

## **THE METHODS OF DISPUTE SETTLEMENT FOR DISPUTES ARISING FROM INTERNATIONAL CONSTRUCTION CONTRACTS AND BUSINESS PARTNERSHIP CONTRACTS**

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### **Abstract**

*Negotiation, mediation, referee-expertise, technical expertise, pre-Arbitration, interpretation or adaptation and completing contracts by third parties are the main alternative ways of settling disputes other than the courts and Arbitration methods. Today, because courts and Arbitration are expensive and taking too much time regarding settlements of international commercial disputes, alternative dispute resolution techniques have made more attractive.*

**Keywords:** Dispute Settlement, Arbitration, Conciliation, ICC Rules, ICSID Rules, UNCITRAL Rules, Arbitrator, Conciliator.

### **INTRODUCTION**

Disputes to be arisen from international trade contracts including international construction and joint venture contracts, would be either settled in a national court of one of the Parties of the Contract or be resorted to international dispute settlement procedures such as “Conciliation” and “Arbitration”. In this Article, respectively, resolution of disputes through national judicial bodies and other international dispute settlement mechanisms are examined.

#### **A. SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES IN NATIONAL COURTS**

Since national courts are typically regulated to resolve disputes arising from internal law relations, they do not have necessary opportunity, approach, and legal structure for resolution of international commercial disputes arising from international construction and joint venture contracts. Furthermore, judges conducting trial activities in national courts, are loyal to the economic, social and cultural policies and values of the state which they belong to and appointed them. In this case, the party who is not a citizen of the state which has the court to solve the Dispute, can not trust whether the proceedings will be impartial (Şanlı, Cemal: *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, Üçüncü Bası, Beta, İstanbul, Haziran 2005, p.68).

Since national courts tightly attach to the detailed procedural rules of national law, lawsuits get longer, costs increase and the taking fair decision about dispute can not be often possible. In addition, national courts are not specialized regarding resolution of very diverse and complex nature of international commercial disputes. Furthermore, if the given decisions of national courts are not in the country in which the defendant's assets are placed, execution in other countries is extremely limited and creates serious problems (Ibid.).

Because of the above-mentioned reasons, the quickness in solving international commercial disputes, impartiality, equity decisions and simplicity of executions of decisions, international Arbitration and other settlement methods are preferred to resort to national courts alternative. In spite of resorting to national courts has disadvantages for the resolution of international commercial disputes, sometimes issuing a jurisdiction clause in contracts, parties sometimes choose a specific way to solve disputes in a state court (Ibid.,p.69).

In this selection, factors such as a certain state court being close to the Parties and evidences geographically, the cost of prosecution low, party preparing contract documentation and the economically stronger imposed upon the other party in standart contracts or general conditions of contracts can be effective (Ibid.). If Arbitration is not provided for in international commercial contracts or joint venture agreements between the parties, as natural solution of disputes general to judicial remedy, state courts will be resorted. If the Parties have not determined the state court to be resorted by agreement, the preferences of the claimant will determine the court which will resolve the dispute.

The Claimant can make his/her decision, taking into account the litigation and lawyer costs, knowledge and experience in the legal system, political trust and stability, the execution of the decision, membership of the common language and legal culture, being favoured and would be preferable to foreign party, the case would end in less time and other practical considerations (Ekşi, Nuray: *Türk Mahkemelerinin Milletlerarası Yetkisi*, İstanbul, 1996, p.73). However, in cases of absence of any Arbitration clause or licensing agreement in the Contract, ruling a case by the state court basing on the preferences of the claimant, is depending on the court to see itself as authorized in the concrete case (Şanlı, op.cit., p.69). In parallel to the freedom of choosing the law to be applied to the dispute between the Parties in the field of international private law, the freedom of choosing the law authority to be resorted by the Parties in international procedural law in case of dispute. This selection is made by the parties of agreements to be concluded (Ibid., p.70; see also Sargın,F.: *Milletlerarası Usul Hukukunda Yetki Anlaşmaları*, Ankara, 1996). In investment agreements with developing countries, host countries insist on a clause providing for the authorization of their own courts as a resolution body. Since these states have concerns about decisions made by other state courts on disputes arise contracts of facilities to be constructed in their countries. When these insistings are not overcame, mostly foreign contractors accept the authorization of courts of the host country (Şanlı, op.cit., p.71).

While choosing the authorized court in international commercial contracts, opportunities of execution of decision to be made in the future by the court to be chosen and authorization clause should be regulated so. In practice, insisting of the Parties generally on the authorizaiton of their own countries, can cause aggainset them because of exequatur difficulty of the decision in the forein country. Because of this, while regulating authority clauses in international construction and joint venture contracts, that the oppurtunity of ecuting the future decision in the countries of the Parties where their accepts are placed should be considered. In terms of executing the court award in the country where the debtor's assets are situated, selecting the courts of the defendant's country may be more appropriate for the claiment's needs. (Ibid., p.71-72). If international trade contracts parties have not agreed on arbitration, conciliation or a particular state court as a judicial body in case of disputes arising, disputes arising from contractual relationships will inevitably be resolved in national courts. In order to rule a case with foreign feature by national courts, they have to have international authority according to its own law. Each country determines about its use international authority in which case with foreign feature (Ibid., p. 72).

## ***B. ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES OTHER THAN ARBITRATION FOR INTERNATIONAL COMMERCIAL DISPUTES***

Mutual discussions and reconciliations of the Parties is the ideal method of resolving international commercial disputes. Directly settling the Disputes through mutual discussions has benefits, taking into account the high cost of judicial method, time and the damage on parties in the future. In this phase, the eventual advantages of the cases to be open in state courts or Arbitration courts should be compaired.(Ibid., p.371). Generally, because disputes arising from interpretation and executing contracts, can cause cause a psychological tension between the parties, this situation may prevent the Parties to start negotaitons to settles such disputes. That is why, for the settlement of disputes to initiate negotiations and to reach a consent solution as a result of negotiations between the parties, help and intervention of conciliators or conciliator institutions having a neutral third party position is required. Help and intervention of third parties are based on agreement of the parties. This agreement can be done with the mutual application of the Parties or special provisions settled in the Contract implicitly (Ibid., p. 371-372).

Negotiation, mediation, referee-expertise, technical expertise, pre-Arbitration, interpretation or adaptation and completing contracts by third parties are the main alternative ways of settling disputes other that the courts and Arbitration methods . Today, because courts and Arbitration are expensive and taking too much time regarding settlements of international commercial disputes, alternative dispute resolution techniques have made more attractive. Today, in international arena dispute resolution techniques, drafts regarding these new dispute settlement techniques and model laws are published (Ibid.).

### ***1. NEGOTIATIONPROCEDURE***

Some of disputes arising from an international trate contract can be solved directly through negotiations between the parties. Today, in order to support especially export and contracting services for foreign countries, the exporter or investor contractor is insured against the foreign country's commercial and political risks. When the losses for these kinds of goods and services in this kind of insurance coverage occurs, often disputes with the insurance company are resolved through negotiations (Ibid.; please see also Scmitthoff, C.M.: *The Law and Practice of International Trade*, London, 1990, p.471 ff).

In practice, in cases of emergence of disputes from an international commercial agreement, especially the damaged party attempts with the idea of the settlement of the Dispute through negotiations before the embassies and commercial attaches. However these sort of official institutions are not capable to intervene the special legal relations between the parties. Thus where a dispute emerges, caring the limitations and final terms expiry, concluding the negotiations in a certain term and if settlement is not provided, resorting the dispute to the jurisdiction bodies according to the conditions of contract is helpful (Ibid., p. 374).

## 2. EXPERTISE METHOD

The growing complexity of international trade agreements, occurring of technical problems often and causing these problems the Contracts execution more difficult, to review and to make a decision on problems that arise during the execution of the Contract, parties can appoint experts as called "referee-expert" in solving such technical problems, in order to benefit from decision and the referral of experts. For example, quality of poured asphalt or concrete in a performance of highway construction contract, often emerges as a technical problem. If determinations of referee-expertise on matters such as amount, quality, level, efficiency or adequacy are accepted by the parties, dispute is settled without resorting any court. In order to avoid these sort of interim technical problems to cause negative impact on performing of the Contract, technical expertises are appointed in international construction contracts (Ibid., p.386). If the Parties have decided that decisions of referee-expert will not be binding on the parties, in this case, referee-expertises have the conciliatory nature. If the Parties have decided that decisions and recommendations of referee-expert will be binding on the parties, these decisions, even if not abided by the parties, shall constitute definite evidence in terms of their issues related the case to be opened in the future (Ibid., p.387).

The International Centre for Expertise under International Chamber of Commerce (ICC) executes activity of institutional referee-expertise in the field of International economic and commercial disputes. The latest rules regulating activities of technical expertise with name "ICC Rules for Expertise" were revised and put into force on 1 January 2003 (Ibid., p.388; see Rules for Expertise of International Chamber of Commerce, ICC Publication No:649, 2002). Technical experts, are assigned by the Parties as a rule. With such an appointment, an impartial expert person is entitled with powers of protection of properties and proofs and registration of them and provisional interim decision for other cautions. Technical expert functions, are similar to the engineer's powers in some ways according to FIDIC Contracts. Referee expert also has to act quickly in emergency situations. When the technical expert is appointed with the consent of the parties, he can expect that his decisions generally can be accepted by the parties. However, according to the FIDIC Contract the Engineer, is appointed by the employer, one of the Parties singly" (Ibid., p. 389-390).

That the procedure of technical expertise is applied does not prevent to apply for Arbitration or court. But in this case technical expert, then the referee can not accept to serve as referee in the same dispute. When parties accept the application to ICC Technical Expertise Centre, any party can apply to the Centre for technical referee appointment. Otherwise agreed by the Parties, decisions and recommendations according to ICC Technical Expertise Rules are not binding upon the Parties (Ibid., p. 390). ICC has developed "Dispute Board Rules", a new technique that entered into force on 1 September 2004 to solve disputes. (See Dispute Board Rules, ICC Publication No:829, Paris 2004). With these new rules, by providing for agreement of the Parties as soon as possible on the settlement of disputes, preventing become chronic the problems occurred during the execution of contracts. With these new rules, a ICC Dispute Board Centre has been established to execute the activities of disputes boards. According to Dispute Board Rules, in framework agreement of parties, three different type of dispute board can be established. These are Dispute Review Board, Dispute Adjudication Board and Combined Dispute Board (See OCC Dispute Board Rules, Articles 4,5,6; Şanlı,op.cit., p. 390).

According to Article 7 of the Rules, the Parties shall appoint the Dispute Board members and have agree on the number of Dispute Board members. Where the Parties have agreed to establish a Dispute Board in accordance with the Rules but have not agreed on the number of Dispute Board Members, the Dispute Board shall be composed of three members. According to Article 10, before commencing Dispute Board activities, every Dispute Board Member shall sign with all of the Parties a "Dispute Board Member Agreement". According to Article 8, every prospective DB member shall sign a statement of independence. According to Article 7, procedure of Dispute Board shall commence with a submission of a request of a Party. Boards can do hearings. The Dispute Board shall issue its determination promptly and, in any event, within 90 days of the Date of Commencement, unless the Parties may agree to extend the time limit.

According to Article 25, unless otherwise agreed by the Parties, any Determination shall be admissible in any judicial or arbitral proceedings in which all of the Parties thereto were Parties to the Dispute Board proceedings in which the Determination was issued.

### **3. INTERVENTION TO THE CONTRACT BY THIRD PARTIES**

In case of a dispute arising from an international trade agreement, impartial and expert third parties entitled with the Contract, with foreign intervention to the Contract, can interpret the Contract, can fill its gaps or adapt the Contract to the changing conditions. Sometimes the Parties deliberately leave gaps in contracts to be filled according to the conditions in the future, sometimes gaps occur due to weaknesses of technique contract or nature of the work weaknesses. Third party intervention to the Contract can not be possible in the absence of the necessary related contract between the Parties or the application of the Parties together (Ibid., p.392). Experiences have shown that the intervention of a third party may be beneficial with long-term contracts such as construction contracts. According to “the Rules for Adaptation of Contracts” in the brochure numbered 326, which has been put into force in 1978 by ICC, “The Standing Committee for the Regulation of Contractual Relations” under ICC has been established in order to execute its activities (Ibid., p. 393).

When a problem occurs relating interpretation, completion or adaptation of a foreign trade agreement to changing conditions, jointly the Parties or one of the Parties may apply to the Committee with the declaration of a third person appointment who will intervene the Contract or with the request of third person selected by the committee. According to rules 6 (3), the Parties may choose a committee as a third person. When the Committee confirms the impartial expert third person or committee whom parties jointly appoint, third person or committee shall perform the procedure under the auspices and within the framework of rules ICC on the subject. According to Article 11(1) of ICC Rules NO 326, the scope and limits of third party intervention to the Contract depend completely on agreement of parties. According to Article 11(3) of the same rules, the Parties can decide whether recommendation or decision to be given by third-party will be binding.

According to Article 8 of the Rules, the third person shall issue his/her Determination promptly and, in any event, within 90 days of the Date of delivery of the file to him. However according to Article 12 of the Rules, this time can be extended or shortened by the Committee, according to the features of the event. Both application for Ad hoc appointment and institutional third party intervention under ICC does not prevent to resort court. Even if the Parties agreed on binding effect of decisions made by a third person, such decisions are not resolving the Dispute as a final decision, but have the force of a contract binding the Parties before the courts. When the Dispute is not settled amicably and resorted to before the court or the Arbitration, an arbitrator or a judge takes into account the decision issued by a third person, as part of the Contract or the provision within the framework of the law which the Contract is subject to. (Ibid., p.395).

### **4. ICC PRE-ARBITRAL REFEREE PROCEDURE**

During the execution of international trade agreements, the legal, financial and technical problems seriously affecting relations between the Parties and the performance may arise. In these cases, the problems must be urgently intervene. For example when determined that quality of cement and iron is low or work is not done according to the project and the technical norms or the remuneration has not paid, an urgent intervention will be required in for the future of the Contract. With these interventions, the rights and obligations of the Parties are immediately determined, the growth of damages is prevented, evidences are protected, as a result with taken emergency and temporary decisions, amicably the performance of the Contract is provided without growth and deepening animosity between the parties. Thus pre-arbitral referee is a person who intervenes emerging issues and problems previous stage of Arbitration or court dealing with the case. Certainly also the Parties may also grant the power of final decision making on disputes to the pre-arbitral referee, in this case the pre-arbitral referee is at the same time an arbitrator (Ibid., p.395-396).

If one of the parties does not abide by the decision made by the pre-arbitral-referee, disputes shall necessarily be resorted to authorized arbitrator or the state courts in order to get interim or conservatory measure decision and decision regarding identification of evidences and final decision. In Turkish Law, in Act No. 4686 on International Arbitration, according to Article 6, interim decisions of referees are even limitedly accepted for in sense of precautionary measure or provisional attachment and of identification evidences. In addition, it has been adopted that pre-arbitrators' decisions with the capacity of referee-expert are binding on judicial authorities and parties for the suits to be filed in the future (Ibid., p.396).

Pre-Arbitral Referee Procedure has been regulated under the name “Rules for the pre-arbitral referee”

which has been entered into force in 1 January 1990 by ICC to be used in resolving disputes arising from international trade contracts (Ibid., p.397; see ICC Pre-Arbitral Referee Procedure, ICC Publication No:482, Paris 1990). According to Article 3(1) of the above mentioned rules, in order to be used of the pre-arbitral referee procedure, there must be written agreement between the parties. Secretariat of the ICC International Court of Arbitration executes the secretariat services in the procedure of pre-arbitral referee procedure to be pursued under ICC. Despite agreement between the parties, if the pre-arbitral referee has not been appointed jointly by the parties, the pre-arbitral referee's appointment will be done by the President of ICC International Court of Arbitration (Ibid.,p.398). According to article of 6(2) of the Rules, The Pre-Arbitral Referee shall issue his/her Determination within 30 days of the delivery of the file to him. According to article 6(3) the Referee's order does not pre-judge the substance of the case nor shall it bind any competent jurisdiction which may hear any question, issue or dispute in respect of which the order has been made.

##### 5. ALTERNATIVE DISPUTE RESOLUTION METHODS

Alternative Dispute Resolution procedures (ADR) are a group of discretion dispute resolution techniques out of national courts and Arbitration but in parallel them, with suggestions, recommendations, proposals and efforts of an impartial third person (Ibid., p.399, please see. Connerty, A.: The Role of Alternative Dispute Resolutions in the Resolution of International Disputes, Arbitration International, V.12, No:1 (1996), p.47 ff). Today ADR, as providing humanitarian and economic techniques for the liquidation of legal disputes, are widely accepted all over the world and have legal bases. (Şanlı,op.cit.,p.400; please see. McMillion, R.: Growing Acceptance for Alternative Dispute Resolutions, ABA Journal, May 1996, V.82, p.106). ADR common features are following: (1) Entirely the procedure is optional. (2) decision given by impartial third party (mediator) is not binding upon the parties. (3) the party is not satisfied with the solution set forth by the mediator, there is always the possibility to resort to courts or Arbitration (Şanlı, op.cit., p.400).

ADR techniques have developed in the United States, then spread to other countries from United States. Today, in the United States more than 80 percent of disputes are resolved by ADR procedures (Ibid.,p.400; Goldsmith, J.C.: Report by the Working Group on Means of Alternative Dispute Resolution [ADR] ,Report on Alternative Dispute Resolution in Europe, Paris, 21 April 1995, p.5-6). United States and Continental Europe in the ADR the most commonly used type is a "mini-trial" procedure. (Şanlı,op.cit., p.402; please see Connerty, p.51). In this method, directly meeting the Parties of the Dispute and it is aimed to discuss the problems. Mini-trial, is made by a committee consisting of high-level representatives of both parties and the Chairman as impartial third person who is selected by them (Şanlı,op.cit., p.403; see also Goldsmith,op.cit., p.11). ADR procedures are quite different than the mini-trial. The following techniques are examples of other ADR methods:

- "Dispute Review Board" method which is generally used for joint venture agreements and having contractual basis,
- "Direct Mediation" (Senior Executive Appraisal) method where any impartial mediator or conciliator is not included, high-level authorities of the Parties participate in directly,
- "Arbitration Limited to Arbitrator's Choice" procedure where the referee selects one of the solution proposals submitted by the Parties (Baseball or Final Offer Arbitration) ,
- "Summary Jury Trial", today in the United States is widely applied, and it is based on recommendation decision made in virtue of summary statements of the Parties by a civil jury before official trial proceeding (Şanlı,op.cit., p.403-404; Goldsmith, op.cit., p.4; Connerty, op.cit., p.50 ff).

In order to ensure resolution methods to be used widely in international trade and economic disputes, ICC has developed a series of rules. "Amicable Dispute Resolution Rules" of the International chamber of commerce no 809 has enter into force as from 1 July 2001 (Şanlı,op.cit., p.404; see ADR Rules and Guide to ICC ADR, ICC Publication No: 809, Paris, 2001). The procedure provided for by the rules of referred above is completely voluntary. According to Article 5(2) of the Rules, in the absence of an agreement of the Parties on the settlement technique to be used, mediation shall be used.

According to Article 7(1) of the rules, in the absence of any agreement of the Parties to the contrary and unless prohibited by applicable law, the ADR proceedings, including their outcome, are private and confidential and can not be used before official courts, arbitration courts or other institutions. According to Articles 1 and 2 of the Rules, the parties, may not use the decisions, offers, statements or documents given by the impartial third person in this procedure, in any trial procedure in the future.

ICC, put into force the “Rules for Documentary Credit Dispute Resolution Expert /DOCDEX” on 1 October 1997, in order to solve disputes arising from ICC Uniform Customs and Practice for Documentary Credits /UCP” and “Uniform Rules for Bank to Bank Reimbursement Under Documentary Credits/URS” by an effective, inexpensive and speedy manner of the experts. (For these rules see ICC DOCDEX Rules, Publication No:557). ICC carries out this activity according to DOCDEX under control and supervision of ICC Banking Commission, through the International Technical Expertise Centre (Şanlı,op.cit., p.406). According to Article 2(1) of DOCDEX Rules, where the Parties agreed that the Dispute shall be settled according to ICC DOCDEX Rules, the Request shall be supplied to the Centre in Paris, France. When a dispute is submitted to the Centre in accordance with Article 1(3), the Centre shall appoint three experts from a list of experts from 70 different countries maintained by the Banking Commission. In practice, decisions are made about in 2-3 months.

According to Article 1(4) of the Rules, unless otherwise agreed, a DOCDEX Decision shall not be binding upon the parties. These decisions can not be used in cases which will be opened in the future before the courts. Because cases in national courts and Arbitration take too much time for resolution and cause huge costs, ADR procedures are used more and more for international economical and commercial disputes. (Ibid., p.407).

## **6. CONCILIATIONPROCEDURE**

According to agreement of the Parties, the conciliator may just give recommendations to the Parties relating amicable resolution of the dispute or make a decision according to his evaluations. The Parties are free to abide these recommendations or decisions. Traditionally, conciliators are the people who have prestigious reputation jointly the Parties regard. The conciliation can be provided for as an alternative to Arbitration or official judiciary or as a preliminary step of these two procedures by the parties. If the Parties issued that they would resort to conciliation before Arbitration or where after the conciliation procedure fails, Arbitration case can be opened by a certain date with mandatory expressing words in their Contract, before the conciliation procedure ending which is the preliminary stage or at the end of the certain date they can not resort to Arbitration. Skipping of these type of settlement clauses non including non- imperative statements and resorting to Arbitration do not affect the validity of the Arbitration clause. In general, that one of the Parties (the claimant) open the case to Arbitration or court without applying to the the settlement phase of the Contract means that he/she will not abide by in advance the decision of the conciliator, these can be interpreted implicitly as the settlement procedure is resulted in failure (Ibid., p.375-376).

Today, in order to contribute to international economic and commercial disputes resolutions, large number of official and semi-official or private institutions provide institutional settlement. Mainly these institution Offering services of conciliation are following: ICC (International Chamber of Commerce), UNCITRAL(United Nations Commission on International Trade Law), ICSID (International Centre for Settlement of Investment Disputes), AAA (American Arbitration Association), RCIA (The Regional Centre for International Arbitration/Malesia), CIA (The Chartered Institute of Arbitrators/London), CEDR (The Centre for Dispute Resolution/London), The British Academy of Experts/London, The Society of Construction Arbitrators/London, The Australian Dispute Center, The Australian Commercial Dispute Centre, The British Columbia International Commercial Arbitration Centre/Los Angeles-USA, The Hong Kong International Arbitration Centre, The Japan Commercial Arbitration Centre, The Korean Commercial Arbitration Board, NAI (The Netherlands Arbitrage Institute), Zurich Chamber of Commerce, ĞTO (Ğstanbul Ticaret Odası). Conciliation activities of ICC, UNCITRAL, ICSID ve FIDIC are the most widely used in institutional settlement procedures in international trade practice (Ibid., p.377).

### **a. ICC Conciliation Rules**

ICC Settlement Rules have entered into force on 1 January 1998 (see Guide to ICC Arbitration, ICC Publishing, S.A., Paris, 1994). However “Amicable Dispute Resolution Rules” of the ICC no 809 has replaced the above one as from 1 July 2001, The ICC Discretionary Conciliation Rules of 1998 are legislated away (Ibid., p.378; see ADR Rules and Guide to ICC ADR, ICC Publication No:809, Paris, 2001, p.16).

### **b. UNCITRAL Conciliation Rules**

The UN Commission on International Trade Law (UNCITRAL) has adopted a number of settlement rules in 1980 to be used in settlement and the UN General Assembly has recommended such rules on December 4 1980 to the international business world (Ibid.,p.378; For UNCITRAL Conciliation Rules see Dayınlarlı, Kemal: UNCITRAL Kurallarına Göre Uzlaşma ve Tahkim, Dayınlarlı Hukuk Yayınları, Ankara, 2007, p.125-168).

In order to perform a conciliation procedure according to the UNCITRAL Rules, the Parties must have accepted this procedure with the Contract. In addition, the conciliation procedure shall entry into force with the mutual agreement of the Parties on appointment of the conciliator. Conciliation is a discretionary procedure for dispute resolution totally the Parties' comply with the agreement prepared by the conciliator. According to Article 16 of the Conciliation Rules, the Parties during the conciliation procedure, when loss of any right is in question, except the limitation of case expires, have comitted not to resort to Arbitration and Courts in relation to conciliation of the Dispute. In case of failure of the Parties in Conciliation procedure, they may resort the Dispute to Arbitration or official judicial (Şanlı, op.cit., p.379).

### c. ICSID Conciliation Rules

“Convention on the Settlement of Investment Disputes between Parties from Different States and Nationals of Other States” ( the ICSID Convention) which has been prepared by the World Bank has been adopted in 1965 (See Convention on the Settlement of Investment Disputes between Parties from Different States and Nationals of Other States). Turkey has signed the ICSID Convention on 24 June 1987 and the agreement entered into force for Turkey on 2 April 1989. Today, 155 countries are parties to the ICSID. According to Article 1 of the ICSID Convention, an international center has been established which will be authorized to solve disputes through Arbitration or settlement. The name of the Center which is located in Washington is “International Centre for Settlement of Investment Disputes”. Between Articles 28-35 of ICSID Convention, settlement procedure is regulated. According to Article 28(2) of the Convention, in order to commence Arbitration or settlement procedure in the Centre the state or citizen's or legal person's must be a party of the ICSID Convention and the request shall contain information concerning the issues in dispute, the identity of the Parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and Arbitration proceedings (Şanlı, op.cit., p.380).

The center does not serve a as conciliator or arbitrator directly for international investment disputes, only directs the procedures. In this context, the Centre prepares list of skilled mediators whome the Parties can rely on and provides secretarial services required to settlement procedures. Reconciliation requesting party applys to General Secretariat Centre in order to the request is forwarded to the other party and will be initiated thereby settlement procedure. The centre forms a conciliation commission. According to Article 90 If the Commission is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, the President of the World Bank ex officio appoint the conciliator with opinions of the Parties. In principle, it is not necessary the selection of conciliator from the Centre list prepared in accordance with Article 12 of the Agreement. The Parties can also choose external conciliator (Ibid., p.381).

According to Article 34(2) of the Convention, If the Parties reach agreement, the Commission shall draw up and publish a report noting the issues in dispute and recording that the Parties have reached agreement as accepting the amicable resolution proposal of the centre. If any agreement fails between the partie , the Commission shall draw up a report noting the submission of the Dispute and recording the failure of the Parties to reach agreement. According to ICSID Rules, if the settlement procedure is ends successfully and agreement is reached between the parties, the final report of the Commission is eventually an agreement. It is not possible to execute the agreement in contracting contries such decisions of arbitrators. If one of the Parties fails to comply with the agreement reached as a result of the settlement procedure subsequently and resorts to court or Arbitration, the Contract shall be binding upon the Parties terms of this agreement, the Parties will take the nature of a binding contract (Ibid., p.381-382).

### d. FIDIC Conciliation Rules

We had mentioned in previous part that, 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 (See Dumont, H.A.: The FIDIC Conditions and Civil Law, ICLR (1988), p.43 ff). 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 (Şanlı, op.cit., p.383).

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 (Ibid., p.386).

### **C. ARBITRATION PROCEDURE FOR THE DISPUTES ARISING FROM INTERNATIONAL COMMERCIAL CONTRACTS**

#### **1. INTERNATIONAL COMMERCIAL ARBITRATION AND PRACTICE OF TURKEY**

Today, in international economic and commercial disputes international commercial Arbitration is the most common solution. For minimizing the legal risks of international business life, the most appropriate dispute resolution technique is Arbitration. For resolution of International commercial and economic disputes, reasons for the preferences are given below (Ibid., p.219-222):

(1) Arbitration, is perceived by carrying out the activities of international trade as an independent and impartial legal authority. Parties hesitate to resort to the courts of the state of each other with concern because of objectiveness, and this makes Arbitration proceedings more popular.

(2) Arbitration is a procedure that makes its decision faster than state courts.

(3) Arbitration courts are expert persons or institutions for resolutions of international commercial disputes.

(4) In Arbitration procedure, referees are not such depended on material and procedural rules of *lex fori* as the *lex fori* like state courts, including the rules of conflict of laws. Arbitration is a special jurisdiction procedure based on the will of the parties. For this reason, arbitrators may not apply the mandatory and public order local rules which are incompatible with the needs of international commerce more easily comparing judges, and they can make decision applying current rules, customary rules and usages in the sectors including the Dispute. Thus, in Arbitration, according to the nature and needs of international trade, the expectations of the Parties and the principles of justice, much more appropriate decisions can be given ( See. Şanlı, Cemal: *Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk*, Ankara, 1986, p.61).

(5) The most important reason for preference of the Arbitration in international trade is its prevalence and utility in execution of arbitrator decisions in comparison to local court decisions. Today, 135 state is party to the New York Convention prepared by the United Nations in 1958 on the Recognition and Enforcement of Foreign Arbitration Decisions in 1958. According to the Convention, the arbitrator decisions made in one of the Party Countries can be enforced in the other. New York Convention, has created an International Arbitration Law.

Apart from the New York Convention, arbitrator decisions between some Islamic countries in recent years, multilateral agreements regarding of the enforcement of arbitral awards have been concluded having the regional nature. Iraq, Yemen, Jordan, Sudan, Tunisia and Libya are party to Enforcement of Foreign Courts and Arbitration Decisions of the Riyadh Convention. According to the Convention, the decisions of the arbitrator in the Contracting countries shall be enforced regardless of the nationality of the claimant and the merits of the decision being subject to any processing, under the conditions and form specified in the Convention. Riyadh Convention has great importance for the Islamic Countries who are not party to New York Convention (Regarding Convention see El Ahdad, A.H.: *Enforcement of Arbitral Awards in the Arab Countries*, *Arb. Int.*, V.11, No: 2,1995). Between Arab Countries, in 1987, "Amman Convention on Commercial Arbitration" has been adopted. According to the Convention, Arab Commercial Arbitration Centre has been established in Rabat. Unless decisions of arbitrator provided by the Centre are not contrary to public order, they shall be enforced by the Contracting state high courts authorized by the Convention directly. Decisions taken by the Centre, during execution, can not be contested before the courts of the Contracting countries. Iraq, Jordan, Libya, Tunisia, Yemen, Palestine, Lebanon and Sudan are party to Convention. (Şanlı, op.cit., p.221; Regarding Convention see El Ahdad, op.cit., p.180 ff).

(6) Because Arbitration proceedings are cheaper, confidential and trade secrets are easily stored, the judges are also conciliatory and relationship between the Parties involved in Arbitration procedures are less destroyed peacefully, Arbitration is preferred in international commercial disputes.



Arbitration is a jurisdiction procedure based on free will of the parties. Parties can freely determine the arbitrator or arbitrators to resolve disputes, their numbers and qualifications, selection style, the contents of the Arbitration agreement and condition, place of Arbitration applicable law for the Arbitration agreement, applicable law for the Arbitration procedure, the substantive law, the trial procedure and form, the means of proof and the trial language. National courts prevent these type of enforcement of arbitral awards only by interfering the Arbitration procedures which go beyond borders such as “public order” taht is a part of national law or whose part international agreements parties during the trial or enforcement of award. Agreement between the Parties with the arbitrator or arbitrators is called “compromissum”. In practice, at the beginning of the case concluded with the participation of the Parties and arbitrators, each signed by the two parties with term of reference, this agreement is in writing (Şanlı, op.cit., p.223).

That the Parties have accepted the Agreement to resolve their dispute through Arbitration is called "Arbitration Agreement". Arbitration Agreement can be concluded separately and also can be settled as a “Arbitration Clause” included in substantive law contract. The Parties commit to have settled disputes not by state courts but by private people called arbitrators with the Arbitration agreement arised to to be arised from a certain special legal relationship between them. Accordingly, the Arbitration agreement provides the possibility of an appeal before the relevant legal systems in case the Dispute under contract is resorted to the state judiciary. Arbitration agreement is independent from substantive law contract in terms of validity, even though settled as a clause contained in substantive law contract. Institutional Arbitration is an arbitration happens under control of a certain Arbitration institutio subject to its predetermined rules. In ad hoc Arbitration, keeping the Arbitration agreement detailed has a special significance (Ibid., p.224).

In Arbitration procedure, the Parties can freely the substantive law. “Law selection Agreement” can be concluded separately and also can be settled in a Arbitration Clause included in substantive law contract or be settled separately from such clause. The Parties can determine themselves the procedure to be applied by the arbitrators, referring the rules of a particular Arbitration institution or a national legal system or directly drawing up. In recent years, in order to regulate the legal regime of international commercial arbitration procedures in most countries special "International Commercial Arbitration Laws" have been enacted. The reason of enacting these sort of special laws is that the rules regulating local Arbitration are not suitable for the features and needs of international commercial Arbitration. On 21 June 2001, the Turkish Parliament enacted the Turkish International Arbitration Law No. 4686 and it was issued in the Official Gazette No. 24453 dated July 5, 2001 and entered into force on the same day. The Law regulates all international commercial arbitration procedures where the Arbitration place is determined as Turkey. Local Arbitration will continue to be subject to the Law of Civil Procedure No. 1086 (Ibid., p.227-228).

The United Nations Commission on International Trade Law (UNCITRAL)'s "Model Law on International Commercial Arbitration" has the guidance to International Arbitration Rules, came into force in different countries in 1985. Approved by Law No. 3730 dated 08.05.1991, Turkey has become a party to European (Geneva) Convention of 1961 on International Commercial Arbitration, and Turkey, approved by Law No. 3731 dated 08.05.1991 and has become “the New York Convention prepared by the United Nations in 1958 on the Recognition and Enforcement of Foreign Arbitration Decisions” again, approved by Law No. 3453 dated 27.05.1988, Turkey has become a party to ICSID Convention. In addition, it has been adopted that in all of the bilateral and multilateral "Investment Promotion and Protection Agreements” to which Turkey is a party , investment disputes between host country and other contracting party shall be settled through international arbitration procedure. In each agreement different form of international arbitration has been adopted (Ibid., p.231).

With ICSID and bilateral Agreements for Promotion and Protection Agreements Turkey has adopted the settlement of investments disputes arising from international administrative contracts to which Republic of Turkey is a party, through arbitration. Today, Arbitration procedure for disputes arising from public service concession and contracts containing foreign element for Turkish Law has been adopted. International Arbitration Law No 4886, is just applied for the disputes which have foreign element and of which the Arbitration place is determined as Turkey or when these law provisions are chosen by the Parties or Arbitration Board. Only private law disputes with foreing element and convenient to Arbitration on which the Parties free to dispose and settle are included in the scope of the Law No. 4886. The Parties who prefer ad hoc Arbitration procedure for an international commercial dispute, with a reference in the Contract, can make the Arbitration procedure subject to UNCITRAL Rules on the Ad Hoc Arbitration (dated 1976) or International Chamber of Commerce Arbitration Rules (Ibid., p.234).

## **2. INTERNATIONAL INSTITUTIONAL ARBITRATION**

Today, in the international arbitration arena, there are many different institutional arbitration center. Some of them depends on occupational and sectoral chambers or associations. As of today, in Turkey, there is no an institutional arbitration center which is active in the field of international Arbitration. By the Union of Chambers and Commodity Exchanges of Turkey (TOBB), centered in Ankara, in 1990, created a Court of Arbitration of TOBB, but could not have an active position in the business world. In addition, the Istanbul Chamber of Commerce Court of Arbitration provides arbitration for international commercial disputes. Already in force, the "Istanbul Chamber of Commerce Arbitration, Conciliation and Referee- Expertise Regulations (Rules)" came into force in 1979 (Ibid., p.257). For resolution of international commercial disputes, some of major institutional arbitration centers to which also Turkish foreign tradesman often resort (permanent courts of Arbitration), are examined briefly below.

### **a. ICSID Centre**

The Centre has been established by the "Convention on the Settlement of Investment Disputes between Parties from Different States and Nationals of Other States" which has been entered into force in 1966 by the World Bank. The Center hears the arbitration cases arising from international investment disputes. Although a large number of the state is a party to ICSID, in many international investment agreements ICSID Arbitration Procedure is rarely provided for by the parties. Therefore, resorting to ICSID in general is only possible for the events which arise from the host state's certain acts which constitute tort and for dispute arising from in the next stage of which the Host Country recognizes the Centre's authorization (Ibid., p.259).

In recent years, in many bilateral and multilateral agreements signed between the states directly ICSID Arbitration has been adopted. Referred to ICSID for resolution of disputes arising from bilateral and multilateral agreements by the Centre in the capacity of Arbitration the next phase of the occurrence of the Dispute, a special agreement between the host state and investor also is not necessary. According to Article 47 of ICSID Convention, the Center can give decisions of injunctive relief. The arbitral decisions adopted according to ICSID Rules shall be directly executed in the contracting parties within the framework of local compulsory execution rules (Ibid., p.259).

### **b. International Chamber of Commerce (ICC) Arbitration Court**

International Chamber of Commerce (ICC), has established ICC Arbitration Court in 1923. Arbitration board or arbitrator who directly resolves dispute, in each concrete case if the Parties do not agree or is created by the Court if authorized by the parties. ICC Rules of Arbitration which are in force today is the Arbitration statute revised on 1 January 1998 (see ICC Rules of Arbitration, ICC Publication No:581, Paris, 1997). The application of ICC Arbitration procedure depends completely on the Parties providing for an Arbitration according to ICC Arbitration Statues in case of Dispute occurrence (Ibid.,p.260). ICC Arbitration procedure passes five stages. In the first stage, according to Article 4(1), A party wishing to have recourse to Arbitration under these Rules shall submit its Request for Arbitration (the "Request") to the Secretariat of ICC. In the second stage, according to regulations between the Articals 7-12, in accordance with the Parties' agreement or if the Agreement is not reached, an Arbitral Tribunal is formed to make a decision for the concrete Dispute by the ICC Arbitration Court. Arbitral Tribunal is formed by a sole arbitrator or by three arbitrators. In the thrid stage, According to Article 13, The Secretariat shall transmit the file to the Arbitral Tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

In the fourth stage, awards reached with the participation of the arbitrators and the Parties in the certificate of incumbency certificate, and during the Arbitration procedure and even at the execution phase shall be binding on the parties. In the fourth stage, According to Article 24, The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or by the Parties of the Terms of Reference or, in the case of application of Article 18(3), the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The arbitral tribunal, applying the provisions of ICC Arbitration Regulation, shall exercise the Arbitration trial. The arbitrators settling the merits of the case according to agreement of the parties, if there is no provision, make award according to the Law chosen by the Parties. If the Parties had not chosen a Law, while the Arbitrators settling the Dispute merits by applying the law they deem appropriate in terms of the case, in any case they take into account commercial usages and customs. According to Article 23, unless the Parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.

In the fifth stage, according to Article 27, ICC Arbitration Court, before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form. Once an award has been made, the Secretariat shall notify to the Parties the text signed by the Arbitral Tribunal, provided always that the costs of the Arbitration have been fully paid to the ICC by the Parties or by one of them. According to Article 28(1), Once an Award has been made, the Secretariat shall notify to the Parties the text signed by the Arbitral Tribunal, provided always that the costs of the Arbitration have been fully paid to the ICC by the Parties or by one of them. According to Article 28(b), the Award once made shall be binding on the Parties. By submitting the Dispute to Arbitration under the Rules above, the Parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. In ICC Arbitrations, administrative expenses of the Arbitration, Arbitration fees and related advances which will be paid by the Parties have been regulated as "Arbitration Costs and Fees" in the Appendix of Arbitration Regulation. The tariff has adopted a fee depending on the case and a fee system growing according to this value (Ibid., p.263).

### **c. Other Institutional Arbitration Centers**

In order to resolve through arbitration disputes arising from international trade agreements, the Contract parties can apply other international institutional arbitration centers, of which are the most prominent ones, are listed below (see Şanlı, op.cit., p. 264-279):

- London Court of International Arbitration,
- The International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russian Federation,
- International Arbitral Centre of the Austrian Federal Economic Chamber-Vienna International Arbitral Centre,
- Arbitration Institute of the Stockholm Chamber of Commerce,
- The American Arbitration Association,
- The Grain and Feed Trade Association Arbitration Tribunal / GAFTA Arbitration Tribunal,
- Federation of Oils, Seeds and Fats Associations Arbitration Tribunal / FOSFA Arbitration Tribunal,
- The Refined Sugar Association Arbitration Tribunal.

### **CONCLUSION**

Since national courts tightly attach to the detailed procedural rules of national law, lawsuits get longer, costs increase and the taking fair decision about dispute can not be often possible. In addition, national courts are not specialized regarding resolution of very diverse and complex nature of international commercial disputes. Furthermore, if the given decisions of national courts are not in the country in which the defendant's assets are placed, execution in other countries is extremely limited and creates serious problems (Şanlı, op.cit., p.68).

Because of the above-mentioned reasons, the quickness in solving international commercial disputes, impartiality, equity decisions and simplicity of executions of decisions, international Arbitration and other settlement methods are preferred to resort to national courts alternative. In spite of resorting to national courts has disadvantages for the resolution of international commercial disputes, sometimes issuing a jurisdiction clause in contracts, parties sometimes choose a specific way to solve disputes in a state court (Ibid., p.69).

Negotiation, mediation, referee-expertise, technical expertise, pre-Arbitration, interpretation or adaptation and completing contracts by third parties are the main alternative ways of settling disputes other than the courts and Arbitration methods. Today, because courts and Arbitration are expensive and taking too much time regarding settlements of international commercial disputes, alternative dispute resolution techniques have made more attractive. Today, in international arena dispute resolution techniques, drafts regarding these new dispute settlement techniques and model laws are published (Ibid, p.371-372.).

Today, in international economic and commercial disputes international commercial Arbitration is the most common solution. For minimizing the legal risks of international business life, the most appropriate dispute resolution technique is Arbitration. In the international arbitration arena, there are many different institutional arbitration center. Some of them depends on occupational and sectoral chambers or associations. In order to resolve through arbitration disputes arising from international trade agreements, the Contract parties can apply other international institutional arbitration centers.

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