

The Process for Drawing up and Implementation of International Construction Contracts

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Abstract

If parties of a contract have a different state citizenship or residence or habitual residence in different countries, or if subject in the contract, service, or payments go beyond borders of a country, then this contract has international nature. The parties, could prevent the emergence of a lot of dispute during the phase of preparing an international construction contract or a joint venture agreement, taking into account specific issues likely to arise. In this context, in order to prevent the possible disputes likely to arise in the future, some of the principles to be considered during the design of the contract minimize disputes likely to arise in the future and allows certainty for a solution even in case a dispute arises. For this reason, , attention and care in stage of the preparation of the contract shall seal destiny of cases that may be incurred in future due to the contract between the parties. That is to say, it can be said that contractual cases are won or lost in the preparation of the contract.

Keywords: FIDIC, Conditions of Contract, International Standard Forms of Contracts, Specifications, Applicable Law, Dispute Settlement, Employer, Contractor, Sub-Contractor.

Introduction

The subject of this article is the issues that must be considered in drawing up international construction contracts and standard contracts and specifications which are used in preparation of international construction contracts.

A. THE CONCEPT OF CONTRACT IN TURKISH LAW, THE ELEMENTS OF CONTRACT AND CONTRACT OF WORK
 According to Article 1 of Turkish Code of Obligations, when two parties mutually declare consent that is convenient with each other, the contract shall be completed. Regarding this provision, in the contracts which arise from a debt relationship between the parties, three elements must be present. The first element is a creditor who has the right to demand, the second is a debtor who is obliged to fulfill a demand and the third is an act of the debt relationship.

Two or more natural or legal persons who have capacity to act (capacity to use civil rights) for the arising of the contract must declare their wills and these mutual wills must be convenient with each other. In other words, the contract is set up, when a party offers something and then other party accepts this offer. Sub-type of contract in Article 355 of the Code of Obligations contract of construction is a contract (work) that the contractor becomes indebted to the employer in the execution of a work in return of a fee which employer is committed to provide the contractor. As can be understood by this definition, contract of construction consists of three elements "creation of a work", "fee" and "agreement".

The contractor's obligations in a Contract of Work are to execute work personally, to execute work faithfully and diligently, to supply instruments, to give general notice and to start on time and continue to work, to liquidate damage and delivery of the works. The employer's obligations in a Contract of Work are payment of the contract price, to supply material, to report dangerous conditions to the contractor that could not see and which are known by the employer or other characteristics of materials and things left to repair to the contractor that will affect the work, work control and in case of defective work, to notice of defect liability.

B. DESCRIPTION, SPECIFICATIONS AND ELEMENTS OF CONSTRUCTION CONTRACTS

The most applicable form of work contract is construction contract and building of all following buildings forms the subject of construction contract from a small building which a property developer has built to the largest construction of dams, highways, tunnels, bridges and skyscrapers undertaken by consortia constituted by multi-national contracting companies.¹

¹ Eren, Fikret: "Borçlar Kanunu Açısından İnşaat Sözleşmeleri", İnşaat Sözleşmeleri (Ortak Seminer: Ankara, 18-29 Mart 1996), 2.Tıpkı Basım, Banka ve Ticaret Hukuku Enstitüsü, Yayın No: 381, p.49.

1. DESCRIPTION OF CONSTRUCTION CONTRACTS

Code of Obligations in Turkish Law has not specially regulated the contract for construction also of which definition has not been done yet. In Code of Obligations, the construction contract is only mentioned indirectly in some articles related to the contract of work.² In this context, Article 363/2 of Code of Obligations clearly refers to "real property construction".

The construction contract is a contract that a contractor owes to create and deliver a real estate to an employer in exchange for a price committed by an employer.³ Construction contract has the nature of work contract. With a contract of construction, a contractor owes to create a construction and in return, an employer owes to pay a certain fee.⁴ The contract of construction is issued between Articles 355-371 in the Code of Obligations.

According to the Code of Obligations Article 355, the work is a contract with which one party (contractor) assumes a production of something in return of providing something by other party's commitment (the employer). With a Construction contract, the contractor commits to create a building (structure) work, while the employer commits to pay a price.⁵ The contractor is one of the parties of the construction contract that may be a real person or legal entity (joint stock, collective or limited liability company in the form of a commercial partnership). The employer is one of the parties of the construction contract that may be a real person or legal entity (joint stock, collective or limited liability company in the form of a commercial partnership). Even contractors coming together with an ordinary form of partnership, it is also possible to make construction together. The most common types of partnerships created in the form of ordinary practice are "joint venture" or "consortium".⁶

For the employer of all or part of the construction work undertaken to perform by anyone is called "general contractor". Contract between the general contractor and the employer of a work is construction contract and provisions relating to the contract of work in The Code of Obligations are applied to this contract. General contractor only undertakes the building of construction. Total contractor undertakes planning and designing of construction beside building. The employer also may be natural or legal person.⁷

2. CHARACTERISTICS OF CONSTRUCTION CONTRACTS

Construction contract, having full debts on both sides, is like onerous and permanent contract. Construction contract is a contract by a full two-party debt and principal acts of the parties debted in this agreement constitute essential elements of the contract.⁸ The contractor undertakes a particular act of service, so it is similar to the contract of service. In addition, because the contractor is obliged to deliver the work to the employer, this feature is close to the sales contract.⁹

A construction contract is an onerous contract; if contractor undertakes construction of the work without onerous contract, this is not a construction contract. In such a case, that it is whether attorney agreement or an innominate contract like a construction contract is controversial. The problem should be solved according to the concrete features of the case and in case of doubt, "innominate (mixed) contract" should be considered.¹⁰

While the nature of a construction contract is becoming a contract with instanteneus performance, it is a contract similar to permanent contract in some aspects. After all, in the long-term construction contracts performances owed by the contractor is similar to permanent ones.¹¹

A construction contract is regulated in nature of "individual contract" consisting terms and conditions agreed by the parties. However, the included general operation conditions (FIDIC Contracts and Specifications Type, etc.) also are seen in construction contracts issuing large civil work contract.¹²

² Ibid.

³ See Seliçi,Özer: İnşaat Sözleşmelerinde Müteahhidin Sorumluluğu,İstanbul,1978,p.4.

⁴ Eren,op.cit.,p.49.

⁵ Ibid., p.50.

⁶ Ibid.,

⁷ Ibid., p.50.

⁸ Ibid.,p.51.

⁹ Ibid.

¹⁰ Ibid.,p.52.

¹¹ Ibid.

¹² Ibid.

3. ELEMENTS OF CONSTRUCTION CONTRACTS

The most typical element of a construction contract is the creating of construction. The building work constituting the subject of a construction contract has real estate characteristic, while contract of work has movable estate feature.¹³

“Construction” can be defined as building works directly or indirectly connected to earth, reserved for using as shelter or feeding other needs of living beings such as human or animal, and to storage or place of non-living things such as goods. Construction refers to all kinds of structural work with material nature.¹⁴ Structure must be directly or indirectly connected with the earth, more or less.¹⁵

The construction (building) concept is defined in Article 5 titled "Definitions" of Turkish Zoning Law. According to the mentioned article, "structures (constructions) are fixed and mobile plants involving public and private permanent or temporary, underground and above ground construction on land and in water and additional alterations and repairs of these". Accordance with this Article, “buildings are structures that can be used by itself, covered and where people can enter into for living, working, recreation or rest, worship and the protection of animals and belongings.”¹⁶

The construction is divided into as movable and real estate building. Article 363 of The Code of Obligations, mentioning the real estate construction; Article 654 of Turkish Civil Code refers to estate construction. The subject of a construction contract in principle is a real estate building. However, being connected to an existing construction can constitute the subject of contract of movable building. An integral part of the construction and the details are included in the concept of building.¹⁷

Work of a building, can be constant, can also be temporary. Sheds, cottages, construction site buildings, are structures built for a temporary period and examples of temporary construction. Structures outside the building are called as "other building".¹⁸

Additions, alterations, repairs and adjustments to an existing building are constructions. Even the destruction of an existing structure can be the subject of the work in the construction contract.¹⁹

A construction contract's validity, in principle, is not subject to any form of requirement. However, in practice, parties draw up written and even formal contracts of the important and major construction.²⁰

A construction contract for plot is drawn up between plot owner and the contractor (floor construction contract in return for share of plot) because taking possession of real estate is aimed (ie. shares of the plot regarding independent parts) in terms of validity should be drawn up formally. In order to be valid, the contract containing debt of real estate plot transfer to the contractor must be done as official.²¹

4. THE RELATIONS BETWEEN EMPLOYERS AND CONTRACTORS AND SUB-CONTRACTORS DURING CONSTRUCTIONS

a. THE RELATION BETWEEN EMPLOYERS AND CONTRACTORS

The employer may give various instructions directly or indirectly to the contractor during construction work being executed. These instructions may be related to construction work itself, or it may be about the way of forming the work. In addition, the employer may give instructions about materials used in construction to the contractor or the sub-contractor.²²

In accordance with Article 356/II of The Code of Obligations, the contractor is obliged to form or take out someone else under its own management the construction work in debt personally. Deed owed by the contractor for forming personally or by someone else under his management debt is based on the idea that the contractor's personality, personal ability and competence have importance in a construction contract.²³

¹³ Ibid., p. 53.

¹⁴ Zevkliler, Aydin: İmar Kurallarına Aykırı ve Zarar Verici İnşaat, Ankara, 1982, p.136-137.

¹⁵ Eren,op.cit., p.53.

¹⁶ Ibid., p. 54.

¹⁷ Ibid.

¹⁸ Ibid.,p.55.

¹⁹ Ibid.

²⁰ Ibid.,p.57.

²¹ Ibid.

²² Eren, Fikret: “İnşaat Sözleşmelerinde Müteahhidin Borçları ve Bu Borçların Yerine Getirilmemesinin Sonuçları”, İnşaat Sözleşmeleri, Ortak Seminer: Ankara, 18-29 Mart 1996, 2.Tipki Basım, Banka ve Ticaret Hukuku Enstitüsü, Yayın No:381, p.63.

²³ Ibid., p.64.

The prevision regulating the debt of act by the contractor forming personally or by someone else under his management is not a mandatory provision, the parties may agree the opposite. For example, beside in the contract giving all or part of construction work to the sub-contractor may be predicted, giving construction work may be prohibited completely or partially.²⁴

b. THE RELATION BETWEEN CONTRACTORS AND SUB-CONTRACTORS

According to article 356/II of The Code of Obligations, if the nature of work does not matter in terms of personal ability, the contractor may also create the work of construction through someone else. In this case, the main contractor can take out all or part of construction work to the sub-contractor.

Sub-contracting agreement is a construction contract with its own nature. The main contractor on behalf of the owner of this business, not contract, behalf and account its own making. The main contractor does not make contract on behalf of the employer, but makes its own behalf and account. The sub-contractor has the authority to act on its behalf with this contract independently from the main contractor. After all, the sub-contractor is not dependent on the main contractor, but is an independent assistant, in professional terms has a particular expertise on the subject. In this context, for example, in case a main contractor transfers construction of woodwork, plaster or the sanitary works to a third person, this person is a sub-contractor.²⁵

Because the sub-contractor is not a dependent assistant of the main contractor, the main contractor has no authority of auditing and supervision over the sub-contractor. According to some opinions, beside the sub-contractor is not fully dependent to the main contractor incase agreed in the contract or the nature of work requires, that the sub-contractor works under management and supervision of the main contractor is also possible.²⁶

According to Article 356/II Code of Obligations, the authority of the main contractor to delegate all or part of the job to the sub-contractor is explicitly agreed in the contract or is left the consent (permission) of the employer or is based on convenience the nature of the work to be made by someone else.

The authority of delegating sub-contractor by the main contractor for all or part of the work either can be given at the time of the contract or then with a separate contract. All or part of the work transfer to the sub-contractor, if subject to permission of the employer, the employer's permission must be received for the transfer. The employer then could ratify the transfer made without the permission of him. The permission of employer in principle is not subject to law but it is useful being written.²⁷

The main contractor assigns the sub contractor work his own behalf and account with the construction contract. In this case, between them a new construction contract is concluded independently from the first contract. The sub-contractor performance of the work of building and delivery debt is not for the employer, but it is for the main contractor.²⁸

The employer is not entitled to give instructions to the sub-contractor and also there is no right to demand from the sub-contractor with regard to deliver to him to creating the work. The employer may request the sub-contractor if the conditions occurred only in accordance with tort previsions.²⁹

If the sub-contractor make a commitment to the employer with a contract that he'll perform works full and on time the main contractor had given him, the employer may lead to the sub-contractor within the framework of this agreement. In addition, the contractual relationship between the main contractor and the sub-contractor, if the nature of a contract made for the benefit of the employer, the employer can have some demands from the sub-contractor according to the rules of the contract for the benefit of third party.³⁰

Because of the absence of contractual relationship between the employer and the sub-contractor, the employer has no debt to pay a fee to the sub-contractor. However, if the employer undertakes or guarantees to pay the debt in joint debtor or guarantor qua to the sub-contractor, payment obligation of price to the sub-contractor is in question.³¹

²⁴ Ibid.

²⁵ Ibid., p.65.

²⁶ See Tandoğan, Haluk: Borçlar Hukuku, Özel Borç İlişkileri, C.II, 3.Basım , Ankara, 1987, p.77-78.

²⁷ Eren,op.cit.,p.65.

²⁸ Ibid.

²⁹ Ibid., p.66.

³⁰ Tandoğan, op.cit., p.85.

³¹ Ibid., p.88.

Building work generated by the sub-contractor has some risks in terms of the employer. For example, in case the employer has paid fees to the main contractor before, he fails to pay this fee to the sub-contractor, the employer may have to pay again because of the legal mortgage to the sub-contractor.³² Since according to the provisions of the Civil Code article 807 and continuation of it, because the sub-contractor works on building on plot of the employer, in order to receive price from the main contractor, using to legal right to mortgage against to the employer, the sub-contractor may request the registration of this right. This right to mortgage is valid regardless of whether or not transfer of the work to the sub-contractor is lawful. Even if the employer is informed of the transfer or having land registry of legal mortgage right by the main contractor's favor, this right could be used. The employer can not remove the right of legal mortgage of the sub-contractor in the contract with the main contractor. The sub-contractor in advance can not waive the right of legal mortgage. In terms of legal mortgage registered to land office, the employer, is not responsible for the registration with all the goods only responsible of the real estate.³³

Against the risk of the payment for the second time, the employer can add a record in his contract with the main contractor that "main contractor will be paid if the price obligation to the sub-contractor has fulfilled." As the same way, the employer can have the condition in the contract that the fee of main contractor and the sub-contractor is to be paid directly by him.³⁴

In case the property owner is a public legal entity, and that of the construction work on is public property, because both the main contractor and the sub-contractor receive fee for such real estate for a public, it is not possible to use the rights of legal mortgage. Because, in case the debt of public goods is not paid, by forced execution, cashing in is not possible.³⁵

When the main contractor's liability for the employer because of the sub-contractor's actions is examined, the following result is reached: If the main contractor has the authority to delegate all or part of the work to the sub-contractor, the sub-contractor is considered the main contractor's assistant and due to the actions of the sub-contractor only in case of faulty in choosing sub-contractors or giving them instructions, the main contractor is responsible to the employer according to Article 100 of The Code of Obligations. Here, as there is no authority to audit the sub-contractor by the main contractor, because of negligence it can not be claimed to be responsible for his supervision.³⁶

The main contractor can not evade responsibility. by proving that had chosen a good sub-contractor and given necessary instructions to him. After all, even if the sub-contractor is independent, he is assistant of the main contractor. For this reason the main contractor can evade by proving that being regarded as faulty if only he had acted so, for the sub-contractor's action.³⁷

In contrast, despite the main contractor has no authority to delegate work to the sub-contractor, if such delegation is in question and action of the sub-contractor damaged the employer, the main contractor to the employer is liable according to Article 96 of Code of Obligations, because of sub-contractors' actions of faulty against obligations.³⁸

According to article 100 of The Code of Obligations/I, the main contractor can be responsible also to the employer due to the sub-contractor's act of damaging. That the work delegation is not lawful does not change the result.³⁹

The main contractor acting on behalf and account of the employer may delegate the contract to a third party. Here, the contractor acts as a representative or agent of the employer.⁴⁰

5. OTHER MATTERS COVERED IN CONSTRUCTION CONTRACTS

According to Article 356/III the of the Code of Obligations, providing debt of the necessary instrument, and vehicles, i.e. tools and materials to generate work of building belongs to the contractor in principle. However, in the construction contract between them, the parties may agree the contrary.

³² Ibid., p.89.

³³ Ibid.

³⁴ Eren, op.cit., p.67.

³⁵ Tandoğan, op.cit., p.91.

³⁶ Eren, op.cit., p.67.

³⁷ Tandoğan, op.cit., p.94.

³⁸ Eren, op.cit., p.68.

³⁹ Ibid., p.67.

⁴⁰ Tandoğan, ibid., p.95.

Supply of construction equipment park, construction building and construction of workers' housing and scroll refectories, electricity and water installations required for construction site and construction, procurement of service vehicles, fuel supply and other liabilities are among them.⁴¹

If tools and equipment provided by the employer, contractor must use them carefully. If the contractor is obligated for the supplying devices and equipments, must provide sufficient vehicles suitable to use for the agreed work. If the contractor provides inadequate, unsuitable or defective equipment for the work performance, the employer can act according to Article 358/II of Code of Obligations.⁴²

Whose providing debt of raw materials such as sand and stone and semi-finished materials such as iron, cement and lime that will be used for the construction work can be agreed by the parties freely in the construction contract. Land and plans, in this sense are not considered material. In a usual construction contract, while the employer provides the material, the contractor constitutes the work of construction. In contrast, in contracts of delivery of a construction work, the contractor both provides the material and constitutes the work of the building. However, as a rule, because that the employer is obliged to provide material understood from Articles 357 / I and 357 / II and 356/III of the Code of Obligations, contractor's obligation to provide the material must be rejected in case of doubt.⁴³

Due to the material provided by contractor, he is responsible according to the provisions of the warranties. In case the material supplied by the employer, contractor must show attention to this material, protect and use it carefully to detect faulty material and have to notice the employer immediately. Also at the end of the work if the material remains, the contractor is obliged to refund the remained material to the employer.⁴⁴

Liability of insurance of material used in construction, in principle, belongs to the employer. However, in the contract, unless otherwise agreed, liability of insurance may belong to the contractor. In addition, covering expenses by the employer, in case the material is exposure to specific danger in emergency cases, the contractor must assure the material on behalf of the employer.⁴⁵

The contractor must give an account to the employer with respect to the material. Parties, may specify the details of the obligation of accounting in the contract that. Contractor is obliged to refund remaining of the material supplied by the employer at the end of the working. Remaining material is meant that all kinds of material which is not integral part of the construction build.⁴⁶

According to the article 357/III of Code of Obligations, if it is understood that during the execution of the work the material and the land provided by the employer is defective, and the situations occur that endanger properly or timely execution of construction work or the intervention of third parties, the contractor is obliged to inform the employer immediately, otherwise he has to suffer negative results personally.

Notice is made orally or in written by the contractor personally or his authorized representative to the employer or his authorized representative. Contractor, after the notice has to wait until the employer's decision on continuation of the work. If the employer learns the faults and other situations that are under obligation to notice by contractor, from other sources other than the contractor and If the contractor is lack of such a notice, does not mean he is in violation of its notification obligation.⁴⁷

The construction work which is completed in accordance with the contract must be delivered to the employer by the contractor. For real estate buildings, before the delivery, register of deeds process is carried out.⁴⁸

If the employer fails to take delivery work of building as unjustified, he is put in default according to the provisions of the default of the creditor. In this case, if these works are able, they can be intrusted to the contractor.⁴⁹

With the delivery of construction work, the benefit and the damage on the work passes to the employer. Furthermore, in case of delivery, burden notice and inspection of the work by the employer shall arise. With the delivery, the contractor's fee claim shall become due and payable.⁵⁰

⁴¹ Eren,op.cit.,p.68.

⁴² Ibid.

⁴³ Ibid.,p.69.

⁴⁴ Ibid.,p.70.

⁴⁵ Ibid.,p.71.

⁴⁶ Ibid.

⁴⁷ Ibid.,p.72.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

The parties shall determine time of delivery of the construction work in the contract. In practice, that the parties make criminal terms and premium agreements in relation to the time of delivery is observed. Therefore if the contractor does not deliver the work of building on agreed time, he shall have to pay a penalty. On the other hand, when delivered to the contractor before the date of the agreed time, the employer shall be liable to pay him the agreed premium.⁵¹

The contractor is obliged to transfer the ownership of the construction work to the employer. The contractor must work diligently to fulfill obligations arising from the construction contract and must protect the interests of the employer. According to Article 356/I Code of Obligations, the contractor must be careful as the employee must do the same in a service contract.⁵²

The contractor is obliged to perform a construction work for the employer free from defects. While the contractor is creating the construction work carried out with contract, when submitting his work to the employer, according to the prevailing mentality of construction works, must implement the basic rules of science and technology and pay all attention which is expected from a reasonable and honest construction contractor who carries out performance of similar work.⁵³

Obligation of the contractor to pay attention is determined especially during the execution of the construction work of building according to well-known technical rules. In this context, the contractor is obliged to implement, basis of construction, building, materials, tools and equipment usage, known technical rules on security measures during the execution of them.⁵⁴

Every rule of which the accuracy in terms of theoretical aspects adopted within the framework science and experts and tested and applied by the majority of professionals and experts takes effect as a technical rule. It is not necessary to be readily applied by anyone and be a written rule in order to be adopted as a technical rule. When the rule is generally accepted in the science and practice, it is sufficient. However with the wide application of various professional environment, deviating from the required standard, a rule can not be granted as a technical rule. Similarly, technical rules, comply with the the latest state of science currently, but not have a successful application area can not be granted as rule. Even if the parties in a construction contract refer the old technical rules, it should be accepted that the contract contains the new technical rules under normal conditions, during the execution of the contract especially in case of doubt the technical rules in force should be regarded as valid. Professional chambers' published rules are considered the known rules when they are published.⁵⁵

The contractor who has all or part of the work built by the sub-contractor, he must prove this transfer authority, in case of dispute, he is obliged to prove this transfer authority. The contractor has a liability to perform construction work under his management or in personal diligently. A construction contractor has to abide faithfully to the instructions related to the construction work given by the employer while performing of construction work, has to carefully avoid damaging the employer's property values and personality and especially in case this material is supplied by the employer he has to protect, care these material and inform the employer.⁵⁶

According to Article 361 of the Code of Obligations, under the contractor's obligation, there is obligation to inform about instructions, plans and projects, material selection provided by the employer or his authorized assistants work related the performing of construction work.

Contractor must notify the employer in the course of work emerging large increases in cost price. The fee would paid by the employer, whether it is set according to the unit price or cost price, the situation does not change.⁵⁷ There are no regulations in the law about the form of obligation that the contractor is subject to inform the employer informing to the employer. However, in terms of easiness of proving, it would be appropriate to make notifications in writing by contractor to the employer.⁵⁸

⁵¹ Ibid.,p.73.

⁵² Ibid.

⁵³ Ibid.p.74.

⁵⁴ Ibid.

⁵⁵ Ibid.,p.75.

⁵⁶ Ibid.

⁵⁷ Ibid.,p.76.

⁵⁸ Ibid.,p.77.

The contractor must avoid announcing the secrets, information, decisions, business plans, discoveries that he had learned or entrusted to him by the employer during the performance of the work to third parties or using them for other purposes. For example, if the contractor uses for other works or appropriate the plans and the projects provided by the employer to contractor for use in construction, shall constitute violation of a duty of loyalty. The contractor can not use the construction idea and technique provided by the employer also after end of the contract without the consent of the employer for his own works.⁵⁹

6. TERMINATION OF CONSTRUCTION CONTRACTS

The reasons of the termination of a construction contract are as follows :

-When the contractor delivers the work without fault on time in accordance with the contract and the employer makes payment of fees on time fully, a construction contract is terminated due to performance.

- Determined in advance with the contractor approximate estimated cost (cost, price forecast) are extremely exceeded without the employer's effect, either during construction and after the end of the construction, the employer has the right to renege on a construction contract.⁶⁰

- The employer on condition to pay for the part that has been built before the completion of the work, and to compensate the contractor's full loss, he may unilaterally terminate the contract. In this case, the employer does not have to be based on a justifiable reason.⁶¹

-If the execution of the work has become impossible as result of an hardship event or an action of the employer or the contractor, (if the work has been removed), the construction contract terminates.⁶²

-If the employer fails to meet the debt of providing material or plot or paying fees, or if the employer does not deliver the presented him by the building contractor, the contractor may renege on a construction contract.

- If the contractor does not start on time or delay performance of work in violation of the contract or despite all the predictions he is delayed considerably which does not allow on time completion of the construction work without the owner's fault, the employer may renege on a construction contract without waiting for the time set for delivery.⁶³

- If construction work can not be used by the employer and if it is the severe defective that can not be compelled to accepted by the employer according to the rules of equity, the employer may renege on a construction contract by avoiding acceptance of the construction work or after acceptance of the work.⁶⁴

- If exceptional events that are unpredictable or can be estimated by the two parties but that are not taken into consideration occur later and make very difficult or prevents construction work, judge using his sole discretion increases the agreed price (i.e., adapts to changing conditions of construction contract),⁶⁵ or terminates the contract.⁶⁶

C. THE CONCEPT OF INTERNATIONAL CONTRACTS

If parties of a contract have a different state citizenship or residence or habitual residence in different countries, or if subject in the contract, service, or payments go beyond borders of a country, then this contract has international nature.⁶⁷

According to the new ideas and applications in this area, also contracts without a foreign element as personal or geographical elements or which are not connected with more than one legal system, more have the extent of international trade and / or international investment more have the international nature.⁶⁸

⁵⁹ Ibid.

⁶⁰ See the Code of Obligations a.367/I.

⁶¹ See the Code of Obligations a.369.

⁶² See the Code of Obligations a.368.

⁶³ See the Code of Obligations a.358/I.

⁶⁴ See the Code of Obligations a.360/I.

⁶⁵ See the Code of Obligations a.365/II.

⁶⁶ Eren, Fikret: "İnşaat Sözleşmesinin Sona Ermesi", İnşaat Sözleşmeleri (Ortak Seminer: Ankara, 18-29 Mart 1996), 2.Tipki Basım, Banka ve Ticaret Hukuku Enstitüsü, Yayın No:381, p.89-103.

⁶⁷ For different views and applications on the concept of international contract, See Şanlı, Cemal: Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk, Ankara, 1986, p.29-31.

⁶⁸ See Şanlı, op.cit., p.31.

An international court, as binding, which makes final decision for the conflicts arising from international contracts and an international law regulating, as binding, international contracts are not available. Therefore, the party wills, who provide for the national legal systems and the selection of national legal systems, determine the way and the material content of international contracts and arising settlements of disputes arising from these contracts. However, uniform rules and practices that will guide the parties in preparing an international contract various international codes such as FIDIC Standard Contracts and Specifications, general specifications, standard contracts, agreements.⁶⁹

The parties, could prevent the emergence of a lot of dispute during the phase of preparing an international construction contract or a joint venture agreement, taking into account specific issues likely to arise. In this context, in order to prevent the possible disputes likely to arise in the future, some of the principles to be considered during the design of the contract minimize disputes likely to arise in the future and allows certainty for a solution even in case a dispute arises. For this reason, attention and care in stage of the preparation of the contract shall seal destiny of cases that may be incurred in future due to the contract between the parties. In other words, it can be said that contractual cases are won or lost in the preparation of the contract.⁷⁰

D. THE ISSUES THAT MUST BE TAKEN INTO CONSIDERATION DURING PREPARATION PHASE OF INTERNATIONAL CONSTRUCTION CONTRACTS OR JOINT VENTURE AGREEMENTS IN TERMS OF PREVENTING POSSIBLE DISPUTES THAT ARE LIKELY TO ARISE IN FUTURE

Parties must be capable of drawing up the contract during the course of contract, according to their own national laws which they are subject. After all, a contract being valid and binding in terms of the parties depends on the parties competence to conclude the contract. Because rights and liabilities don't arise from the contracts, which are drawn up between the parties without having the capacity to draw up legally valid contracts. Therefore, for a business man, who will conclude an international contract, should be sure the existence of the other party's legal capacity has a great importance. For this purpose, examining each other's authority documents or signature circular during the contract negotiation or concluding stage is great benefit to the parties.⁷¹

Partners that will conclude a contract should assess interlocutors whether legally competent according to foreign legal system which they are subject to.⁷²

For a legal person who is a party to an international contract, the rights which to be benefited from, which obligations to be borne, what restrictions to be introduced the rights and obligations, rights and liabilities used through whom on behalf of the legal person, are determined according to the law carries out rights and acts capacity of the legal person. Because, according to comparative law, including real and legal persons' rights and licenses to contract, rights and acts capacity, are subject to the law governing personal status. In other words, whether real persons have rights and acts capacity or the limits of this capacity is determined the law of country of residence or habitual residence or citizenship. Legal persons (corporations, foundations, associations) rights and acts capacity are subject to the law of location of headquarters or "the law of the place of establishment".⁷³

According to Article 8 of No. 2675 of the Turkish Law on Private International Law and Procedural Law (LPILPL), capacity rights and act of real persons, is subject to the person's citizenship of that country (national) law. However, the foreign real persons who are incapable according to their national law, if they are competent according to Turkish law, they are considered capable to ensure the safety of operation in terms of their legal actions in Turkey."⁷⁴ "According to Article 8/4 (LPILPL), the rights and the acts capacity of legal entities is subject to the law of administrative headquarters in status. However, even if administrative headquarters of a legal entity indicated in the status in a foreign country, if the legal person's administrative headquarters is in Turkey, in order to ensure the safety of operation act the Turkish Law shall apply for legal person rights and capacity.⁷⁵

⁶⁹ For detailed information on this subject See Cremades, B.M./Plehn, S.L.: The New Lex Mercatoria and The Harmonization of the Law of International Commercial Transactions, Boston University ILC, V.2 (1984), p.317-348; Diamond, A.L.: Harmonization of Private International Law Relating to Contractual Obligations, Res.des Cours, 1986-IV, No:199,p.241 etc.; Boggiano, A: International Standard Contracts, Res.des Cours, 1981-1, p.17 ff.

⁷⁰ Sanlı, Cemal: Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, 3.Baskı, Beta Yayınları, İstanbul, Haziran 2005, p.3-7.

⁷¹ Ibid., p.10.

⁷² Ibid., p.10-11.

⁷³ Ibid., p.11; For applicable law on capacities to right and act of nature and legal persons, See also Dicey- Morris: The Conflict of Laws, 12th Edition, V.2, London, 1993, p.1271 ff; Tekinalp, G.: Milletlerarası Özel Hukuk, 7.Basım, İstanbul, 2002, p.47 ff.; Nomer, E./Şanlı,C.: Devletler Hususu Hukuku, 12.Basım, İstanbul, 2003, p.208 ff.

⁷⁴ Şanlı, op.cit., p.11.

⁷⁵ Ibid.

In negotiation phase of international construction contracts or joint venture agreements, it is important to know whether the contract is concluded legally valid in terms of being sure when needed in the future to open a case against the other party, if the parties have the passive and active capacity to litigation, if they have representation and to charge and who is authorized body or person.⁷⁶

Turkish contractors conclude construction contracts in the transnational construction industry, the employer of a foreign country is often a public institution. This in case of disputes arising from construction contracts in the future, against the contracting public authority when a foreign state court case is open or an arbitration court is resorted, often the appeal as judicial exemption of contracting public authority is seen.⁷⁷

"Therefore, in order to dispose judicial exemption of the international contractors engaged in construction works, " to be able to dispose the appeals for the judicial exemptions which are blocking the rights to remedies in the negotiation process against, authorities of a foreign country, the states such as "the contracting authority shall waive the judicial exemption", the subject work of the contract is a private law disposal and thus in the future judicial exemption can not be claimed" should be stated in the construction contract with foreign country's public authority."⁷⁸

In international practice, when essential elements of the contract are reached, a letter of confirmation bearing the signatures of persons have authority to represent and bind of the party companies is exchanged. According to Article 23 of the Turkish Commercial Code, a letter of confirmation ensures verbal or agreements via telephone, telegram or telefax as written agreements. In this case, one of the parties, may send a confirmation letter covering the main elements of the contract made among them orally or telephone, telegraph, telex, fax. If there is no appeal to this letter in the period of time provided for in the law, which the contract is subject to, the text of the letter of confirmation will have the nature of a written contract between the parties and in the proof of the presence of the agreement means a written evidence. One of the parties cannot object as binding contract not concluded between them and the exchanged documents are belong to the negotiation phase.⁷⁹

According to article 23/III of Turkish Commercial Code, orally, by telephone or telegraph, if a person who received a confirmation letter of the contents of drawn up contracts or declarations does not appeal within eight days from the date of receiving, it shall be deemed that the confirmation letter is in conformity with the contract and the declarations. According to the international private law, the parties' choice of law to be applied to the contract does not apply to capacity of the parties' rights and acts.⁸⁰

In general, in national legal systems, international trade law and related international agreements in terms of form, "freedom of contract" policy has been adopted. However, in practice, drawing up written international construction contracts and joint venture agreements in detail is important. After all, by drawing up a written contract as a proof, in the future possible arise of problems is reduced in case of dispute.⁸¹

Question of the validity of concluding international contracts through "electronic contracts" are widely used in recent years " and agreements made through the "Electronic Data Interchange" are on the agenda. In order to create the legal infrastructure for electronic commerce, international organizations such as International Chamber of Commerce (ICC), UNCITRAL, the United Nations, Economic Commission for Europe (ECE), the World Trade Organization and the OECD have developed codes that have nature as a guide. UNCITRAL's the Model Law on Electronic Commerce, Electronic Trade Directive of the European Union are examples of these codes.⁸²

In practice, an electronic data interchange (EDI), or telefax text sent to the other party constitute "text" element (the material element) of the contract, many times there are no signature or signatures which are not original on these texts, especially such signed texts are as only copies, considered only a beginning of evidence in terms procedural law. Signature copies are not accepted as valid signatures according to Turkish Law.⁸³

⁷⁶ Ibid.

⁷⁷ Ibid., p.13.

⁷⁸ Ibid.

⁷⁹ Ibid., p.13-14; For this subject see also Doğanay, İ.: Ticari Alım-Satım Akdi ve Nevileri, Ankara, 1993, p.53-55.

⁸⁰ Ibid., p.14.

⁸¹ Ibid., p.15.

⁸² Ibid., p.15-16.

⁸³ Ibid., p.16.

Failure to fulfill the need of written form of contracts that are signed in electronic media, has led to the development of the concept of electronic signature and its legal regulation in many countries.⁸⁴ No. 5070, dated January 15, 2004, "Electronic Signature Law", has entered into force also in Turkey. According to Article 5 of the mentioned law, secure electronic signature, creates the same legal effect handwritten signature. However, in the same article, legal procedures subject to a special ceremony holding or the official form of laws such as security contracts can not be performed with secure electronic signature." "In this context, without the above-mentioned exceptions in Turkish Law international, all international trade and economic agreements and contracts including construction contracts and joint venture agreements can be electronically concluded existence of the contracts can be proved with the tools of secure electronic signature verification.⁸⁵

When a written contract is not drawn up in detail between the parties, for solutions of problems arising from interpretations and executing the contract in the future, on issues not regulated in the contract they shall have to resort to a legal system. This legal system will be determined either directly by the parties or the court for the resolution of the dispute according to the rules governing conflict of laws. Therefore, the international construction contracts or joint venture agreements should be prepared filling or completion of gaps in order to minimize the necessity of the application any national legal system in the future. This may be possible with a self-sufficient and self-managed content by preparation of a detailed contract. In particular, the contract should be issued the main elements in detail. Because, the preparation of international agreements in writing and in detail, will minimize the problems of conflict of laws After all, resorting to national legal systems to be used in solving issues not regulated in the contract, in case material legal systems have different regulations regarding the matter in dispute it will result in exposure confronting with a real conflict of laws.⁸⁶

In cases having international nature arising from the interpretations or executing international contracts, during the trial elimination of conflict of laws is one of the very difficult issues, it causes national courts and arbitration committees take serious time, increased costs and prolongation of the cases. For this reason, to be able to eliminate disputes will arise in the future from the beginning the possible problems that can source important issues must be set by the parties in writing and in detail in the text of pre-contract.⁸⁷

While preparation of international contracts, there must be a harmony between the chosen law to be applied and contract and contract provisions. In practice, it is observed that sometimes even though parties drawn up contract taking into account a country's law, they chose law of another country to be applied to the contract. Many times in this case, the provisions of the contract that the parties agreed contradict with the mandatory rules of law chosen by the parties most of contract provisions that often presumed by the parties is invalidated by the legal system of their own choice again. To avoid such a contradictory situation in the future, the legal system which is taken into account when drawing up the contract, also should be selected as a law to be applied to the contract.⁸⁸

Although as a rule international construction contracts and joint venture agreements are not subject to any form in terms of validity, regulations regarding form in law of place of performance during the drawing up contract have to be taken into consideration always.⁸⁹

International contracts are subject to the law of the country were they are drawn up in terms of form. In Turkish Law, the contracts in accordance with law of the country where it is drawn up or the law which is applied to the contract are valid in terms of form. However, sometimes form requirement provided for in the law of place of performance may serve to protect public order and contracts completely in different forms may not be deemed valid. For this reason, it is very useful for the parties to examine the form requirements and regulate their contract according to the country's law that they have consensus on it in the negotiation stage, that is subject to law of the country in terms of form and substance (and in particular where the contract will be performed).⁹⁰

⁸⁴ Ibid.

⁸⁵ Ibid., p.17; For detailed information for this subject see Özdemir Kocasakal, H.: Elektronik Sözleşmelerden Doğan Uyuşmazlıkların Çözümünde Uygulanacak Hukukun ve Yetkili Mahkemenin Tespiti, İstanbul, 2003.

⁸⁶ Şanlı,op.cit.,p.18.

⁸⁷ Ibid.

⁸⁸ Ibid., p.19.

⁸⁹ Ibid., p.22.

⁹⁰ Ibid.

International construction contracts should include clear and detailed provisions relating to the choice of law applied to these issues contract definition and characteristics of the service, location and method of performance and damage-loss and the devolving of property and all the responsibility of the parties.⁹¹

In international contracts the parties may decide freely the way of payment within the framework of payer country's foreign exchange regime. In international business relationships, payment methods are used such as, letter of credit, advance payment, payment against documents, payment against goods, exchange, or via joint account payment, acceptance credit.⁹²

International construction contracts and business joint venture agreements are subject to *pacta sunt servanda*. However, if some cases arising out of the will of the parties or extraordinary situations in terms of making difficult one of the parties to perform the contract, the *pacta sunt servanda* is compensated and contract is revoked or adapted to the new conditions. Because concluding or execution of the contract become impossible due to some of the exceptional circumstances arising after the contract or performance request because of significant degradation in economic balance between the mutual acts, becomes inconsistent with good faith and fairness. For example, wars, internal unrest, riots and rebellions, strikes, floods, fires, earthquakes, extraordinary increases in raw material prices, the world's political and economic conjuncture the changes occurred unexpectedly, unexpected excessive inflation or devaluations, the typical events threatening performance of international construction contracts. In particular, (such as international construction contracts), the long-term contracts can be extremely impacted by such events.⁹³

If the parties don't set clearly the events which will constitute force majeure and hardship events and the impact of these events to the fulfillment of the contract and the parties' rights and obligations in the contract, these issues shall be determined by the applicable law which will be the basis of the contract.⁹⁴

Setting "hardship clauses" in international construction contracts in order to prevent problems in contracting phase that may arise in the future events making performance of contracts or a make difficult or impossible whether they are majeure force or hardship situation and what extent they impact on parties' rights and obligations can be advised.⁹⁵

Thanks to these hardship clauses parties could limit events that can be considered force majeure or hardship events in the contract and in the future outside of them based on as state of force majeure or hardship events are prevented. In addition, the parties may decide with these clauses that will take place in contract, in case of any force majeure or other hardship occurs, whether the contract will be terminated or go on the fulfillment or contract will be adapted to changing conditions, whether shall bring compensation or return obligation to the parties, these cases constitute a time extension, who will implement the contract to new conditions (whether by a neutral third party, arbitrator or state court charged the main case).⁹⁶

Parties may determine the general and special events or circumstances which constitute Force Majeure and Hardship, form and the notice period of these cases by turning in some international codes into a contract clause in this sector, rather than setting with provisions in the contract in which the impacts of these cases to the contract future and to the parties. For example, the parties in the international construction contract may set the issue referring to "Force Majeure and Hardship Code" of International Chamber of Commerce (ICC) No:421.⁹⁷

National legal systems recognize validity of the hardship clauses in contracts. According to Article 117 of Obligations Code of Turkish Law, the events which are impossible to be avoided or eliminated and make performance of the contract impossible in objective terms are called "force majeure". In Turkish Law, general provisions and principles that regulating hardship and the impacts of these to the contracts are not mentioned. Special provisions have been set only concerning the issue regarding some of the types of contract.

⁹¹ Ibid., p.23.

⁹² Ibid.; For this subject see Scmitthoff, C.M.: The Law-Practice of International Trade Law, 9th Edition, London, 1990, p.379 ff; İçier, V.:Uluslararası Ticarette Bankalararası Ödeme Yöntemleri, Interbank yayını, İstanbul, p.37 ff.

⁹³ Şanlı, op.cit., p.35-36.

⁹⁴ Ibid., p.36.

⁹⁵ Ibid., p.37; See Montaque, A.A.: Hardship Clauses, IBL, V.13 (1985) p.135-137.; See also Horn,N.: Third-Party Intervention, IBL, V.13 (1985), p.139-141.

⁹⁶ Şanlı, op.cit., p.37.

⁹⁷ Ibid.; See "Force Majeure and Hardship" Brochure, ICC Publication No:421, Paris, 1985.

However, today the period between concluding and execution of the contract, objective reasons unpredictable by the parties the execution of contract because of becoming difficult seriously or impossible for one of the parties the termination of the contract or may be asked to adapt to changing conditions basing on "good faith" in Turkish Civil Law.⁹⁸

In case (a construction contract) does not take place any hardship clause, termination of contract and adaptation of the contract to the new conditions pursuant to force majeure or hardship states will vary depending on the preferred dispute settlement procedures. If the parties select the legal authorities to resort in case of dispute or if they refer to the courts because of no arbitration condition in the contract, the courts interfere the contract, accepting the force majeure and hardships under the legal system to be applied.⁹⁹

If the parties resort arbitration in general, the arbitrators charged with international trade and construction affairs, interpret as a silence the parties' although it is possible for the parties all the time to do opposite, when provisions are not set in the contract providing adaptation to new hardship conditions. In this regard, if the arbitration is a preferred procedure in the contract for the settlement of disputes, the contract must have hardship clauses.¹⁰⁰

The above descriptions indicate that "when the arbitration of disputes is selected as a way of solution, the parties must take into consideration that the termination or adaptation to changing conditions of the contract can not be easily accepted by the arbitrators like the official courts during the preparation phase of the contract, if there is no a clear provision in the contract."¹⁰¹

E. THE SELECTION OF APPLICABLE LAW IN THE INTERNATIONAL CONSTRUCTION CONTRACTS

In international construction contracts, the parties to a particular subordination of the legal system is required. Because the gaps in the contract that the parties not issued are filled in accordance with the rules of law chosen by the parties.¹⁰²

Because at the beginning for the parties, to draw up a contract covering all existing and possible solutions of the problems is not possible, in practice always to be applied to in matters that are not regulated in the contract the need for the application of a legal system arises. In addition, will of parties has to obtain its binding power from a legal system. For these reasons, in the field of international private law in contracts there is always a particular need the contracts to be based on a legal system.¹⁰³

Unless a choice of law in the contract is not done, the dispute referred to legal authority shall determine authorized law with its own rules of conflict of laws. This law may not be appropriate often to the expectations of the parties and the contractual nature of the relationship.¹⁰⁴

Construction contract provisions must be compatible with the relevant provisions of selected law. This harmony can be provided by selecting the law while drawing up contract as well as the selection same applicable law of contract. Therefore, for the preparation of an international construction contract taking into account a specific legal system, selecting the same applicable law for the contract is essential. Thus, by ensuring required harmony between the provisions of the contract and the selected law, potential disputes will be avoided during the preparation of the contract.¹⁰⁵

Also chosen law and legal authority between there should be harmony resorted in case of conflict. After all, the best known and best applied by a judicial authority law is its own law. Otherwise, the supply, translation, approval and interpretation of foreign law to be applied by the judicial authority, will increase the costs of the trial.¹⁰⁶ On the other hand the difference between the chosen law and legal authority sometimes raises the result of not applying certain provisions of law chosen. Because the legal authority does not apply the rules chosen by the parties when they contradict with the rules that have to be applied directly or regarding public order.

⁹⁸ Şanlı, op.cit., p.38.

⁹⁹ Ibid., p.39.

¹⁰⁰ Ibid., p.40; See also Şanlı, Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk, p.355-357.

¹⁰¹ Şanlı,op.cit.,p.41.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.,p.42.

¹⁰⁵ Ibid., p.43.

¹⁰⁶ Ibid.; See Delaume, G.R.:Transnational Contracts-Applicable Law and Settlement of Disputes, Appendix IV-Booklet D.2 (1988), p.6.

In such cases, the referenced legal authority declares null and void the parties' many choice of law provisions, and, will re-issue the contract with its own law's the mandatory rules or public order rules.¹⁰⁷

In the field of International private law, parties' freedom of will is available in determining law to be applied to problems arising from contractual relationships. In cases The parties particularly choose arbitration as a dispute resolution body, wills will be much more effective on the selection of the law. Surely, arbitrators not so sticked by formal rules of procedure of the judiciary like state courts has an important role. For this reason, the parties should be careful by choosing a judicial authority will recognize the full validity of the contract provisions in the future the during the preparation of construction contract. Otherwise, disputes surprisingly may be made subject to the law that the parties are not familiar with.¹⁰⁸

In case of dispute arising, the arbitrators are dependent on the state courts with will regulations of the parties in dispute In comparison to the state courts and therefore arbitrators, will recognize more easily validity of the legal selections the parties.¹⁰⁹

In case particularly one of the parties of international construction contracts is state or state institution, the construction contract may be made subject to supra state norms such as the general principles of law, Law of Nations rules, the rules of international trade law, the principles adopted by civil Nations to limit state's disposals for seeking to modify the contracting status in the future. In this case, the choice of such law will provide security may be preferred to the uncertainty created by this law. Except in such exceptional circumstances, in order to solve disputes easily that may arise in the future for the contract choosing by parties as an applicable law of a state law will be more appropriate for the goal.¹¹⁰

In international private law, even the parties' wills regarding the selection law cover, the chosen law's, mandatory, supplementary and replacement rules and the chosen law is applied to the contract as a whole. The place of performance or place of the judiciary law's many provision concerning public order, prevent the implementation of the chosen law in whole or in part.

For example, country's laws and rules regarding public order such as law of the customs and foreign exchange regime, tax-related laws, rules relating to the import and export restrictions, restrictions on the transfer of technology brings the rules, urban development laws, laws related to employment whilst health and safety, environment-related lawssuch as the contry where an international construction contract are applied directly to public or exclusively to foreigners doing business in that country. While an international construction contract is prepared, these kind of laws and rules tightly contact with the contract and directly applied to the contract should be taken into account and contact provisions should be regulated in conformity with these rules.¹¹¹

To be sure that chosen law shall be governed with the material law rules, the chosen law is a material law or to conflicts of laws rules of chosen law shall not be applied should be written clearly in the contract. In addition, if the parties want to make their contractual relationships subject to the law in force on the date of the contract, they should indicate it clearly also in the contract. Otherwise, the subsequent changes in chosen law can disrupt the contract balance between the parties in favor or against and one of the parties could be damaged seriously by these changes. In practise for this reason stabilization clauses are settled in international construction contracts. Thus it is tried to prevent the law regime of the contract negatively from the chosen national law.¹¹²

Statute of limitations differences in national legal systems, must be always taken into account in the preparation of international construction contracts. After all, the statute of limitations is related to the material law in the countries' law included in Continental European legal system and therefore subject to Chosen law. According to Anglo-Saxon countries laws the statute of limitations is related to the procedure thus is subject to lex fori, not the law chosen by the parties (ie, the national procedure law which hearing a case by national court is subject to).¹¹³

¹⁰⁷ Şanlı,op.cit.,p.43.

¹⁰⁸ Ibid.,p.45.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.,p.46.

¹¹¹ Ibid.

¹¹² Ibid., p.47; See Delaume,op.cit., p.24.; Nygh,P.: The Reasonable Expectation of the Parties as a Guide to the Choice of Law Contract in Tort, Res. des Cours, 1995, p.32 ff.

¹¹³ Şanlı, op.cit., p.49; See also Şanlı, Cemal: Milletlerarası Akitlerde Zamanaşımı, İstanbul Barosu Dergisi,C.63(1989), p.638 ff.

Particularly in contracts containing the performances in different countries and a international construction contracts such as, contracts that are associated firmly law of the host country spreading performances long period of time, the parties can make contractual rights and obligations subject to different legal systems, breaking down them. Such contracts, except for exceptional cases, should be made subject to always a single law with all aspects. On the other hand, sometimes international construction contracts have "nature of umbrella contracts", and the apparent is under a single contract and the parties are different, but related to each other includes various contracts. For example, a construction contract regarding the construction of an underground work, may be divided into five packages and each package may be contracted out to a different contractor. In this context, the construction of tunnels may be contracted out to a company, manufacturing and construction of the rails to a company, manufacturing and mounting of wagons to another company, electrification and signalization other company may be contracted out to another one and with each of them contracts could be made separately. And also, control of the work may be tender to another company with a consultant contract.¹¹⁴

Contractors can tender a portion or all of work to subcontractors with sub-contracting contracts. However, the employer may conclude credit agreements with various banks in relation to the financing of the work under the responsibility of the contractor. While different contracts regulating various aspects of international construction works are being designed, coordination and integration between these contracts should be considered. For this purpose, construction contracts signed between different parties related the work as should be made much as possible subject to the same law and issues in dispute and should be referred to the same judicial authority. Because this is needed to provided the acts can be coordinated, to reach different conclusions, and avoid conflict with each other and ultimately to provide legal harmonization regarding the main contract. Because during binding a single law the various contracts drawing up related to a single construction work, prevents the emergence of conflicts and in the event of a possible disputes facilitates solutions.¹¹⁵ Parties of international construction contracts should take into account international agreements applicable to contracts as part of legal system, while choosing this applicable law to their contracts¹¹⁶

Choice of law clauses or choice of law agreements and law selected to be applied to the contract, shall apply to all the problems that are associated with contract or arise from the contract. If the parties want the implementation of the chosen law to certain points arise from the contract or relating to the contract, these matters should be indicated clearly one by one. In this case, the issues outside the scope of selected law, the case hearing the case court shall apply the law determined with conflict of laws rules.¹¹⁷

Parties of International construction contracts may chose some standardized terms of contracts such as FIDIC Standart Contracts and Specifications or standard contracts, some codes, rules, regulations, or international agreements for implementation in their contracts. In this case, the chosen rules become the contract provision and are applied to the contract in this capacity. These kind of rules that became a contract provision of the contract by the parties can be applied how much they are suitable with the mandatory rules of law to be applied to the contract.¹¹⁸

In international construction contracts, taking into account the execution of decision to be given finally in case of a dispute in the country where the goods and receivables of the parties are placed, for in case of any dispute, legal authority should be determined in the contract by putting a special provision in a contract. For example as a judicial authority a state court with citizenship of one of the parties', *ad hoc* arbitral tribunal or an international corporate arbitration tribunal may be appointed.¹¹⁹

In order to minimize disputes that may arise in the future, for the parties it will be appropriate to design contracts in the language they know jointly. Parties drawing up contract in a single language they are familiar with jointly and accepting it as only valid text are the most preferred and most convenient method in practice can be followed. However, today, as the language of international trade and economic agreements, with practical considerations, English is preferred mostly.¹²⁰

¹¹⁴ Sanlı, op.cit., p.50.

¹¹⁵ Ibid.

¹¹⁶ Ibid., p.51.

¹¹⁷ Ibid., p.52.

¹¹⁸ Ibid., p.53.

¹¹⁹ Ibid., p.55.

¹²⁰ Ibid., p.57.

Interpretation problems arising in international construction contracts, the lex obligationis to be applied is included in the application area. While an international construction contract is interpreted according to the interlocutor's status and the conditions, that right of inferring of the other party explanation of will is analyzed, and this meaning will prevail. Today, in the Turkish Law, the comment method called "Trust Principle" adopted. The same principle is settled in the article of 4(2) Principles of International Commercial Contracts dated 1994 prepared by International Institute for the Unification of Private Law (UNIDROIT).¹²¹

International construction contracts, in comparison to construction contracts for local, because the parties have different law cultures and language, they are more open to potential disputes of interpretation. Therefore, the parties of an international construction contract, having enough information about the principles of interpretation their choice of law or judicial authority, thus legal authority and applicable law should be selected.¹²²

F. GENERAL CHARACTERISTICS OF INTERNATIONAL CONSTRUCTION CONTRACTS

A contractor with an employer within the boundaries of a country, can conclude each article negotiated of the original construction contract that contains specific provisions. If the employer is a public legal entity, it is also possible to have any construction work by making contractor accept any standard construction contracts which are generally applicable to all types of business which he already has regulated.¹²³

In case of the contracts for international construction works in the different countries and citizenship, who are accustomed to different of legal orders, for all parties such as the employer, contractor and consultant-engineer, a contractual construction work for each private construction contracts contain specific provisions for regulations are not practical, the international necessity to create a standard contract for construction contracts has always been felt.

Construction and facility contracts abroad, there are typical features. One of the parties of an international construction contract is usually a foreign government agency, the other side is a corporate headquarters located in another country or companies of more than one contractor acting together. Often, the employer is a developing country's public institutions, the contractor company is from an industrialized country. International construction contracts in Legal terms are service contracts, a contract for the supply of goods or a combination of these types of contracts. Economically the international construction contract is a contract for the transfer of technology from one country to another. International construction contracts may be as the contractor undertakes to deliver a ready to use construction work turnkey nature, as well as each phase of the construction has to be accepted by the employer, being tested and gradually advancing construction contract may be considered.

Another feature of an international construction contract is that being about usually with large amounts of money. Generally, if the employer is a public authority, especially in a developing country and unable to finance the construction project from its own resources or will not choose to finance it with its own resources, necessity arises to be financed by international public institutions such as International Bank for Reconstruction and Development- IBRD, International Development Association-IDA, European Investment Bank-EIB, European Development Fund-EDF. Some of these international institutions have published guidelines (instructions) which are expected to follow from the Parties who received credit from them focusing on the work of an international construction contract for preparing international construction contracts.

Another dimension of the financial importance of international construction contracts is that they led to the emergence of various types of contract guarantees. These guarantees are the tender guarantees, performance guarantees and repayment guarantees, some varieties of these warranties have been designed in brochure of the International Chamber of Commerce, titled "Uniform Rules for Contract Guarantees".¹²⁴ Another feature of the International construction contracts is to fulfill the commitments arising from these contracts takes generally a long period of time. Economic situation may change during this long period. Therefore, in addition to the usual exchange rate and Force Majeure clauses, aiming to minimize the economic risk of long-term contracts, special clauses such as "price adjustment" and "difficulty (hardship) clauses" are added often to such contracts.

¹²¹ Ibid., p.63; See Dayınlarlı, K.: Milletlerarası Ticari Sözleşmelerle İlişkin UNIDROIT İlkeleri, Güloren Tekinalp Armağanı, MHB Özel Sayısı, Yıl:23, P.1-2, 2003, p.203 ff.

¹²² Şanlı, op.cit., p.64.

¹²³ Türegün, Necip: "FIDIC Açısından İnşaat Sözleşmeleri", İnşaat Sözleşmeleri (Ortak Seminer), Banka ve Ticaret Hukuku Araştırma Enstitüsü, p.253.

¹²⁴ See ICC Brochure No: 325 on Uniform Rules for Contract Guarantees, August 1978.

G. USEFUL STANDARDS CONTRACTS AND SPECIFICATIONS THAT SHOULD BE TAKEN INTO CONSIDERATION WHILE DRAWING UP THE INTERNATIONAL CONSTRUCTION CONTRACTS

1. UNCITRAL LEGAL GUIDE

UNCITRAL (United Nations Commission on International Trade Law) has adopted the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works in 1987 August and this guide was published in 1988 by the United Nations.¹²⁵ UNCITRAL's this guide is a comprehensive and detailed handbook is prepared in order to be useful to persons who have to draw international construction contracts. Given in this manual, determinations, observations and suggestions are intended to provide just and fair balance between the interests of the employer and the contractor. UNCITRAL Legal Guide, is not at a level of regional and is interested in construction contracts at global level.

2. STANDARD FORMS FOR INTERNATIONAL CONSTRUCTION CONTRACT

The international construction contracts usually are concluded according to the standard forms developed according to the requirements of the process. The most widely used forms of the model contracts for construction works abroad, are as follows:¹²⁶

1. FIDIC Conditions of Contract for Works of Civil Engineering Construction (4th ed., March 1987): Because this standard contract form has been developed by FIDIC (Federation Internationale des Ingénieurs-Conseils) is called the briefly "FIDIC Contract".

2. FIDIC Conditions of Contract for Electrical and Mechanical Works (3rd ed., 1987)

3. FIDIC Conditions of Contract for Design-Build and Turnkey (1st ed., 1995)

4. General Conditions for Construction Contract (6th ed., January 1991): This standard form is prepared by Institute of Civil Engineers (ICE) in England.

This General Conditions is advised by Institution of Mechanical Engineers, Institution of Electrical Engineers and Association of Consulting Engineers in England.

5. The Guidelines for Procurement under IBRD Loans and IDA Credits (3rd ed., May 1985): These rules are known also "World Bank Principles".

6. General Conditions for Public Works and Supply Contracts financed by the European Development Fund (Brussels, February 14, 1974) of the European Economic Community (EEC) applied to Cooperated-funded contracts in the overseas countries and regions (Brussels, February 14, 1974): These general conditions is known as "Conditions to EDF (European Development Fund Conditions). In addition, the "Arbitration Rules for contracts financed by EDF " have been prepared.

7. Standard Forms of Contract drawn up by the United Nations Economic Commission for Europe can be used for international construction Works. The main forms of these model contracts are as follows:¹²⁷

- Form No. 188A for import and export and for the Installation and the supply of machinery and plants,
- Form No. 188B provides additional Clauses oo control mounting machinery and engineering facilities abroad,
- No. 730 Form for the export of durable materials and engineering materials,

In addition to this, the Economic Commission for Europe has published number of guides connected with each other provide for regulations related to important international contracts for construction works and facilities:¹²⁸

- Guide on drawing up contracts for large industrial works (ECE/Trade /117),

¹²⁵ See The UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, A/CN.9/SER. B/2. UNCITRA is also continuing to prepare a Model Law on Procurement.

¹²⁶ Schmitthoff, Clive M.: "The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions" (1968), 17 I.C.L.Q, p.551.

¹²⁷ Benjamin, Peter: "The General Conditions of Sale and Standard Forms of Contract drawn up by the United Nations Economic Commission for Europe", [1961] J.B.L., p.113.

¹²⁸ Ibid., p.114.

- Guide for drawing up international contracts between parties associated for the purpose of executing a specific project (ECE/Trade /131),
- Guide for drawing up international contracts on consulting engineering, including some related aspects of technical assistance (ECE/Trade /145),
- Guide on drawing up international contracts for services relating to maintenance, repair and operation of industrial and other works (E.87. II. E.2).

Conclusion

According to Article 1 of Turkish Code of Obligations, when two parties mutually declare consent that is convenient with each other, the contract shall be completed. Regarding this provision, in the contracts which arise from a debt relationship between the parties, three elements must be present. The first element is a creditor who has the right to demand, the second is a debtor who is obliged to fulfill a demand and the third is an act of the debt relationship.

Two or more natural or legal persons who have capacity to act (capacity to use civil rights) for the arising of the contract must declare their wills and these mutual wills must be convenient with each other. In other words, the contract is set up, when a party offers something and then other party accepts this offer. Sub-type of contract in Article 355 of the Code of Obligations contract of construction is a contract (work) that the contractor becomes indebted to the employer in the execution of a work in return of a fee which employer is committed to provide the contractor. As can be understood by this definition, contract of construction consists of three elements "creation of a work", "fee" and "agreement".

The contractor's obligations in a Contract of Work are to execute work personally, to execute work faithfully and diligently, to supply instruments, to give general notice and to start on time and continue to work, to liquidate damage and delivery of the works. The employer's obligations in a Contract of Work are payment of the contract price, to supply material, to report dangerous conditions to the contractor that could not see and which are known by the employer or other characteristics of materials and things left to repair to the contractor that will affect the work, work control and in case of defective work, to notice of defect liability.

If parties of a contract have a different state citizenship or residence or habitual residence in different countries, or if subject in the contract, service, or payments go beyond borders of a country, then this contract has international nature. The parties, could prevent the emergence of a lot of dispute during the phase of preparing an international construction contract or a joint venture agreement, taking into account specific issues likely to arise. In this context, in order to prevent the possible disputes likely to arise in the future, some of the principles to be considered during the design of the contract minimize disputes likely to arise in the future and allows certainty for a solution even in case a dispute arises. For this reason, , attention and care in stage of the preparation of the contract shall seal destiny of cases that may be incurred in future due to the contract between the parties. That is to say, it can be said that contractual cases are won or lost in the preparation of the contract.

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