Dispute resolution in the health sector PPPs:

The Turkish experience

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From the Editor

Turkey, ambitious and developing at a brisk pace, has recognized the need for the Public-Private Partnership ("PPP"). The demand for high quality public services, particularly with respect to health care, is growing rapidly. This demand will only accelerate given the growing expectations of Turkey's increasingly modern and sophisticated population. To satisfy this booming demand, the private sector – with its often superior access to resources, including financial, and its use of international best-practices – is increasingly being tapped by the Turkish government to assist it in the provision of these public services.

Along with the recognition of the need for PPPs is the recognition that, to attract private sector participation, concerns – legitimate or otherwise – private sector actors may have regarding possible pro-government bias in the local courts must be addressed. In the following paper we discuss the dispute resolution options presently available in Turkey, many of them newly fashioned in an attempt to correct this perceived source of imbalance between the public and private PPP participants.

Alternatives to the local courts now include arbitration (domestic and international), expert determination, mediation or conciliation, and/or resolution by a relevant governmental regulatory agency. The paper ends with a discussion of the dispute resolution procedures provided for in the very first Turkish PPP, a three-phase combination of, first, negotiations between the chief-executives of the parties to the PPP followed by attempted resolution by a neutral expert and, if still not resolved satisfactorily, access to arbitration pursuant to Turkish law (including the 2001 Turkish International Arbitration Law).

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1. Legal aspects of health PPPs in general

By Beyza Uygun

The public sector is traditionally known for providing public services. The government has full responsibility and accountability for developing the public service system in the country. However, increased demand for public services is often unmet by governments due to a scarcity of resources. To satisfy domestic and regional needs, the private sector, often with access to better resources (capital, know-how, technology, efficiency and management skills), is increasingly more deeply involved in providing these public services.[1] This paper considers the co-operative relationship between Turkish public authorities and the private sector known as the Public-Private Partnership ("**PPP**").

PPP is a model used by the government to attract the involvement of the private sector for the provision of significant public services, particularly in areas concerning specialization. PPPs are used in many projects between public authorities, project companies and sub-contractors with regard to financial, technical and operational works. These relationships often lead to disputes, and thus resolution of disputes becomes crucial.

This paper summarizes different forms of dispute resolution adopted in Turkey and developed countries in health sector PPPs. The paper has been structured in three parts, discussing legal aspects of health PPPs in general, international experiences with PPPs and the implementation of PPPs in Turkey.

It is almost impossible to do anything alone in the health sector. The constant rise in prices, changes in disease patterns and increased use of technology for diagnosis and treatment have made it virtually impossible for organizations to provide services without some type of institutional partnership.

Addressing these challenges can be overwhelming for governments, which may prefer to retain the majority of the responsibility over health delivery systems. In general, governments' primary role is to finance and operate public hospitals, since in most countries public hospitals and respective ancillary services account for the largest percentage of overall healthcare spending. It is observed that governments are increasingly considering various approaches to private sector participation—often resorting to PPPs—due to public sector financing difficulties and borrowing restrictions. Such

[1] S. Kadarisman, "Public-Private Partnership in Providing Public Services and a Strategic Approach Towards Its Implementation," p.1.

arrangements help determine a viable approach towards control of costs, improvement of services and increase in access.[2]

1.1 Project financing and PPP implementation

Governments around the world are searching for alternative mechanisms to reduce costs while seeking to increase the medical capacity of the system by making significant investments in infrastructure.[3] Third party debt financing plays an integral role in the PPP process.

However, PPP should not be regarded solely as a financial model used to gain advantages in public procurement but should also be regarded as a tool for enabling more efficient construction and maintenance. It can be said that PPP is an alternative procurement method for the public authorities.[4]

The scope of PPP practice has been expanded in order to benefit from the management abilities of the private sector, allowing the public sector to concentrate on areas such as coordination, general planning and investment monitoring.[5]

This funding model is used for capital-intensive projects. PPPs are seen in almost all areas of public service in developed countries, including provision of health services, education, water and wastewater services, waste management and public buildings.

1.2 Legal characteristics of PPP contracts

PPP contracts are drawn up between public entities and private parties in order to permit public parties to perform certain elements of a public service. These contracts include provisions that go beyond the scope of private law. Accordingly, a PPP contract would in normal circumstances be regarded in Turkey as an administrative contract, with provisions of administrative law applying to disputes arising from such a contract.

However, the applicable PPP contract law in Turkey is the subject of private law. Act no. 6428 "Concerning the Construction of Facilities, Renovation of Existing Facilities and Service Purchasing by the Public Private Partnership Model" ("**PPP Act**," the "**Act**") governs the establishment and implementation of PPP projects in Turkey. By virtue of this Act, the applicable law of the contract is made the subject of private law, and judicial courts are responsible for settling disputes arising under the contract.

As an exception, if disputes arise from executive decisions which take place prior to the signing of the PPP contract, administrative law will be applicable. In this respect, it must be noted that non-executive decisions are subject to private law even if the contract in question does not come into force.

[2] "Public-Private Investment Partnerships in Health Systems Strengthening," Wilton Park April 9-11, 2008, p.2.
[3] D. Barrows, I. Macdonald, A. Supapol, O. Dalton-Jez, S.Harvey Rioux, "Public Private Partnerships In Canadian Healthcare: a Case Study of the Brampton Civic Hospital," p.6.
[4] B. Beck, "PPP in Sweden and Germany," p.3.
[5] Y. Örnek, C. Yüksel, "Turkey's PPP legal framework: a work in progress."

1.3. System for PPP projects

PPPs are long-term, performance-based structures used for procurement of public infrastructure, which allow governments to hold the private sector accountable for some or all of the design, construction, financing and operation of public assets. PPPs combine the expertise and innovation of the private sector with the discipline and incentives of project finance debt and equity provision to deliver public infrastructure projects.[6] They are based on long-term contracts, due to the initial requirement of a high level of capital investment.

Disputes inevitably arise from the contracts in these projects. When disputes are not resolved rationally and satisfactorily, performance of the contract becomes very difficult and may even lead to damages to the public interest.

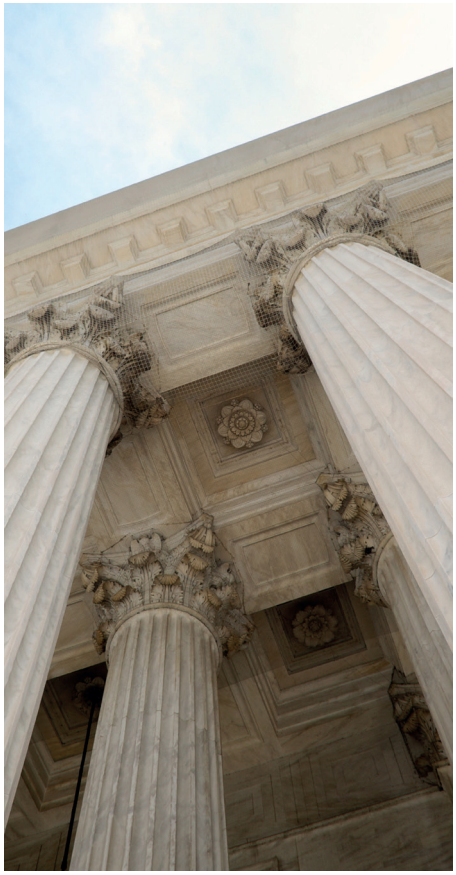
A typical PPP project includes various contractual relationships, bilateral and multilateral, amongst various parties, such as public authorities, the Project Company, funders, sub-contractors, service providers, shareholders and third parties. The role each party plays in the PPP project affects the method used for resolving disputes.

1.4. Significance of dispute resolution in PPP projects

Disputes are common in the PPP projects for a number of reasons, but principally:

- Large investments are required and
- The contract is long-term and circumstances change.

Effective resolution of disputes is imperative to the efficient and effective performance of PPP projects.



[6] C. F. Gonzalez, "Resolving Disputes in Private/Public Agreements."

2. Resolutions of disputes in PPPs: International experiences

In this section causes of and solutions to typical disputes will be explained. Subsequently, dispute resolution implementation in the UK will be discussed and will be compared to that commonly found in Turkey.

2.1. Resolution of disputes in general

Disputes arise from the undermining of an existing interest or the deterioration of the balance of the interests established by the contract in question. It is necessary to re-establish this balance to maintain economic equilibrium. This balance may be re-established efficiently by use of certain methods of dispute resolution, which may be used separately or collectively.

When PPPs involve long-term arrangements between two or more parties, the risk of conflicts over factors such as the service quality, customer satisfaction and tariff reviews increase. This is not surprising as PPPs often involve a myriad of complex legal arrangements. The interpretation of these arrangements may lead to a conflict between the parties to the contracts.[7] Furthermore, conflicts may concern awards of concessions, permits, operations and enforcement of obligations. The interaction of public and private sectors may also create tensions.

2.2. Alternatives for dispute resolution in PPPs

The mechanisms available to resolve disputes and conflicts play a significant role for private investors when assessing contract risks. The typical dispute resolution mechanisms are as follows:

- **The national court system (litigation):** The judiciary is traditionally regarded as one of the three branches of State power. It is considered to be the duty of the State to organize a justice system, build the necessary legal and tangible infrastructure for such, recruit judges and make access to the system available to the public at an acceptable cost.[8] If redress through the court system is not available or is perceived to be unfair, particularly in the case of foreign investors, or is undesirable for other reasons, there may be alternative mechanisms available at law or by contract.[9]

- Arbitration (domestic or international).

- Expert determination: This is often used for specific issues (e.g. a technical or financial matter) or to give an initial decision which, if unsatisfactory to any party, may be appealed through litigation or arbitration.

- Mediation or conciliation (where the third party decision maker does not provide a binding decision but attempts to facilitate an agreement amongst the parties).

- A decision by a relevant governmental regulatory agency.[10]

The decisions made by use of the first three mechanisms strictly take the PPP contracts as the basis. The last mechanism, decision by a regulatory body, may be based on the PPP

[7] "What are conflicts?," United Nations Development Programme.
[8] L. Mistelis, "ADR in England and Wales: A Successful Case of Public Private Partnership," p.2.
[9] "Dispute Resolution Systems Available," PPP in Infrastructure Resource Center website.
[10] "Dispute Resolution," The EPEC PPP Guide.

contract. Regulators, however, tend to depart from the contract and apply the principles of their own mandate. The regulator may exercise discretion in its judgment. This is regarded to be a considerable risk for investors if reliance on the stability of the regulatory framework or the decisions of the regulator is problematic.

Effective relationship management in a PPP project is important for facilitating resolution of disputes in the future. However, if a party chooses an inappropriate dispute resolution process, the process may damage the relationship.[11] Therefore, dispute resolution mechanisms ought to be well-suited to achieve PPP agreements.

2.3. Implementations for dispute resolution in health PPPs

The PPP model has become prominent in many countries by the virtue of advantages it offers. The PPP model, which was first adopted in the United Kingdom in the 1990s, has been applied in healthcare sectors across European countries (such as Ireland, Portugal, Spain, France, Italy and the Netherlands) and across other parts of the world (such as Australia, Mexico, Japan, Canada, Philippines and Latin America). In Turkey the Ministry of Health has adopted a structure with striking similarities to the UK's NHS PPP system.

The UK has played the pioneer role in implementation of mature PPP projects. For this reason, the dispute resolution procedure in England will be examined below.

The UK model

PPPs have been used on a widespread scale in the UK for the provision of public facilities and services. Many successful PPP projects have been undertaken via the cooperation of public and private sectors, however some have encountered difficulties.

We briefly set out below the common types of PPP or Private Finance Initiative ("**PFI**") disputes that we are managing in the UK together with the typical dispute resolution mechanisms in these forms of contract.

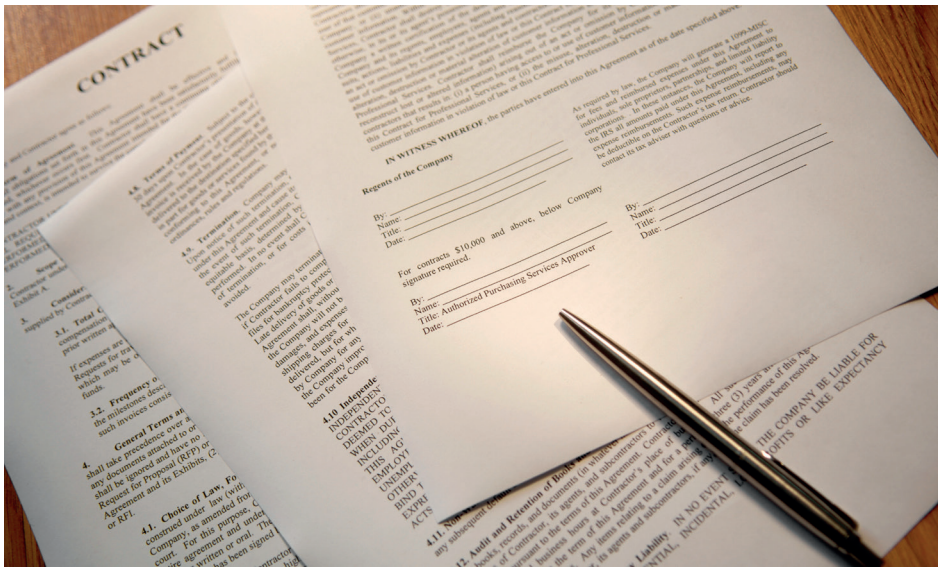
The recent economic climate in the UK has meant there has been an increase in the level of budget cuts required to be achieved by public bodies. In turn, this has meant that those bodies who entered into PFI/PPP contracts prior to the downturn in 2008 have since found a number of such agreements unaffordable. We have seen a trend in public bodies (including national health service trusts) retaining freelance consultants whose sole brief is to find savings in such contracts.

This approach tends to change the dynamic of the PFI/PPP contract from a 'partnering' relationship between the public body and the project company to one increasingly focused on the contractual terms.

Public bodies have moved to seek to exploit technicalities in the project agreement to achieve savings, levy availability deductions or in extreme cases move to termination scenarios to avoid future liabilities. Examples of the kind of disputes that we have acted in recently are set out below.

- The public body looks to exploit the project agreement to identify grounds to award or increase the number of service failure points, which have been set for identifying where there has been consistently poor performance and implementing remedies under the contract it can award. Rather than necessarily awarding these service failure points when there is an issue of genuine concern to the public body, the body awards service failure points in an attempt to either retain money from the project company, seek a renegotiation on more favourable terms or in extreme cases, to terminate the project agreement. We have seen this in a major highway PFI.
- The public body decides to undertake a "reconciliation exercise" which is an analysis of project completion, in an attempt to claw back historic payments made to the project company, which arguably should not have been made, through the set-off provisions in the project agreement.
- The public body seeks to rely on disclosure or audit provisions in the project agreement to

[11] "Dispute Resolution," The EPEC PPP Guide.



request historic documents. In doing so, the public body tries to "fish" for evidence that the project company failed to meet its obligations in any original investment period and as such demand a refund or set-off against the unitary charge. The public body often argues that any refusal to provide these documents is in itself grounds to support withholding payment or making deductions.

- The public body seeks to renegotiate the nature of the project agreement through the procedure for instructing variations to the works, rather than a formal deed of amendment or an agreement to vary the terms of the project agreement. The project agreement tends to give the project company only limited reasons and time to object to a Variation Order. This can enable the public body to perhaps force through a change without the project company having a proper opportunity to object. We can exemplify adjudication which is a short-term dispute resolution mechanism. Adjudication may be defined as a legal process where an arbitrator or judge reviews evidence and argumentation including reasons set forth by opposing parties to conclude concerning rights and obligations between the parties.[12] This type of dispute resolution is used extensively in the construction sector due to being short-term. As we say below, adjudication reference Housing Grants, Construction and Regeneration Act in the UK. For example, we recently won an adjudication which found that the public body was not entitled to change the risk/reward profile for lifecycle maintenance by way of a variation enquiry. Such an amendment would have made the project economically unsustainable for the project company. The Adjudicator confirmed that such a change would, instead, need to be agreed as an amendment to the terms of the project agreement. We have seen this kind of dispute frequently in the healthcare sector.

- We have also acted for project companies defending claims for alleged defects which are not defects but rather the natural effect of technical requirements being agreed to with regard to budget and not "buildability." Some defects occur due to waivers on technical requirements and low budget. We have seen these in the healthcare sector both in major hospital projects (temperature issues due to compliance with mechanical and electrical design) and mixed use healthcare schemes (flooding due to compliance with agreed drainage design).

The typical dispute mechanism in the UK PFI or PPP contracts is initially to hold an informal consultation to

[12] N. Gould, "Adjudication and ADR: an overview" p.7-8.

attempt to resolve the dispute in "good faith." If this is unsuccessful then there is an escalation to a project board or liaison committee. If this is also unsuccessful, the project agreement usually provides for litigation (or sometimes arbitration) after an adjudication or expert determination. The parties would have the right to refer the dispute to adjudication at any time provided the dispute is a construction dispute under the Housing Grants, Construction and Regeneration Act 1996 (as amended).

We have found that most PFI disputes are incapable of being resolved at the informal levels and more disputes are being resolved using the interim binding measures of adjudication or expert determination. In one dispute we are handling there have been a number of contested local court hearings where the public body unsuccessfully sought to defend an expert determination by asking the court to provide declaratory relief as to the meaning of certain contractual provisions.

While the economic landscape remains one of austerity for public bodies, more and more of the long term project agreements agreed to prior to the downturn will be deemed unaffordable. As such, the likelihood of disputes remains high.

3. Resolution of disputes in health PPPs in Turkey

The Ministry of Health of the Republic of Turkey has developed and is implementing a plan to expand and improve its medical services by creating a new and efficient public health infrastructure. These projects enable Turkey to open up to foreign investments in this sector. It is generally observed that foreign investors are nervous about relying on a legal system with which they are unfamiliar.[13] Accordingly, understanding the methods for dispute resolution in Turkey is considered to be very important for foreign investors.

The Ministry of Health's mission is to conduct effective planning for the construction, renewal and management of new health facilities and enhance the quality of already existing healthcare services by adapting them to modern standards. Utilization of the PPP model in order to benefit from the resources and experiences of the private sector plays a significant role in achieving this. In this regard, it is deemed important for the Ministry to perform all of its assigned roles and responsibilities transparently, fairly and honestly.

The Ministry of Health's stated goal is to perform its assigned roles and responsibilities successfully for the construction and renewal of the required health facilities up to internationally accepted standards by applying PPP models which allow enhancement of quality and increase

of accessibility to healthcare services. The Ministry wants to see itself as a leader in the creation of successful business models which may be used by other related institutions.

Article 47 of the Turkish Constitution allows for the implementation of PPPs, enabling governments to enter into contracts with the private sector to carry out certain public services.[14] The legislation governing PPP projects in Turkey is discussed below.

3.1. Analysis of legislation for dispute resolution in health PPPs

The PPP Act is the main legislation for healthcare PPPs. This Act, which has its roots in the Health Services Act No. 3359, principally aims to avoid the criticism posed by the private sector with regard to the demands and guarantee requirements for finance providers. There is a provision in the PPP Act that deals with the resolution of disputes.

Article 11, set forth below, provides the applicable law and alternative methods for dispute resolution:

"Turkish law applies to legal disputes that may arise between the parties during the implementation of the contract and the courts of the Republic of Turkey shall be the authorized forum for resolution of such disputes. However, the parties may agree that disputes may be resolved within the frame of the International Arbitration Law dated 21st June, 2001 and numbered 4686, provided that Turkish law is

[13] "Dispute Resolution Systems Available," PPP in Infrastructure Resource Center website.
[14] M. Rodrigues, D. Şahbaz, E. İnal, "Airport PPPs in Turkey," p.1.

the applicable law and the hearing is to be in Turkey."

Moreover, the Regulation concerning the Construction Facilities, Renovation of Existing Facilities and Purchasing Services by the Ministry of Health through PPP Model (the '**Regulation**'), which was published in May 2014, is also of some note regarding dispute resolution. For example, Article 49 of the Regulation, entitled "Matters that will be included in the contract," requires that procedures for resolution of disputes are to be part of the contract.[15] In addition, Article 51/2 of the Regulation provides that:

"The contract is subjected to provisions of private law."

That said, as can be seen, provisions concerning dispute resolution are limited, providing little more of substance than that, regardless of the dispute resolution methods used, Turkish Law must be applied.

3.2. Resolution of disputes in Turkish legal system

Given the Turkish Law requirement mentioned above, the following addresses some of the most important applicable laws and procedures related to resolution of disputes under Turkish Law.

3.2.1. Code of civil procedure

The Turkish Code of Civil Procedure (the '**Code**') determines the jurisdiction of specific courts and sets forth special procedures applicable in civil proceedings before these courts.

According to Article 407 of the Code, certain provisions of the Code shall be applied to disputes which do not contain a "foreign element,"[16] as defined in the Article 2 of the International Arbitration Law, and in disputes where Turkey is determined as the seat of arbitration.

The relevant provisions of this Code regulate the following issues in domestic arbitration, that is arbitration without a "foreign element:" The scope of application of the provisions, arbitrability of cases, waiver of the right of objection to breach the arbitration agreement, court of competent jurisdiction and court assistance, definition and form of arbitration agreements, objections to arbitration, preliminary injunctions and preservation of evidence, number, appointment, challenge and liability of arbitrators, competence, equal treatment and the parties' right to be heard, determination of procedural rules, location of arbitration hearings, commencement and term of arbitrations, statements of claim and defense, hearings and proceedings without hearings, failure of a party to attend arbitral proceedings, appointment of experts, collection of evidence, procedures for rendering an award, settlement, termination of arbitral proceedings, form, content and preservation of arbitral awards, correction, interpretation and completion of arbitral awards, notifications, actions for cancellation of arbitral awards, arbitrators' fees, costs of arbitral proceedings, deposit of advance payments and payment of costs and restitution of arbitral proceedings. Without going into each of the matters listed above, suffice it to say that the procedures used in domestic arbitration are set forth in great detail in the provisions of the Code.

3.2.2. International arbitration law

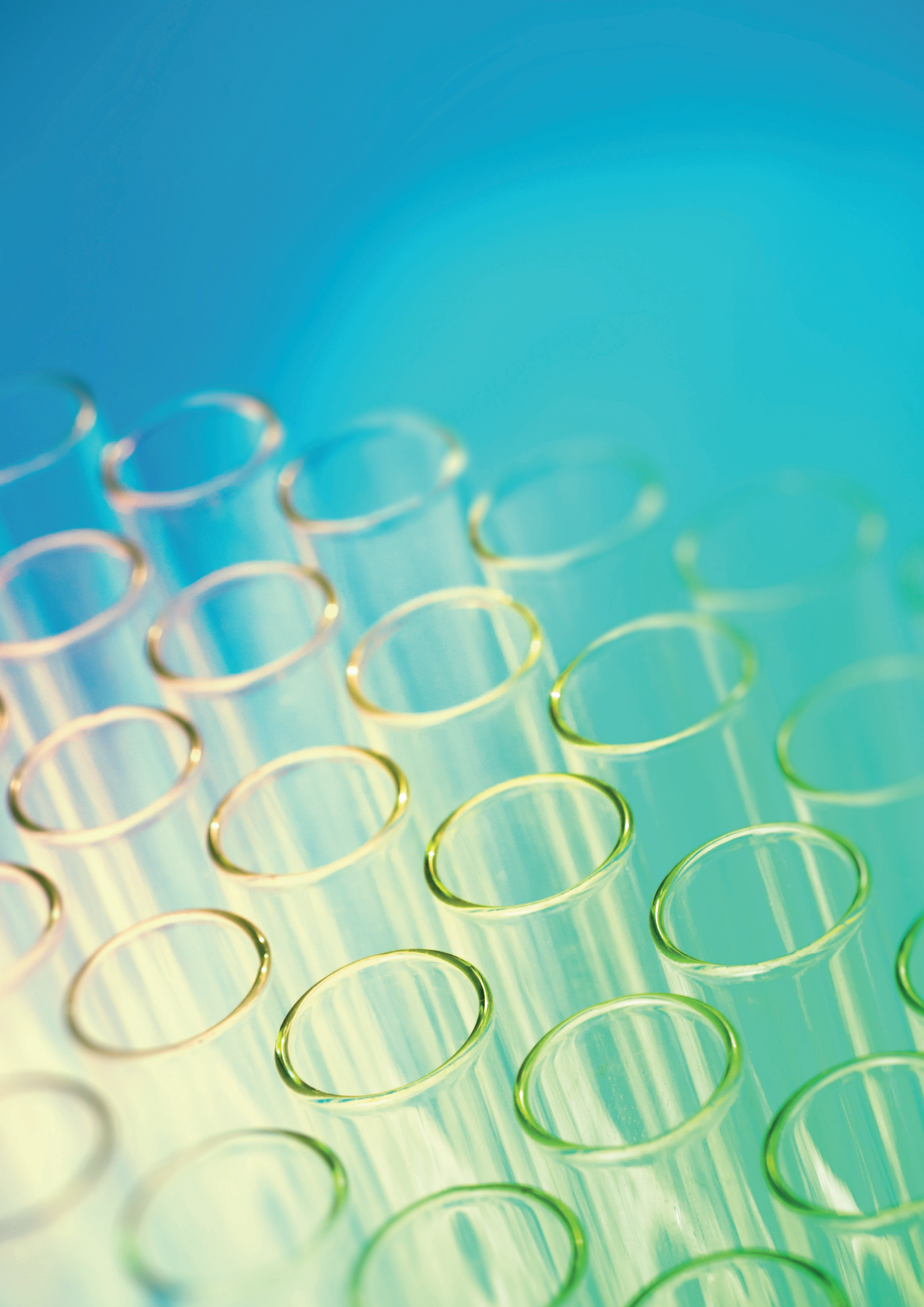
International arbitration law No. 4686

Following the increase in international commercial relations, investment transfers have been also increased. At this point, arbitration procedures in the country where foreign investors and credit institutions invest are extremely important. Turkey has enacted International Arbitration Law No. 4686 to encourage foreign investment and provide arbitration to be held in Turkey.

Scope of the law in question:

- This Law may be applied with respect to the disputes containing foreign element and for which Turkey is determined as the seat of arbitration or;
- For which the provisions of this Law are chosen by the parties or the arbitrator or the arbitral tribunal or;
- Cases in the settlement through international arbitration of

[15] Article 67 of the Regulation, under the heading of "Dispute Resolution," includes this same provision.
[16] We will mention the "foreign element" in the section "International Arbitration Law No. 4686".



the disputes arising from the concession agreements and contracts regarding public services in which a foreign element exists pursuant to the Law No.4501.

The concept of a foreign element has utmost importance in terms of determining the scope of the law. The article relating to foreign element is as follows:

"The presence of any one of the following circumstances indicates that the dispute contains foreign element and in this case, the arbitration acquires an international character.

1. That the domiciles or habitual residences or the place of business of the parties to the arbitration agreement are located in different States;

2. That the domiciles or habitual residences or the place of business of the parties are located in a State other than;

   a) The seat of arbitration in cases where it is specified in the arbitration agreement or determined on the basis of this agreement,

   b) The place where a significant part of the obligations arising from the main contract shall be performed or the place with which the matter in dispute has the closest connection;

3. That at least one of the company partners, who are parties to the main contract forming the basis of the arbitration agreement, have brought foreign capital according to the Legislation of Encouragement of Foreign Capital or that in order to be able to implement this contract, it is required to conclude credit and/or guarantee contracts for the purpose of obtaining capital from abroad;

4. That the main contract or the legal relation constituting the basis of the arbitration agreement realizes the transfer of capital or goods from one country to another."

The concept of a foreign element widely involved in the law in order to extend the scope of the law.[17] The only restriction imposed on the law is related to disputes concerning the real rights on the immovable properties in Turkey and to the disputes which are not subject to the will of both parties.

The International Arbitration Law limited the courts intervention to the arbitration. When the parties have a validly concluded arbitration clause related to the matter in dispute, the courts do not have principal jurisdiction on the dispute. The Courts shall have jurisdiction only for the special circumstances that is clearly referred in the Law No. 4686.[18]

This Law brought an innovation concerning conservatory measure and conservatory attachment. Unless otherwise agreed, during the arbitral proceedings, the arbitrator or the arbitral tribunal on the request of one of the parties may decide upon the conservatory measure and conservatory attachment.

One of the innovations brought by the Law No. 4686 concerns fees of arbitrators. Unless otherwise agreed, the fees of the arbitrators shall be agreed between the arbitrator or the arbitral tribunal and the parties, taking into consideration the amount of the claim in dispute, nature of the dispute and the term of arbitral proceedings.

The parties may also determine the fees of the arbitrator or the arbitral tribunal by reference to the international established rules or institutional arbitration rules.

[17] Prof. Dr. Kemal Dayınlarlı, "International Arbitration Guide" p.31.
[18] Prof. Dr. Z. Akıncı, "Arbitration Law of Turkey: Practice and Procedure" p.43.

If the parties and the arbitrator or the arbitral tribunal can not agree on the determination of the fees or the arbitration agreement does not include any provision regarding the determination of the fees, or no reference has been made by the parties to the established international rules or institutional arbitration rules in this respect, the fees of the arbitrator or arbitral tribunal shall be determined according to the fees tariff prepared annually by the Ministry of Justice by consulting with the concerned professional organizations in the nature of public establishment.

Both agreement on fees between parties and the arbitrator or the arbitral tribunal, and in the event that the parties and the arbitrator or the arbitral tribunal cannot agree on the determination of the fees, fees tariff to be applied may make international arbitration more attractive.[19]

UNCITRAL arbitration rules

UNCITRAL Arbitration Rules were created in 1976. When these rules were established, ad hoc arbitration was adopted instead of institutional arbitration to maintain the flexibility of the arbitration.

It is considered that the establishment of UNCITRAL Arbitration Rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems will contribute to the development of international relations. These rules based on safe and quick international trade are the most frequently used rules for ad hoc arbitration.[20]

In Turkey, UNCITRAL Arbitration Rules were placed into law with International Arbitration Law No. 4686 in 2001.

UNCITRAL Arbitration Rules offers a comprehensive set of rules about arbitration procedure to the parties that consent to disputes arising from international commercial relations to be dealt with by ad hoc arbitration. These rules provide the possibility of solving the problem with a reference, without the need for long negotiations. Thus, in the event that the parties made reference to the UNCITRAL Arbitration Rules, these rules will become a part of the arbitration agreement. UNCITRAL Arbitration Rules give priority to parties' wills.[21]

The parties must have accepted UNCITRAL Arbitration Rules through an agreement to implement these rules. Due to the fact that UNCITRAL Arbitration Rules are not binding, if necessary, the parties may propound different provisions in the agreements. When deemed necessary, the parties may provide different arrangements due to UNCITRAL Arbitration Rules are not binding.[22]

UNCITRAL aims to provide fair arbitration, prevent the loss of time and create a specific order for the implementation of arbitration rules through exemplary flexible arbitration rules in this respect.

[19] Prof. Dr. Kemal Dayınlarlı, "International Arbitration Guide" p.41.
[20] Yearbook of the UNCITRAL, 1982, Vol.XIII, p.420.
[21] H.E. Demircan, "Ad Hoc Arbitration under International Arbitration Law Provisions and UNCITRAL Arbitration Rules" p.25; No mer-Ekşi- Öztekin, p.66.
[22] H.E. Demircan, "Ad Hoc Arbitration under International Arbitration Law Provisions and UNCITRAL Arbitration Rules" p.25; Kalpsüz, UN Commercial Law Commission, p.2.

3.2.2. Law on mediation in civil disputes

Mediation is one of the alternative dispute resolution mechanisms that is very new in Turkey. Mediation is an option to solve disputes between the parties. In contrast to litigation and arbitration, the third party (mediator) does not have authority over the parties, and the third party cannot impose a decision on the dispute. It is seen that the mediation is economical and short term in comparison with the arbitration.

Law on Mediation in Civil Disputes regulates mediation under Turkish law. Article 1 of the this Law stipulates that mediation may be applied in private law disputes, arising solely from the affairs or actions on which the parties may freely have a disposal, including those possessing a foreign element.

This Law aims to regulate the procedures and principles for resolving civil disputes by mediation and without recourse to courts; the aim is to reach a solution in a simple and easy manner through this method, a form of alternative dispute resolution.

Mediation is defined in Article 2/b of Act No. 6325 as follows:

"A method of voluntary dispute resolution system carried out with the inclusion of an impartial and independent third party who is specially trained to bring the relevant parties together by way of systemic techniques and with a view to help such parties mutually understand and reach a resolution through a process of communication."

Mediation is an effective dispute resolution method for individuals and companies that are willing to resolve their issues as soon as possible. An important feature of mediation is that it is applicable to the resolution of civil disputes as well as disputes containing a foreign element.

3.3. Resolution of disputes in the Kayseri Health Campus Project's contract

The Kayseri Health Campus Project was the first PPP project carried out by the Turkish government, and the project may provide useful insights and guidelines for other PPP projects. Regarding its principal aspect, the provisions used there concerning dispute resolution shall be described in detail.

In accordance with the implementation of this project's contract, the dispute resolution procedure has three phases:

- Negotiation Phase (Chief Executives of the Administration and the Project Company)
- Expert phase
- Arbitration phase

In accordance with the contract provisions, if there was a dispute between the parties, first of all the dispute was to be referred to the Chief Executives of the Administration and the Project Company. The Chief Executives were to be appointed independently by the government and Project Company.

If the dispute was not resolved within 10 business days of the original referral, either Party was able to commence the procedure for the resolution of the dispute through an Expert. It was compulsory for the Parties to have recourse to the Expert Procedure before having recourse to arbitration.

The Expert was to fulfil his duty within 20 business days of accepting the appointment, or for a longer period if the parties so agreed.

Within the period of time, the Expert was required to draft and send to the parties an Expert Report based on the examination he had carried out. The dispute was to be resolved according to the Expert Report. In this regard, the parties were to communicate to the other party and the Expert, within a certain period, their confirmation of their adoption of the Expert Report.

In the event that the dispute is not resolved pursuant to the procedures mentioned above, the dispute was to be resolved via use of arbitration. Applicable laws to the dispute were "Law no. 4686 of the International Arbitration Law" and Turkish Law. The

Arbitration was to be held in Ankara and in the Turkish language.

According to the contract, the arbitral tribunal was to be comprised of three arbitrators. Each party was entitled to appoint one arbitrator. The two party arbitrators then were to meet and nominate the third arbitrator, who was to chair the arbitration tribunal. In the event the arbitration tribunal was not able to be formed pursuant to the above mentioned procedure, the related provisions of the Law No 4686 of the International Arbitration Law were to apply.

When the dispute resolution procedures in Turkey, as exemplified by the ones used in Kayseri Health Campus Project, are compared with the procedure in the UK, it is seen that there are many similarities. Both countries typically follow a three stage procedure. Initially, parties seek to solve the dispute through a board established specific to the project. In the UK, if informal consultation is unsuccessful, then the disputes are negotiated through a project board or liaison committee. As mentioned above, in Turkey the board is called the "Chief Executives."

If this board fails to resolve the dispute, the parties move to the second stage, which varies for both countries. In the UK and Turkey, an expert is involved, with Adjudication in the UK for cases falling under the relevant legislation. Additionally, in the UK, an alternative dispute resolution procedure with non-binding decision can be used.

Similarities are observed between procedures adopted by both countries in the final stage. The final stage in both countries provides resolution of disputes via arbitration. In the UK, any binding alternative dispute resolution procedures may be used, and the parties may resort to the local court for final resolution.

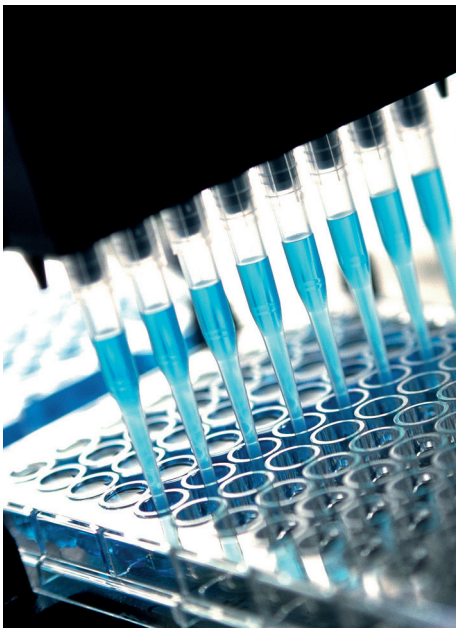
Moving on to time limits, it is observed that time limits are typically set forth in contracts drawn up in Turkey and the UK.[23] The parties also may not set forth time limits in contracts in Turkey and the UK; it is subjected to contracts signed between the parties. In the event that the parties do not set forth time limits, one of the parties may go to arbitration or litigation provided that the party proves that he had invited the other party to solve the dispute and waited a reasonable amount of time.

[23] T. Beckers, J. Gehrt, J.P. Klatt, "Renegotiation Design for Long-Term Contracts The Case of Public-Private Partnerships," p.14.

4. Conclusion

The purpose of this paper is to highlight the importance of attention to dispute resolution in order to ensure the efficiency of PPP projects. Dispute resolution and settlement procedures are becoming increasingly significant in PPP projects, projects that usually establish a contractual relation between parties extending over a very long duration. Alternative dispute resolution—that is, using alternatives to local court dispute resolution—has developed considerably of late throughout the world. The existence of well-defined conflict-resolution mechanisms plays an increasingly integral role for private parties as they seek to ensure the stability of profitability of their projects.[24] Furthermore, dispute resolution systems play an important role in ensuring the smooth operation of the provision of public services.

The public sector has greater administrative powers in Turkey than in many other countries due to multiple reasons, including tradition. Because the state has retained so much authority in so many areas, ensuring the highest level of fairness in the solution of disputes should be regarded as a matter of the utmost importance to the parties involved as well as to society in general.



[24] E. Engel, R. Fischer, A. Galetovic, "Public-Private Partnerships to Revamp U.S. Infrastructure", p.22.

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Balcıoğlu Selçuk Akman Keki Attorney Partnership is an Istanbul-based full service law firm with a team of 75-plus lawyers and economists. Our practice focuses on a wide range of areas including real estate, corporate, mergers and acquisitions, banking, project finance, capital markets, competition and anti-trust, employment, litigation and arbitration, telecommunication, regulatory and public law and intellectual property. We represent and advise Turkish and multinational clients, including Fortune 500 companies, in the banking and finance, private equity, real estate, manufacturing, hospitality and leisure, retail, automotive, energy, information technology, life sciences, luxury fashion and beauty, and media sectors.

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