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1-The Nature of BOT Contracts

BOT is a model that enables a private corporation to provide public services by financing of the project of public services or construction work that is to be transferred back to the relevant public institutions after obtaining depreciation and interest from the income of utilities provided.

The seat of settlement is considered to be the most important issue with regards to the BOT Contracts. In the agreements that are signed between the foreign companies, international corporations and private or public corporations in Turkey it is usually agreed that the disputes are to be solved by arbitration.

2- The Approach of the Constitutional Court to the application of International Arbitration to the BOT contracts

The Law 3996 regarding the construction of some investments and services by BOT Contracts was enacted in 1994.

Under Article 5 of the Law 3996 it has been concluded that the contracts regulating the transfer of building, and operation and the transfer of investments and services by juridical persons to private corporations to be considered as legal contracts involving changes in their legal nature and subject to the provisions under private law.

The purpose of Article 5 is to escape from the scrutiny of the Council of State regarding these contracts and prevent arguments about the validity of arbitration clauses incorporated into these contracts.

But as a consequence of the action of nullity filed in the Constitutional Court against the Article 5 of the Law 3996 the Article was considered as unconstitutional and it was held for the annulment of the Article. The Constitutional Court does not approve BOT Contracts as they fall out of the jurisdiction of the Council of State. The purpose of Article 5 which states that BOT Contracts are considered as private contracts is regarded in a same way.

With regards to the decision of annulment held by the Constitutional Court the investment agreements signed between foreign investors and state enterprises gained the legal nature of contracts subject to Administrative Law. In accordance with the Article 2 of the Code of Administrative Jurisdiction Procedure the Administrative Courts have jurisdiction for hearing the disputes arising from the contracts subject to Administrative Law.

After the decision of the Constitutional Court the issue whether arbitration is considered as a dispute resolution for the BOT Contracts or not has lead to confusions.

3- The Current Situation Regarding the Dispute Resolution of BOT Contracts by Arbitration

By the Law 4446 regarding the amendments in various articles of Turkish Constitution a provision is added to article 125/1 of the Constitution and an amendment is made in article 155/2.

In accordance with the provision added to article 125/1; the disputes arising from the BOT Contracts regarding public services can be settled by domestic and international arbitration. International arbitration is only available in disputes involving a foreign element.

With the amendment in article 155 the Council of State's role in reviewing BOT Contracts has been restricted to merely expressing an opinion within a two-month time limit.

4- The Law Governing the Provisions for Applications to Arbitration for the settlement of disputes arising from BOT Contracts Regarding Public Services

After the amendments in the Constitution, a Code is established for the determination of the provisions governing the arbitration agreements formed for the solution of disputes arising from the BOT Contracts regarding public services. The Code constitutes of 9 main and 1 temporary articles.

This law only governs the arbitration agreements regarding BOT Contracts involving foreign elements. The law does not have an effect on the projects and transactions arising from the BOT Contracts which are initiated prior to its enactment date. Parties to BOT Contracts already executed before enactment of this law are within a set time limit able to apply to the Council of Ministers for inclusion of an arbitration clause.

In accordance with this law the disputes arising from BOT Contracts involving foreign elements can be settled by Ad Hoc or Institutional Arbitration (Art.2/a)

The parties may establish the arbitration agreements in the form of a separate agreement or in the form of an arbitration clause inserted in the BOT Contracts.

The parties are free to determine the seat of arbitration and the applicable law.

In the arbitration clause or arbitration agreement issues regarding settlement of a dispute by arbitration, application of the arbitration provisions, seat of arbitration, appointment and number of the arbitrator(s) and their qualifications, the jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, applicable law to the substance of disputes, language of proceedings, taking an evidence by the parties and arbitrators, appointment and notification of experts, period of arbitration, the arbitrator's fee, costs for arbitration shall be stated in detail.