the engineer as an “obligatory mediator”, however in any case without taking advices of the dispute conciliation board which are not binding in nature, the parties shall not be able to resort to litigation or arbitration mechanism.²⁶

It is stated that in the field of international construction projects in the United States of America having started in 1980, a permanent implementation of Dispute Review Board continues successfully in large and even smaller projects, according to the price of the project, costs of these boards are lower than arbitration costs and due to the board members are nominally elected by the employer and the contractor during the contract drawing up, they are more effective in terms of expertise, prestige and impartiality.”²⁷ “Also assessing this practice in the United States, the World Bank has suggested changing of Clause 67 of FIDIC General Conditions in this direction. Suggestions and debates such as how to constitute Dispute Settlement and Conciliation Board and tasks of this board have continued for a long time.²⁸ In settlement of disputes between the parties for the international construction contracts, the ultimate solution is resorting to international arbitration. However this is an expensive and risky way for the parties. Before resorting to international arbitration, other alternative remedies should be exhausted and developed for dispute settlements. Thus in the major construction works in recent years, “Permanent Conciliation Board” has emerged as an alternative solution with or instead of the engineer in settling disputes without resorting to arbitration.

²⁰ Ibid.

²¹ Ibid., p. 262.

²² Ibid.

²³ Ibid.

²⁴ Ibid., p. 279.

²⁵ Ibid., p. 279-280.

²⁶ Karayalçın, op.cit., p. 306.

²⁷ Ibid.

²⁸ Ibid.

"Disputes Settlements Board" was held for the first time in 1996, publishing a supplementary document to the FIDIC fourth edition published in 1987. The General Conditions section is settled as 20 Clauses; in the FIDIC General Conditions of Contract 5th edition published in 1999, the section headings of these Clauses are as follows:

- Clause 1- General Provisions
- Clause 2- Employer
- Clause 3- Engineer
- Clause 4- Contractor
- Clause 5- Assigned Sub-Contractors
- Clause 6- Staff and Workers
- Clause 7- Plant, Materials and Labor
- Clause 8- Commencement, Delays and Suspension of Work
- Clause 9- Completion Tests
- Clause 10- Acceptance of Employer
- Clause 11- Defects Liability
- Clause 12- Measurement and Evaluation
- Clause 13- Changes and Adaptations
- Clause 14- Contract Price and Payment
- Clause 15- Termination of Contract by Employer
- Clause 16- Suspension of Work and Termination of the Contract by Contractor
- Clause 17- Risk and Liability
- Clause 18- Insurance
- Clause 19- Force Majeure
- Clause 20- Claims, Disputes and Arbitration

3. Disputes Settlement Mechanism According to FIDIC 5th Edition

In Turkey, in the construction contracts and public tenders, employer administrations, currently prefer to use widely FIDIC Specifications 4th edition published in 1987, because of which Turkish edition is available. Due to regulations, since FIDIC Conditions of Contracts are not like binding regulation, invalidating and replacing the previous editions of the next editions is not possible. The parties may base on the FIDIC Conditions of Contract 4th edition (1987) instead of 5th edition (1999), (Conditions of Contract for Construction for Building and Engineering Works Designed by The Employer, First Edition, 1999). However it is observed that FIDIC conditions of contract 1999 edition is taken as base, because its English edition is used in the international tenders of the projects funded by credits of international financial institutions or the foreign employer administrations. As the most important difference between these two editions, being titled as "Claims, Disputes and Arbitration" and regulating the ways of dispute settlements, the regulations, which are provided for by the new 20 Clauses, are examined below.

According to Sub-Clause 20.2 titled as "Appointment of the Dispute Adjudication the Board", in FIDIC (1999) General Administrative Conditions of Contract, Disputes shall be settled by Dispute Adjudication Board (DAB) in accordance with Sub-Clause 20.4 titled as "Obtaining DAB's Decision". According to the said Article; The Parties shall jointly appoint DAB by the date stated in the Appendix to tender. The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons. If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB. The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them. The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration. If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party. If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB.

Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause. The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 [*Discharge*] shall have become effective.

According to Sub-Clause 20.3 titled as "Failure to Agree on Dispute Adjudication Board": If any of the following conditions apply, namely:

- (a) The Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2.
- (b) either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date.
- (c) The Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

Then the appointing entity or official named in the Appendix to Tender shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official. According to Sub-Clause 20.4 titled as "Obtaining DAB Decision"; If a dispute (of any kind whatsoever) arises between the Parties in connection with or arising out of the Contract or the execution of the Works, including any dispute decision as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause. For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s). Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract. If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause. If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties. According to Sub-Clause 20.5 titled as "Amicable Settlement"; Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made. According to Sub-Clause 20.6 titled as "Arbitration"; Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause

1.4 [*Law and Language*], the arbitrator(s) shall have full power to open up review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute. Either Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration. Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

According to Sub-Clause 20.7 titled as "Failure to Comply with Decision of the Dispute Adjudication Board"; In the event that:

- (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*],
- (b) the DAB's related decision (if any) has become final and binding, and
- (c) a Party fails to comply with this decision.

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*]. Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference.

According to Sub-Clause 20.8 titled as "Expiry of Dispute Adjudication Board's Appointment"; If a dispute arises between the Parties in connection with, or arising out of the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply, and
- (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [*Arbitration*].

In the appendix of the FIDIC 1999 General Administrative Specifications (Edition 5) "General Conditions of Disputes Settlement Agreement" set forth. Among these general conditions there are matters such as, definitions, general provisions, guarantees, general liabilities of the Board's member and general liabilities the employer and the contractor, payments, end of the time, member's fault, detailed regulations and disputes. Disputes arising from the construction contract between the parties regarding the implementation and interpretation, in order to resort to the Dispute Adjudication Board, tripartite "Disputes Settlement Agreement" must be signed between the employer, the contractor and the Board members. In the annex of this agreement a nine-Clause "Rules of Procedure" is issued which shall be applied by the board, while reviewing and deciding disputes which are resorted to this board.

Conclusion

At the beginning of the twenty-first century, the international construction services sector with its related peripheral services, operating through assistants and partners in its original structure, faces with both opportunities and challenges. Wide range of factors which are affecting job opportunities of international contracting services sector abroad; the matters such as international financing of infrastructure projects, international procurement procedures and standard contract forms, international arbitration and alternative dispute settlement mechanisms, export credit insurance and the removal of barriers to entry into foreign construction markets stand out as priority issues.

While need of infrastructure is increasing on a global scale day by day, it is observed in general that there are world-wide difficulties in finding funds required for new construction and maintenance activities in the field of infrastructures. Under this circumstance as a new method of financing of infrastructure investments and the conducting of infrastructure services, bringing into force more the public-private partnership model is emerging as a current solution. 5th edition, published by FIDIC in 1999, the new red, yellow, and silver-colored books (general and special conditions of contracts), in other words, the standard contract forms, have been imposing the risk of the construction to contractor, more than what was seen in the past. However, in

most countries in Asia, Africa and Latin America still the 4th edition red book published in 1987 currently is used widely in drawing up construction contracts and in international tenders, it is understood that it would take some more time that the new edition of FIDIC type conditions of contract would replace entirely the old edition version. A modern tender system must begin with the effective pre-qualification assessment of the applicants and must continue with a tender procedure based on high-quality tender documents and the balanced conditions of the contract which distribute possible future risks in a fair manner among the employer and the contractor. The construction industry, particularly international construction projects need special alternative dispute settlement mechanisms that can provide rapid settlement, even if possible just then on the site as far as they emerge, related to construction projects. The current practice of export credit insurance coverage provided by insurance companies is limited to political and commercial risks; environmental, social and cultural capacity to mitigate risk is negligible. Because the traditional construction activity fulfills the instructions which are based on technical criteria and conditions which are determined by the employers and their consultant engineers, capacity of influencing environmental aspects of the construction work of contractor, is limited to the tender documents prepared by third parties and designs (drawings) and national legislation of the foreign country where the construction is built.

In June 2003, some of the world's largest and most famous private financial institutions have adopted the Principles of Ecuador. These guiding principles aim to guarantee the development of socially responsible and environmentally harmless construction projects funded by these credit institutions. In fact, the conference of the General Assembly of the European International Contractors Association in Istanbul on April 15, 2004, as selecting the subject as "Export Credit Insurance and Environmental and Social Standards in Project Finance" emphasizes the importance of the new standards of international financing for infrastructure projects in developing countries. China which became a member of the World Trade Organization in 2001, by adopting new legal regulations contrary to its commitments, created new barriers against foreign contractors to get into Chinese construction market. Restrictions, which are provided for by China's new legislation, such as the nature of barriers in order to restrict market entry, residence clause for foreign contractors, the number of foreign engineers, obligations to bring certain capital have been relaxed as a result of partially becoming successful efforts, which are carried out in cooperation with the European Commission and other international organizations, to convince Chinese Government in order to attract more international construction companies to Chinese construction market.

After recent developments in the agenda of international contracting sector have been assessed above, when we discuss this topic in our country's International Contracting services sector, as the main problems in the agenda of the sector, following are calling the attention most: A need of creating more effective coordination in the bureaucracy, difficulty to find financing and ensuring letters of guarantee, social security, the difficulty of obtaining information about foreign markets, lack of publicity, focusing on certain areas and not entering to new markets, the "Avoidance of Double Taxation" and "Promotion and Reciprocal Protection of Investment" agreements that could not have been completed yet in all the countries where business activities are being carried out and, tarnishing the positive image of the sector because in terms of technique and experience inadequate Turkish construction firms in the sector undertake works abroad and Turkish technical consultancy and engineering firms abroad not being active adequately. By solving the problems outlined above as soon as possible, in order to close our country's existing current deficit, which is already quite high, beside traditionally foreign currency earning export and tourism sectors, there is an urgent necessity to clear the way of International Contracting services sector through removing obstacles and providing all kinds of possible legal and financial support.

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