

Mediation in Construction Disputes:

A Review of Turkish Case

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Abstract

Construction contracts often become subjects of disputes, mostly as a result of multiparty, time barred and complex nature of construction projects. Construction disputes are remarkable both by their values and numbers, so it takes money and time to resolve them. Although litigation is the customary way of resolving construction disputes, alternative dispute resolution techniques have been developed to obtain shorter and better dispute resolution. Mediation, for example, as an Alternative Dispute Resolution (ADR) method is viewed as "beneficial, allowing an element of a dispute to be settled, narrowing the disputes or contributing to a greater understanding of the other side's case generally". Alternative Dispute Resolution techniques have been used in countries like UK, USA, for many years and considerable experience have been gained since then. In UK, researches reveal that construction industry is well aware of ADR methods and effectively uses them to resolve disputes. For Turkish construction sector, on the other side, ADR techniques are not as familiar as they are in UK. "Law on Mediation in Civil Disputes No. 6325" was enacted in 2012, though it has been rarely used since then, especially for commercial and construction cases. Using mediation as a dispute resolution method in construction cases is currently an unfamiliar process for Turkey; Industry professionals have little knowledge about mediation, legal professionals approach mediation suspiciously and there is limited knowledge about what could be expected from mediation in relation to commercial cases, especially construction disputes. This paper aims to find out and discuss the developments in use of Mediation as a dispute resolution method for construction cases in Turkey since enactment of Turkish Mediation Law in Civil Disputes. After a review of past literature and researches on mediation as an alternative dispute resolution method for construction industry in Turkey, cases referred to mediation since the enactment of "Law on Mediation in Civil Disputes No. 6325" has been analysed in order to find out current practice. Results reveal the fact that mediation has rarely been used by construction industry until now.

Keywords

Construction Disputes, Mediation, Alternative Dispute Resolution,

1. Introduction

Alternative Dispute Resolution methods have emerged as an alternative to traditional litigation due to their ability to provide faster, cheaper and undisclosed solutions to commercial disputes. Although alternative dispute resolution methods such as mediation and arbitration have their roots in ancient laws of Middle East as old as 1800 BC (Boulle 2005) or ancient Far East approaches to dispute resolution (Özmumcu, 2011), modern usages have mainly emerged in early 20th century from USA and Western Europe. Of these methods, arbitration has provided a convenient method to dispute resolution, especially for cases that emerged from contracts related to international commerce. 1958 New York convention has offered the parties who hesitated to go to local courts for disputes arising from international contracts, a relative protection in signatory countries. (1958) Fast globalisation of international markets has been seen as a factor in parties' willingness to use ADR methods, thanks to their pragmatic character. (Tanrıver, 2006) Growth of international trade from Second World War moved away side by side with growth of usage of Alternative Dispute Resolution processes. Large expansion of capital movements and international investments after Second World War can also be seen as a catalyser for rising interest in ADR methods. (Newcombe and Paradell, 2009) Besides its advantages, arbitration process still constitutes an adversarial process and costs could be high. Gradual, stepped dispute resolution methods have been adopted to overcome these difficulties. Flexible, hybrid methods that provided cheaper solutions for dispute resolution process became popular in commercial as well as construction contracts. (Arıcı, 2012)

Turkish case has followed its Western counterparts in adopting ADR methods to find cheaper solutions for dispute resolution and prevent litigation whenever possible. In context of Mediation, a special legislation was enacted by Turkish Parliament that regulates Mediation in Civil Disputes in 2012. This paper aims to discuss use of mediation in construction disputes by comparing survey results conducted between construction industry professionals prior to enactment of law and official statistics published since enactment.

2. Way to “Law on Mediation No.6325”

One of ADR methods, used as a pre-litigation method, is mediation. Mediation has its origins in traditional Far East dispute resolution culture. Its modern use in construction contracts has emerged first in US and spread to UK (Özmumcu, 2011). It was started being used in early 1990s in UK, though its progress in construction industry has been slow until late 1990s. However, researches conducted in UK on use of mediation reveal that construction industry is now well aware of ADR methods and effectively uses them to resolve disputes. (Gould and King, 2010)

On the EU side, EU Commission has encouraged member and candidate countries towards enacting legislation concerning usage of Alternative Dispute Resolution methods in commercial disputes. In 1999, the Heads of State or Government of the Member States “called for the

creation of alternative, extrajudicial procedures for dispute resolution in the Member States in order to improve access to justice in Europe". (Europa Press Releases, 2008)

On 2002, EU Commission presented a Green Paper on alternative dispute resolution in civil and commercial law. The objective of Green Paper (2002) was presented as "to initiate a broad-based consultation of those involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law." The paper listed the interest in ADR in European Union then, according to three main reasons; increasing awareness of methods, legislation encouraging usage of ADR methods and political priority given by EU Institutions to promote ADR methods.

In 2004, European Commission adopted its Proposal for a Directive (IP/04/1288) establishing rules on civil procedure to ensure a sound relationship between mediation and judicial proceedings. The European Code of Conduct for Mediators was launched in 2004, developed by a group of experts as a self-regulatory instrument, to deal with matters concerning issues on accreditation and appointment of mediators. The Code of Conduct (2004) stated that it was aimed at setting out "a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility. It may be used by mediators involved in all kinds of mediation in civil and commercial matters".

On 23 April 2008, European Parliament approved the Directive on certain aspects of mediation in civil and commercial matters. Directive aimed to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings." Directive stated that member states shall adopt necessary laws, regulations and administrative provisions into national law to comply with the requirements of the Directive.

Trends in Turkey have also evolved towards adopting special legislation regulating use of ADR methods. Although, concepts of ADR methods such as mediation, conciliation are seemed as unfamiliar to Turkish Law, Turkish Law contained concepts of compromise, settlement agreement and similar concepts in various laws. However, rather than being regulated under a special law, various laws contained provisions including these concepts. (Özmumcu, 2011)

Since 1990s, in tandem with developments in Western countries, an increasing academic interest in ADR methods could be seen in Turkey as well. Process of adaptation of national laws in compliance with EU Regulations as part of EU accession process and the ongoing academic debates on regulating ADR under special laws opened the way for the "Law on Mediation in Civil Disputes No. 6325". A commission was formed to prepare draft law and various legal sources were considered in preparation of draft. Draft law was approved in Turkish Parliament in 07.06.2012 and was enacted. Provisions of Draft Law were generally in compliance with EU Directive and before its enactment it was stated by the researchers that the Draft Law "provides the main directions for possible implementations in the Turkish construction industry". (Dikbaş and İlter, 2008)

3. An overview of “Law on Mediation in Civil Disputes”

“Law on Mediation in Civil Disputes No.6325” stresses that mediation employs systematic techniques, it is a voluntary process and requires the participation of an impartial and independent third person with specialty training. (Clause 2.1) Article 3 defines voluntariness and equality as basic principles of mediation. Confidentiality, one of the most important strengths of ADR methods when compared to litigation is dealt under Clause 4. Article 9 states that mediators are liable of carrying out their jobs carefully and impartially. Article 13 states that resorting to mediation can be done “before filing a law suit or during the course of a law suit” as long as it is done on basis of agreement of both parties. Article 15 provides the opportunity for the parties to choose their own mediation procedures. Parties shall not be bound by strict rules and procedures can be chosen on a flexible basis. Article 17 determines the circumstances when a mediation process is considered to be concluded. Under Article 18, agreement of parties is considered. In compliance with the flexible nature of mediation, no rules on the scope and form of the agreement are imposed on parties.

In respect of agreement, it is stated that unless the parties will desire the agreement to have the force of a verdict, the document will be subject to general provisions. Article 19 requires that Ministry of Justice “shall keep the register of the persons who attained the authority to mediate in private law disputes”. Under Article 20, only persons who hold an undergraduate law degree with at least five years of experience are allowed to register as mediator. Article 22 determines that any person willing to register as a mediator shall receive a “mediation training”. Article 33 deals with the situations when the rule of confidentiality stated in Article 4 is violated. Violation of confidentiality may result in imprisonment up to six months and prosecution of the offence depend on complaints.

4. Mediation in Turkish Construction Industry

Research conducted in 2008 by Dikbaş and İlter reveals that Turkish construction industry was unaware of the mediation as an ADR method. Findings at the time revealed that prior to enactment of Mediation Law, %85 of respondents of research have never been involved in mediation process as part of resolving disputes arising from construction contracts. On the other hand, Dikbaş and İlter point the fact that 90% of the respondents said that they would consider using mediation.

Another survey conducted prior to enactment of Mediation Law seems to support these results. According to the survey, conducted in 2010 by Gül and Acar, participants from construction industry stated that they use mediation as a dispute resolution technique between never and rarely for disputes arising in international markets and they rarely use mediation for disputes arising in local markets.

Another data obtained from construction industry professionals in 2012, by Arıcı, reveal the level of knowledge on ADR methods. Survey was conducted in 2012, in the same year with

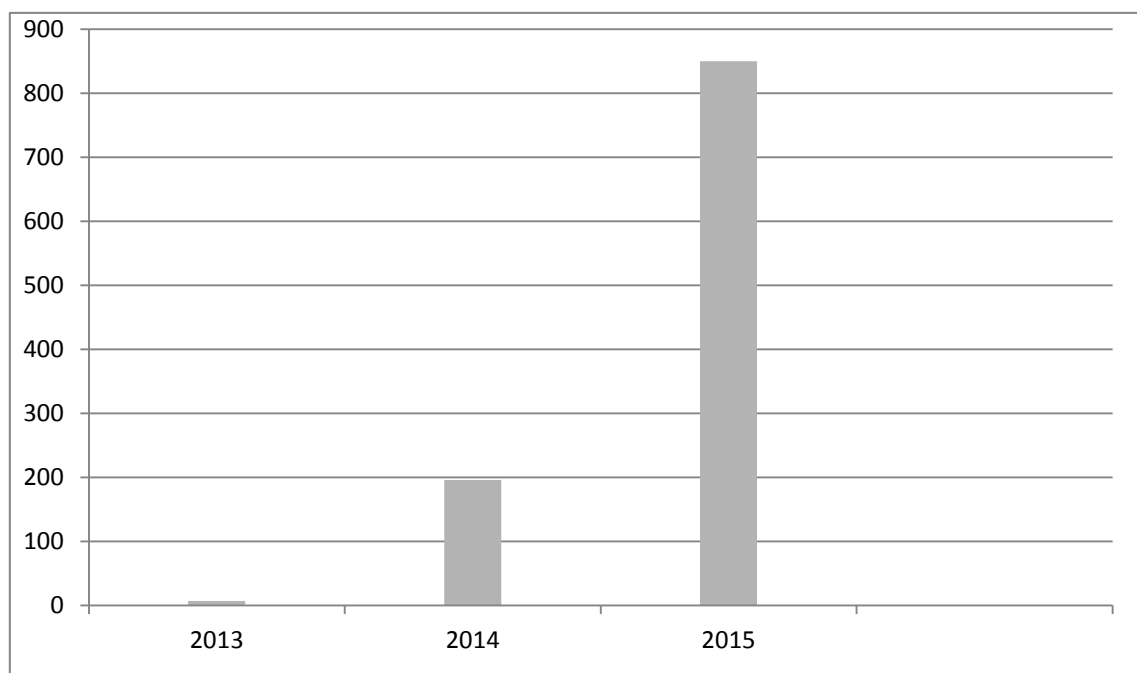
enactment of Mediation Law. According to survey, public officials working in construction projects have little to medium knowledge on mediation. For those working on contractors, knowledge of mediation seems to be between medium to high. The same survey reveals that public officials have been involved in a mediation procedure between “rarely to sometimes”. Contractors on the other hand have responded that they have been involved in a mediation process in past projects between “never and rarely”.

Findings of the surveys conducted by Dikbaş and İlter (2008), Gül and Acar (2010) and Arıcı (2012) seem in line with each other. It seems that level of knowledge has slightly increased from 2008 to 2012 while mediation experiences of industry participants have been rare.

More than 3 years have passed since the enactment of Mediation Law and Department of Mediation established under Ministry of Justice after the enactment of legislation, publishes the statistics about mediation regularly since then. Statistics reveal that in only 1053 cases mediation has been chosen as a method for dispute resolution. When compared with huge number of cases dealt in civil courts, 2.024.056 new cases were brought to civil courts while number of open cases reached as high as 3.293.090 over the year, number of disputes referred to mediation seems marginal.

Number of cases referred to mediation, on the other hand, seems to increase rapidly; only 7 cases were referred to mediation in December 2013, number increased to 196 in 2014 and 850 in 2015 until the end of October. This rapid increase may be parallel to the increase in rising number of mediators and increasing awareness in public as a result of efforts to promote ADR by using advertisements, panels etc.

Table 1: Number of civil cases referred to mediation from December 2013 to October 2015 in Turkey

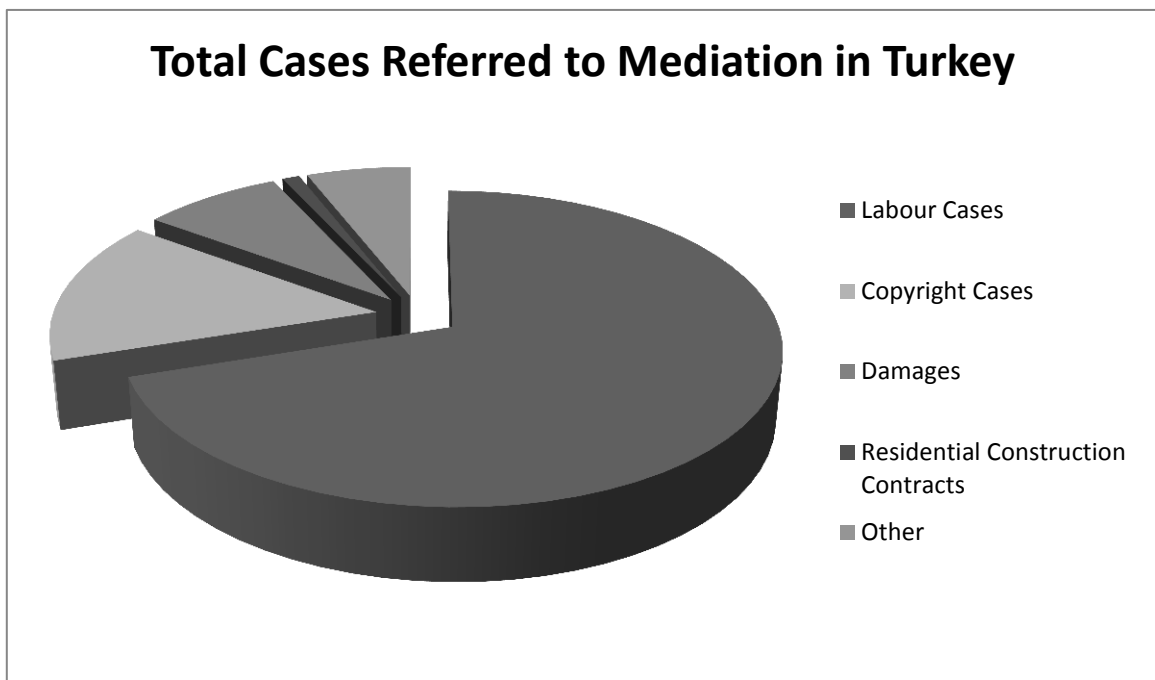


According to official statistics, construction industry hardly seems to consider using mediation until now. Number of cases concerning residential building contracts between landlord and contractors referred to mediators are only four. Of these four cases, two were referred in 2014 and two were referred in 2015. Three of these cases were resolved with an agreement between parties, while one case could not be resolved by agreement.

Statistics are published according to the subjects of cases and cases under headings “compensation” may involve disputes related to construction contracts. However, only 82 cases arising from damages were referred to mediation and this constituted an overall %8 of total cases.

Statistics reveal the fact that 70% of total cases referred to mediation were cases related to labour law and 15 % were related to copyrights. This large number of cases containing disputes arising from employment contracts might be commented as a continuance of familiar practices since the Labour Law contained provisions regarding conciliation even before the enactment of Law on Mediation in Civil Disputes.

Table 2: Distribution of total cases referred to Mediation in Turkey according to their subjects



5. Conclusions

This paper aimed at getting a balance of Turkish Mediation practice, in the context of Turkish construction industry, after the enactment of Law on Mediation in Civil Disputes in 2012. Pre-legislation researches and post-legislation statistics were compared to provide an overview of current situation.

Surveys conducted by researchers in 2008, 2010, 2012 respectively showed that Mediation practice was unfamiliar for construction industry. However, slight increase in awareness prior to enactment of legislation and positive approach of industry participants towards using ADR and mediation in future disputes provided a suitable background for future of ADR and Mediation in Turkey.

However after three years of mediation experience, an analysis of statistics reveals the fact that mediation is still an unfamiliar and unknown process in Turkey. Besides large number of cases referred to courts each year, a marginal number of cases were referred to mediators. Of these cases, construction cases remain insignificant in portion, which indicates the unwillingness or unfamiliar approach of the industry participants towards using new methods in dispute resolution.

On the other hand, rapid increase in cases referred to mediation each year, increasing awareness of society due to strong support of public bodies, time and cost problems arising in arbitration processes as well as in litigation and the trend that was followed in Western countries all point to an increased use of mediation by construction industry in future.

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