

# The Nature of Dispute Board Decisions, with Special Emphasis on the Turkish Law Approach

by YASEMİN ÇETİNEL\*

## ABSTRACT

*Dispute boards first appeared in the construction industry as a reply to the needs of the industry's actors for the fast resolution of contentious issues and the need for predictable cash-flow throughout the construction projects. Various types of dispute boards were formulated to correspond to project type, actors or geography. FIDIC, being the most prominent institution within the construction contracts practice started to regularly use dispute boards with its 1999 series of contracts and gave birth to the relevant jurisprudence worldwide, especially on the binding nature of dispute board decisions and their manner of enforcement. Turkey recently entered the international construction practice and its relevant currently applicable legal material requires careful scrutiny and further legal developments are required before a proper dispute board practice can become established in the country.*

## I. INTRODUCTION

With the worldwide growth in investment in the construction and infrastructure industry in the second half of the twentieth century, a need for the avoidance and quick resolution of disputes arose as an adequate alternative to lengthy litigation procedures (be they court proceedings or arbitration). The United States may be considered as the first to respond to this need with the creation of the dispute review board concept which then was followed elsewhere by statutory adjudication in England and Wales. The global reply, came in mid 1990s however when *Fédération Internationale Des Ingénieurs-Conseils* (FIDIC) introduced the dispute board mechanism as a mandatory step before arbitration in its suite of contracts and the Dispute Resolution Board Foundation (DRBF) was established for the long term promotion and development of the concept.

Dispute boards used in sectors other than construction are not taken into consideration for the purposes of this paper. Accordingly, it will firstly examine the dispute adjudication board and other types of boards, the nature of the dispute board decision in FIDIC practice and the enforceability of dispute board decisions from a global and Turkish law perspective.

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\* Yasemin Çetinel is the founding Partner of Çetinel Law Firm, which specialises in construction law and construction disputes. She is Turkey's Representative on the Dispute Resolution Board Foundation.

## II. THE CONCEPT OF THE DISPUTE BOARD

In construction contracts, the dispute board mechanism is formulated on the basis that issues which may lead to potential disputes should be prevented and disputes should be resolved in real time, as opposed to resorting to litigation or arbitration which are considered as last resorts and effectively used only after the completion of the projects. As Dr. Omoto states, 'The best way to resolve disagreement is to prevent it from becoming a formal dispute'.<sup>1</sup>

To that end, the concept of appointing a board of independent and experienced construction professionals at the beginning of a project was born. Such boards were to serve as continuous team members, supervising the project and keeping an equal distance between the parties, namely the contractor and the employer.<sup>2</sup>

### a) Dispute Board Types

Different cultures and legal systems created different types of dispute boards. In common law legal culture, for example in the United States – the source country for the concept itself – dispute boards started as dispute review boards, empowered only to give recommendations not binding in nature and usually serving on a continuous basis (known as 'standing dispute boards') throughout the project. The author finds it useful to note that although not binding, recommendations of dispute review boards are frequently complied with in the United States as a result of the country's settlement culture.<sup>3</sup>

In contrast, civil law countries generally classified the mechanism as part of a multi-tiered system and preferred dispute adjudication boards authorised to give decisions (binding in nature, as further elaborated below) and resorted to only when a dispute arose (known as 'ad-hoc dispute boards').

FIDIC, in its 1999 suite of contracts on civil works, the Red Book and the Pink Book, establishes standing dispute adjudication boards. It uses ad hoc dispute adjudication boards in the Yellow Book and the Silver Book (on design and build and EPC works). That is to say, FIDIC practice is based on the civil law model of dispute adjudication boards and therefore substantially impacts current jurisprudence on the nature of dispute board decisions. Established in 1913 and currently managing affiliates and members from all around the world, FIDIC has acted since the late 1950s as the foremost dispute resolution entity within the fields of civil engineering and construction.<sup>4</sup>

Recognising dispute boards' positive impact on the construction sector, prominent alternative dispute resolution institutions came up with their own set of rules regulating various dispute board types as well as the conduct of dispute board proceedings. The International Chamber of Commerce (ICC) introduced its Dispute Board Rules in 2004,

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<sup>1</sup> Dr. Eng. Toshihiko Omoto, 'Dispute Boards Resolution and Avoidance of Disputes in Construction Contracts', *JCAA Newsletter*, no.23, November (2009).

<sup>2</sup> Paul Taggart, 'Dispute Boards as Pre-Arbitration Tools: Recent Developments and Practical Considerations', *Kluwerarbitrationblog.com*, posted on 28 February 2015.

<sup>3</sup> DRB Foundation Project Database, <<http://www.drb.org/manual/DRBFProjectDatabase2014.xlsx>>, accessed on 13 October 2014.

<sup>4</sup> Ellis Baker et al. 'FIDIC Contracts: Law and Practice', *CRC Press* (2013): 1-14.

and revised them in 2015; the Chartered Institute of Arbitrators (CIARB) published its rules in 2014. Both sets of rules refer to dispute review boards and dispute adjudication boards to be chosen at the discretion of the parties. The ICC went a step further and introduced the new dispute board concept of a ‘combined dispute board’, a board that may give recommendations or decisions, which created an ongoing discussion as to the jurisdiction of such a dispute board when it comes to rendering decisions.<sup>5</sup> Several other institutions familiar with the generic concept of a dispute have similarly taken steps towards drafting their own sets of rules.<sup>6</sup>

## b) Nature of Dispute Board Decisions

For the purposes of this paper, as previously mentioned, the author will focus on the nature of the dispute board decisions, excluding review of dispute review boards and their recommendations.

FIDIC Sub-Clause 20.4 (4) states that the dispute board’s 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 ...’. On the other hand, Sub-Clause 20.4 (7) establishes that ‘If the DAB [*Dispute Adjudication Board*] has given its decision as to the matter in dispute to both parties, and no notice of dissatisfaction has been given by either Party within 28 days after it has received the DAB’s decision, then the decision shall become final and binding upon both Parties’. These are the two core provisions setting forth the ‘binding’ and/or ‘final’ nature of dispute board decisions.

In principle, as of the date of its issuance, any dispute board decision is binding in nature - it is a contractual obligation with which the parties should comply. Furthermore, in case neither party gives notice of dissatisfaction with the decision, the decision also becomes final. The finality of the decision adds a different layer on top of the contractual obligation, as in most legal systems the final decision may be enforceable. Whilst final and binding decisions become enforceable legal documents, these cases are rare as parties very often give notice of dissatisfaction. The more problematic issue concerns simple binding decisions which are not directly enforceable and are often not complied with by the parties. The question then concerns the enforceability of a contractual obligation (i.e. complying with dispute board decision), for which question a body of case law is in the process of being developed.

## III. DISPUTE BOARD DECISIONS: DISPUTE BOARDS IN PRACTICE

Although the primary focus and intent of dispute boards is primarily to prevent disputes and assist construction contract parties to complete the project with the least number

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<sup>5</sup> The problem concerns the right of a party to object in case the other party requests the board to render a decision as opposed to a recommendation. For further reading, please refer to Christopher Koch, ‘The New Dispute Board Rules of the ICC’, *ASA Bulletin* 1/25.

<sup>6</sup> See e.g. the American Arbitration Association (AAA) Dispute Resolution Board Specification, <[https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_014010](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_014010)>; the Beijing International Arbitration Center, Construction Dispute Board Rules of Beijing Arbitration Commission, <[http://www.bjac.org.cn/english/page/data\\_dl/zyys\\_en.pdf](http://www.bjac.org.cn/english/page/data_dl/zyys_en.pdf)>; and the Institution of Civil Engineers, ICE Dispute Board Procedure, <<https://www.ice.org.uk/ICEDevelopmentWebPortal/media/Documents/Disciplines%20and%20Resources/09-3-ICE-Dispute-Board-procedure-2012-04-30.pdf>>.

of disagreed issues and maintain steady and predictable cash-flow, disputes do arise and boards exercise their duty to render decisions when invited. Accordingly, the boards' secondary purpose is to give immediate effect to such decisions, again in order to keep the contractual balance. This is especially so when the decision concerns the payment of any sums of monies. In this respect, the dispute board concept's principle is often referred to as 'pay now, argue later'.<sup>7</sup> But what if there is no compliance with a binding decision? How is it enforced?

### a) Global Approach

Pursuant to the confidential nature of the dispute board and arbitration proceedings, it is not always easy to be informed of recent developments in the application of the dispute board mechanism and decisions. However, in recent years certain published decisions assisted in dispute board practitioners' understanding and finally in establishing a case law precedent.

The *Persero* case constitutes a landmark case and decision on the enforcement of dispute board decisions. Very briefly, in the long lasting legal battle before the courts in *CRW Joint Operation v. PT Perusabaan Gas Negara (Persero) TBK*, the Singapore Court of Appeals firstly established that arbitration may not be initiated solely for the enforcement of a binding (but not final) dispute board decision (*Persero I*).<sup>8</sup> The ruling held that the arbitral tribunal was not entitled to enforce such a decision by way of a final award without addressing the merits of the underlying dispute board decision in the same arbitration.<sup>9</sup> The Singapore Court of Appeals then concluded that an arbitral tribunal could issue an interim award giving effect to a dispute board's decision provided that it had addressed the merits of the decision (*Persero II*).<sup>10</sup> The nature of the arbitral tribunal's award to enforce the dispute board decision was the subject of lengthy discussions among scholars. The author notes that the award may be considered as a 'partial final award'<sup>11</sup> in order to be attributed the necessary enforcement power in various jurisdictions.<sup>12</sup>

The *Persero II* decision furnished international law with an express acknowledgement of the spirit of the dispute board mechanism and the principle of pay now, argue later as follows:

A security of payment regime addresses the imbalance between contractor and employer. Its driving principle is the aphorism 'pay now, argue later'. When a

7 Cyril Chern, *Chern on Dispute Boards*, (2008), 468.

8 *CRW Joint Operation v. PT Perusabaan Gas Negara (Persero) TBK* [2011] SGCA.

9 Christopher R Seppälä, 'How Not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in the Persero Case', *White & Case Product*, April 2012.

10 *PT Perusabaan Gas Negara (Persero) TBK v. CRW Joint Operation (Indonesia)* [2014] SGHC.

11 To put it simply, a partial final award is given when the arbitral tribunal fully dealt with the question at hand and therefore no further legal analysis will be carried out in that specific subject (in our example, the enforceability of the binding dispute board decision), which describes its 'final' nature. On the other hand, the tribunal rules that it will proceed with other questions (in our example, the merits of the dispute and subject matter of the dispute board decision) and therefore the arbitral proceedings are not over, which describes its 'partial' nature.

12 In a different view stating that such ruling should be in the form of a provisional order, please see: Taner Dedezade, 'The legal justification for the 'enforcement' of a 'binding' DAB decision under the FIDIC (1999) Red Book', *Construction Law International*, Volume 7 Issue, 1 March 2012.

dispute over a payment obligation arises, the regime facilitates the contractor's cash flow by requiring the employer to pay now, but without disturbing the employer's entitlement (and indeed also the contractor's entitlement) to argue later [in arbitration] about the underlying merits of that payment obligation.<sup>13</sup>

Another contribution was made from another continent: the South African High Court fairly recently rendered a decision fully recognising the enforceability of dispute board decisions until they are reversed by a tribunal.<sup>14</sup> The judge giving the decision in the High Court of South Gauteng Johannesburg stated that 'I therefore find that terms of the relevant contractual provisions are perfectly clear: the parties are obliged to promptly give effect to a decision by the DAB. The issue of a notice of dissatisfaction does not in any way detract from this obligation ...'.<sup>15</sup>

These are clear examples from countries with considerably developed alternative dispute resolution practices advising parties to a construction contract where a dispute board is in force to comply with dispute board's decision instead of proceeding with challenges and therefore being in breach of the contract.

As a last note, the author would like to cite a decision by the Amman Court of Appeals<sup>16</sup> whereby the Court was asked to appoint an arbitrator but refused to do so on the grounds that the contract included a dispute board mechanism to be exhausted prior to any arbitration proceedings. Although the decision does not further elaborate the nature of dispute boards or dispute board decisions, it is an important indication for any potential decisions as the Court acknowledges the contractual obligation of the parties to consult a dispute board. Therefore, the author opines it may be fair to conclude that compliance with dispute board decisions will similarly receive favourable treatment in the Amman courts.

## **b) Turkish Law Perspective**

Turkey has recently begun to use international construction contracts with dispute boards, as opposed to the traditional public procurement contracts. Thus as at the date of this paper, there are no Turkish Court of Appeals decisions in relation to the nature of dispute boards or dispute board decisions. This section therefore will refer to the author's views on the position of the dispute board decisions under Turkish law and also raise certain practical considerations for ensuring their enforceability.

### *1. Contractual Nature*

The parties to a construction contract accept the dispute board mechanism by way of contractual consent. In the same manner they contractually consent to be bound by the decision rendered by the dispute board. Non-compliance with a dispute board decision is therefore by default a contractual breach by a party that must be assessed in the light of contract law provisions. For example, unless the contract indicates a penalty or liquidated

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<sup>13</sup> *Ibid.*, 146.

<sup>14</sup> South Gauteng High Court Johannesburg Decision dated 3 May 2013 for the case no: 06757/2013, in the matter between Tubular Holdings (PTY) Ltd and DBT Technologies (PTY) Limited (Tubular Holdings Case).

<sup>15</sup> *Ibid.*, para. 18.

<sup>16</sup> *Not indicated v. Not indicated*, Amman Court of Appeals, Ruling No. 05/2009, 21 July 2009.

damages for such breach, the affected party will only be entitled to request compensation, corresponding to the damage it incurred directly due to the failure of the other party to comply with the dispute board decision.

This, however, is not the intended result of the dispute board mechanism. The intended result is the compliance of the party with the decision. The enforcement of a specific obligation is only possible when there is a legal provision expressly attributing such enforceability. Turkish law provides for two alternative dispute resolution mechanisms, i.e. mediation and arbitration, both governed by their own specific laws; the enforceability of arbitral awards or mediator decisions are expressly stated therein. Furthermore, Article 38 of the Turkish Bankruptcy and Enforcement Law (TBEL)<sup>17</sup> lists a finite number of documents which have the effect of a court decision under Turkish law as acceptances and settlements made before the courts. The list doesn't include dispute board decisions. As a result, dispute board decisions are not specifically regulated under Turkish law and therefore are not legally enforceable.

## 2. *Contract on Procedural Issues*

Although not specifically regulated under Turkish law, the dispute board concept may correspond to some similar arrangements already existent under the law and therefore efforts may be made to ensure their enforceability accordingly. To that end, the author would like to refer to the concept of the 'contract on procedural issues' established by the Turkish Civil Procedure (Code) Article 173 of such (Code) reads as follows:

The parties may decide that the events, which have been stipulated to be proven by specific means of evidence under the law, to be proven by other forms of evidence or evidences; or they may also agree that the events which have not been stipulated to be proven by specific evidence under the law, to be proven by specific evidence by agreeing in writing or before the courts by recording/inserting/writing/including within the minutes.

The contracts on procedural issues which render the exercise of the right of evidence impossible or highly difficult for one of the parties shall be deemed as null and void.

This particular article of the Code is often referred to in relation to the time-bar provisions under construction contracts to determine whether or not there is a waiver of parties to pursue claims in case such claims are not raised within a specified time period. In fact, FIDIC contracts' dispute resolution provisions are considered as contract on procedural issues by the Turkish Court of Appeals<sup>18</sup> which strictly applies the time-bar concept and confirms the validity of the parties' waiver of their rights.<sup>19</sup>

In the light of such an understanding and approach by the Turkish Court of Appeals on time-bar provisions, the author is of the view that a similar understanding should be attributed to dispute board decisions. In other words, if parties enter into contractual

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<sup>17</sup> Turkish Bankruptcy and Enforcement Law, numbered 2004 dated 9 June 1932, published in the Official Gazette dated 19 June 1932 and numbered 212.

<sup>18</sup> Turkish Court of Appeal 15th Circuit Decision numbered 2012/7720, Turkish Court of Appeal 15th Circuit Decision, numbered 2001/1032.

<sup>19</sup> Yasemin Çetinel, 'Losing Entitlement to Claim and Resort to Dispute Resolution in Construction: Time Bar Provisions and the Turkish Approach', <[www.kluwerarbitrationblog.com](http://www.kluwerarbitrationblog.com)>, 19 December 2014.

obligations whereby, if they do not give notice in a specified time, they lose their entitlements, they should surely be bound by a contractual obligation to comply with a dispute board decision. Accordingly, it may be fair to conclude that only binding dispute board decisions shall be enforceable as a contract on procedural issues between the parties and an arbitral award ordering such enforceability shall not be subject to any set-aside ruling by the Turkish Court of Appeals.

### 3. *Arbitration Experts*

Another comparison may be made between the dispute board concept and arbitration experts under Turkish law, as Prof. Yeşilirmak has already suggested.<sup>20</sup> However, this may only be done in a restrictive manner - the dispute board is empowered to resolve any kind of contractual dispute referred to it whilst arbitration experts are only allowed to decide whether there is damage incurred by the parties and its value; they cannot rule on rights and obligations of the parties by referring to the law. The report of the arbitration expert is binding on the court, based on the same principle and regulation on the contracts on procedural issues.

### 4. *Practical Considerations*

A tool for specific circumstances, and especially when the dispute board decision is final and binding, may be a reference to Article 35/A of the Attorneys Code.<sup>21</sup> This Article establishes that attorneys may invite the parties to negotiate exclusively on a matter and then, if the parties reach an agreement, a settlement statement is drafted. If such a statement is signed by the attorneys of the parties, the Code of Attorneys establishes that the statement is a form of 'court award', under Article 38 of the TBEL. Using this method for final and binding dispute board decisions would be an effective way of establishing the enforceability of those decisions.

Other suggestions would require the legislators to take action. The author opines that a dispute board mechanism should be added as a pre-court or pre-arbitration procedure in various Codes in order to ensure the enforceability of decisions. As public tenders for large infrastructure projects are subject to the Public Procurement Law,<sup>22</sup> such an addition to the legal framework, either as a pre-court or pre-arbitral procedure (as the case may be for each tender), may be of great benefit for the development of the practice of using dispute boards in a domestic contract. Likewise, but for an international and more general scope (i.e. not necessarily for construction contracts) a similar addition could be made to the International Arbitration Law.<sup>23</sup> Finally, it would be useful to make

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<sup>20</sup> Ali Yeşilirmak, *Türkiyede Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi için Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tabkim: Sorunlar ve Çözüm Önerileri* (Direct Negotiation, Mediation, Expert-Arbitrator and Arbitration as Effective Dispute Resolution Mechanisms For the Purposes of Enhancing the Commercial Life and Investment Climate in Turkey: Problems and Suggestions), (2011), 24-58.

<sup>21</sup> Attorneys Code numbered 1136, dated 19 March 1969, published in the Official Gazette dated 7 April 1969 and numbered 13168.

<sup>22</sup> Public Procurement Law numbered 4734, dated 4 January 2002, published in the Official Gazette dated 22 January 2002 and numbered 24648.

<sup>23</sup> International Arbitration Law numbered 4686, dated 21 June 2001, published in the Official Gazette dated 5 July 2001 and numbered 24453.

corresponding changes to the relevant legislation on Public Private Partnerships (which currently comprises a multitude of laws and regulations) as projects subject to Public-Private Partnerships are of large scale, complexity and length which would make them the perfect candidate for the application of dispute boards.