

MİLLETLERARASI İHTİLAFLARIN ÇÖZÜMÜ METOTLARI

1. Genel Olarak Alternatif Çözüm Metotları
2. Adjudication (Hüküm Verme)
3. Uyuşmazlık Kurulları (Disputes Review Board and Dispute Adjudication Board)
4. Hakem-Bilirkişilik (Technical-Expertise)
5. Onaylama (Certification)
6. Uzlaştırma (Arabuluculuk) (Conciliation, Mediation)
7. Müzakere (Negotiation)
8. Mini Yargılama (Mini trial)
9. Sözleşmelerin Uyarlanması (Adaptation of Contracts)
10. Bağlayıcı Olmayan Tahkim (Nonbinding Arbitration, Arbitratio Irregulare)



ADJUDICATION (HÜKÜM VERME)

Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 ("The Housing Grants Act 1996"), s 108(1): a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section

- ▶ the contract may provide for adjudication complying with s 108(2) – (4)
- ▶ if the contract does not comply with sub-sections (2) to (4), the provisions of the Scheme for Construction Contracts apply


What are the features of adjudication? How does it compare with litigation and arbitration? How does it compare with mediation?



DRBs and DABs (Uyuşmazlık Kurulları)

- Distinguish DRBs and DABs
- FIDIC 1999 suit of contracts
- 2004 ICC Dispute Board Rules
- 2005 ICE Dispute Resolution Board Procedure
- Consider the features of DRBs and DABs
 - binding decision or recommendation?
 - can the decision become final?
 - what are the key differences with adjudication?

See: Dispute Board Rules of CI Arb (August 2014)



EXPERT DETERMINATION (BİLİRKİŞİ TESPİTİ)

Expert determination is the referral of a dispute to an independent expert, generally used for valuation or technical disputes

- ▶ status of expert's decision depends on parties' agreement, e.g. under Art 12(3) of the 2003 ICC Rules for Expertise administered by the ICC's International Centre for Expertise the expert's report is not binding on the parties unless they parties agree otherwise
- ▶ expert does not act judicially and is allowed to make use of his own knowledge
- ▶ court may stay legal proceedings brought in breach of expert determination agreement in the exercise of its inherent jurisdiction: see *Turville Heath Inc v Chartis Insurance UK Ltd (formerly AIG UK Ltd)* [2012] EWHC 3019 (TCC) (Edwards-Stuart J)

EXPERT DETERMINATION (BİLİRKİŞİ TESPİTİ) REMEDIES (ÇÖZÜMLER)

Jones v Sherwood Computer [1992] 1 WLR 277, CA

Accountants' determination as to amount of sales to be conclusive, final and binding – report could not be challenged on the ground of mistake provided the expert had not departed from its instructions and had not acted in bad faith

Nikko Hotels v MEPC [1991] 28 EG 86

- the issue was one of construction of a rent review clause referring to the 'average room rate'
- if parties agree to refer to the final and conclusive judgment of an expert an issue that either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding

Bernard Schulte v Nile Holdings [2004] EWHC 977 (Comm), [2004] 2 Lloyd's Rep 352

- para 95: 'A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves'
- only actual bias disqualifies the expert

Barclays Bank v Nylon Capital [2011] BLR 614 (CA)

- the expert's determination can always be challenged if the expert had no mandate to make the determination and the court would not adopt the same wide approach to the mandate of an expert as the one the court adopts to the jurisdiction of the arbitrators
- the court determines the issue of jurisdiction itself before the expert has had an opportunity to do so if the issue is real and it is in the interests of justice to do so
- Lord Neuberger MR queried whether, where a pure issue of law arises in the course of a determination by an expert acting under the usual form of clause, a wrong determination by the expert of that issue can be challenged in the courts in circumstances where the interpretation adopted by the expert has the consequence that he is not determining the matter in accordance with the mandate given to him

Arenson v Casson Beckman Rutley & Co [1977] AC 405 and Sutcliffe v Thackrah [1974] AC 727

- an expert is liable if he acts negligently – but note that negligence does not affect the determination of the expert

CERTIFICATION (ONAYLAMA)

Decisions of temporary effect unlike expert determination: see Amec v Secretary of State for Transport [2005] BLR 227 (CA)

- ▶ the claimant contractors carried out road works under a construction contract with the Secretary of State. The contract incorporated a modified version of the Institution of Civil Engineers ("ICE") Conditions of Contract (5th ed) (June 1973) (Revised January 1979) (Reprinted January 1986). Clause 66(1) thereof, as amended by the parties, provided that any "dispute or difference" was to be referred to and settled by the engineer, whose decision, stated in writing and notified to the parties, was to be final and binding subject to arbitration proceedings being commenced within three calendar months of the engineer's decision, or within three calendar months of his failure to give a decision after a request to do so. The arbitrator's award was to be final and binding on the parties
- ▶ dispute relating to alleged defects was referred to the engineer appointed under the contract, who found for the employer. Employer referred the matter to arbitration. Contractor argued that tribunal lacked jurisdiction claiming, inter alia, that the engineer was not impartial and had acted unfairly
- ▶ CA held that the engineer acted as a certifier. He was under a duty to act fairly but not judicially or according to the rules of natural justice. Circumstance that employer had claim against engineer did not disqualify him.



MEDIATION/CONCILIATION (ARABULUCULUK / UZLAŞTIRMA)

Mediation is a process whereby a neutral third party facilitates a settlement between the parties

- UNICTRAL Model Law on International Commercial Conciliation (2002)
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters ("EU Mediation Directive") [2008] OJ L136/3
- ICC ADR Rules



Milletlerarası Tahkimin Yasal Çerçevesi

**Legal framework of international
commercial arbitration**