

Construction Mediation in Turkey and an Overview of the Draft Mediation Law

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Abstract

On April 23, 2008, the European Parliament (EP) adopted the Directive on Certain Aspects of Mediation in Civil and Commercial Matters to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings. The Directive comprises the basic rules to be adopted for the implementation of mediation, stating that the member states will bring into force laws, regulations and administrative provisions as necessary for compliance. As part of adaptation to the EU *acquis communautaire*, a Draft Mediation Law, which is predicated on the Directive, has been prepared by the Turkish Ministry of Justice and was submitted, in May 2008, to the Parliament for evaluation. The Draft Law has been criticized by some and supported by others; however, concerning the problems associated with the judicial processes in Turkey, the genuine need for quicker, simpler and more cost-efficient methods of dispute resolution is undeniable. This paper begins with a synopsis of the legal background of mediation in Turkey, and then examines the on-going debate on the Draft Law making a comparison between the much debated provisions of the Draft Law and the Directive to determine the extent of compatibility between them concerning issues such as referral to mediation, ensuring the quality of mediation and the enforcement of the settlement agreements to determine the key legal challenges and analyze the context enfolding the rather new “mediation” phenomenon in the Turkish construction industry. An overview of the use and perceptions of mediation in the industry is also given using the qualitative data from a workshop done with the members of the industry, in the quest for making projections to its further development. The findings of this workshop reveals the strong intention of the industry members to move away from the adversarial dispute resolution methods and the openness to adapting mediation and other ADR methods for this purpose. It is concluded that, the Draft Law only determines the main directions and there still is a genuine need to develop effective models for viable implementation of mediation and other ADR methods in the Turkish construction industry, since the lack of institutional framework hinders the wide acceptance despite the growing interest.

Keywords: Alternative Dispute Resolution (ADR), mediation, Turkish construction industry, Draft Turkish Mediation Law

1. Introduction

The EP Mediation Directive¹ (2008) defines mediation as a process where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of their dispute, regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the law. It is defined by Richbell (2008) as a voluntary (unless required by contract), flexible process within a framework of joint and private meetings where the mediator helps the parties clarify the key issues and construct their own settlement. According to the EP Directive (2008), mediation can provide cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and help preserve an amicable and sustainable relationship between the parties. Because of these benefits it may offer, mediation is widely used in many countries' construction industries and is still spreading globally (Cheung 2006). However, although the benefits of mediation are widely appreciated as Cheung (2006) suggests, the adoption and implementation of such new methods is obstructed by the relevant laws, regulations and the absence of adequate institutions.

Alexander (2001) also points out that mediation operates against a backdrop of national dispute resolution culture, institutional rules and regulations. This context defines mediation and has a direct impact on how it is practiced. Therefore, an analysis of this context in Turkey is made below, including the background of mediation in Turkey, the Draft Turkish Mediation Law, the comparison of the Draft Law with the EP Mediation Directive (which the Draft Law is predicated on) and finally the use and perceptions of mediation and Draft Law in the Turkish construction industry, in the quest for making projections to further development of mediation in Turkish construction industry.

2. Development of ADR Regulations within the EU

In April 2002, the European Commission prepared a consultation report, the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law² due to the increasing attention and the diversity of ADR practices in the member states. The objective of the Green Paper was to initiate a broad-based consultation on the salient features of the ADR processes to determine the approach to be taken by the Commission in promoting ADR and the determination of Community-wide rules which will constitute a common base for the institutions to be established in future. This consultation resulted in the proposal for a Directive in October 2004.

¹ Commission of the European Communities (2004) Directive on Certain Aspects of the ADR Process of Mediation in Civil and Commercial Matters, http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0718en01.pdf.

² Commission of the European Communities (2002) Green paper on ADR in civil and commercial law, http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf.

2.1. The Directive on Certain Aspects of the ADR Process of Mediation in Civil and Commercial Matters

On 22 October 2004, the European Commission published a Proposal for a Directive (IP/04/1288) seeking to facilitate access to dispute resolution by promoting the use of mediation, which is among the widely used methods of ADR. The Directive is one of the follow-up actions to the Green Paper on alternative dispute resolution presented by the Commission in 2002, the other being the European Code of Conduct for Mediators established by a group of stakeholders with the assistance of the Commission and launched in July 2004. As a result of the consultation made in Green Paper, the Directive comprises the base rules to be adopted by the member states for the implementation of mediation concerning the referral to mediation, ensuring the quality of mediation, the enforcement of the settlement agreements and suspension of limitation periods. In the explanatory memorandum 1.1.3 of the Directive, the Commission stresses the untapped potential that mediation holds as a dispute resolution method and as a means of providing access to justice for individuals and businesses as a quicker, simpler and more cost-efficient way to solve disputes. It also allows for taking into account a wider range of interests of the parties, with a greater chance of reaching an agreement which will be voluntarily respected, and which preserves an amicable and sustainable relationship between them. The Directive was adopted by the European Parliament on 23 April 2008. The key components of the Directive are as follows:

1. The Directive obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conducts and other effective quality control mechanisms concerning the provision of mediation services. These mechanisms may include market-based solutions provided that they aim to preserve the flexibility of the mediation process and the autonomy of the parties and to ensure that mediation is conducted in an effective, impartial and competent way.
2. The Directive gives every judge in the Community, at any stage of the procedure, the right to invite the parties to have recourse to mediation if he considers it appropriate in the case in question. The judge can also suggest that the parties attend an information meeting on mediation.
3. The Directive obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary. The choice of mechanism is left to the Member States. This provision will enable parties to give an agreement resulting from mediation a status similar to that of a judgment without having to commence judicial proceedings. This possibility, which currently does not exist in all Member States, can provide an incentive for parties to resort to mediation rather than go to court.

4. The Directive also ensures that mediation takes place in an atmosphere of confidentiality and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation. To this end, the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties.

5. Finally, the Directive contains a rule on limitation and prescription periods which ensures that, when the parties engage in mediation, any such period will be suspended or interrupted in order to guarantee that they will not be prevented from going to court as a result of the time spent on mediation. Like the rule on confidentiality, this provision also indirectly promotes the use of mediation by ensuring that parties' access to justice is preserved should mediation not succeed.

Once the Directive has entered into force, it will have to be transposed into the national laws of the EU Member States. The Commission will closely monitor the transposition of the Directive by the Member States and ensure that the requirements of the Directive are met. (Europa Press Releases, 2008).

3. Mediation in Turkey

3.1. Adoption of the EU Acquis

In July 1959, Turkey made its first application to join the then recently established European Economic Community. The ensuing negotiations resulted in the signature of the agreement creating an association between the Republic of Turkey and the European Economic Community (the "Ankara Agreement") on 12 September 1963. This agreement aimed at securing Turkey's full membership in the EEC through the establishment in three phases of a customs union which would serve as an instrument to bring about integration between the EEC and Turkey. On January 1, 1996 the Customs Union came into effect and shortly after, at the Helsinki European Council held on 10-11 December 1999, Turkey was officially recognized as a candidate state on an equal footing with the other candidate states. At the end of 2004, the Accession Negotiations between the EU and Turkey were formally started, initiating a formalized process whereby Turkey shall be required to complete the adoption of the EU Acquis. Turkey administers its adoption of the EU Acquis according to a "National Program", furnishing a road-map for adaptation of the legislation and the institutional development for implementation.

The deployment of ADR is an important target in Turkey's State Strategy and Action Plan for 2007-2013 Judiciary Report (2006, p.60). According to the report prepared, ADR mechanisms such as negotiation, mediation, dispute resolution boards and ombudsmen that enable resolving disputes without going through a long judicial process with high costs should be adopted in order to reduce the disputes waiting for proceedings. To realize this objective, it is reported that the necessary councils for mediation and dispute review boards specialized in sectors base should be constituted. Accordingly, there has been an endeavour by the Ministry of Justice towards preparing the necessary legislation. Many draft laws have been prepared which include provisions of ADR, and finally a mediation law has been prepared and is now being discussed at the Parliament. The current Turkish legislation regarding ADR including the Draft Mediation Law, is overviewed below.

3.2. Adaptation of the Legislation

In Turkish law, there is no specific law pertaining to ADR in the existing legislation currently. However, there are provisions of ADR in some, and a Draft Mediation Law has been prepared by the Ministry of Justice in 2007. Below is the synopsis of the legal background of ADR in Turkey. There are two acts in the current legislation that include provisions on ADR in Turkish Law, one being the provision that supports ADR is in the Advocateship Law and the other Code of Criminal Procedure.

3.2.1. The Advocateship Law³

Article 35/A of the Advocateship Law suggests that an attorney and his client may invite the other party and his attorney to negotiation before the case or the trial is commenced. If the parties reach an agreement at the end of negotiation, they execute a written agreement disposing of the dispute, which is called negotiation minute with their attorneys. This agreement is enforceable in the same manner as any other final judgment and includes the subject of negotiation, place and date of negotiation, and the duties of the parties as accepted mutually.

3.2.2. Code of Criminal Procedure⁴

An amendment made to the Code of Criminal Procedure in 2006 contains provisions about victim-offender mediation in criminal cases during investigation or prosecution phases in certain criminal offences. After agreeing to mediation, the parties will appoint a lawyer as mediator. If they do not select the mediator, the public prosecutor or the judge will contact the local bar association to appoint the mediator. To be a mediator one must be an attorney who has been a member of the local bar. Mediator must complete mediation maximum in thirty days form the time of appointing. An extension of the thirty-day limitation may only be granted by the prosecutor once. The limitation period suspends during the mediation. Mediation discussions are confidential and may not be disclosed

³ Ministry of Justice Advocateship Law, <http://www.mevzuat.adalet.gov.tr/html/440.html>.

⁴ Ministry of Justice Code of Criminal Procedure, <http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm>.

subsequently, except with the agreement of the parties. If the case is referred back to the proceeding as mediation is unsuccessful, an acceptance of some facts or even “confession of guilt” by the accused in the context of mediation can not be used as evidence in subsequent criminal proceedings on the same manner. After the mediation process is concluded, the mediator will report to the relevant public prosecutor on his or her interventions in ten days. When mediation is successful in bringing about an agreement between the parties and after the damages compensated and the costs of mediation to be paid by the accused, the public prosecutor order not to prosecute. When the court refers a criminal case to mediation, the same procedure is followed. When the case has been mediated, the court order for the discontinuance of the proceedings. In case of reconciliation, the fees and expenses of the conciliator is paid from the Government Treasury. If the parties fail to reach a settlement, then these fees and expenses are added to the cost of the proceedings. In this code reference has been made to Recommendation no. R(99)19 of the Council of Europe Committee of Ministers on mediation in penal matters (Ozbek, 2005).

3.2.3. *Draft Administrative Procedure Law*⁵

A Draft Administrative Procedure Law is under consideration at the Ministry of Justice. This code envisages the introduction of Alternative Dispute Resolution mechanisms in settling administrative disputes. Chapter six of the Draft Act deals with alternative means for resolving disputes between administrative authorities and private parties. There are the following alternative processes: internal reviews, negotiated settlement, and mediation (or conciliation). In this draft code reference has been made to Recommendation no. Rec(2001)9 of the Council of Europe Committee of Ministers on alternatives to litigation between administrative authorities and private parties (Ozbek, 2005).

3.2.4. *Draft Mediation Law*⁶

The objective of the Draft Law is to facilitate the resolution of private law disputes arising from transactions and rights which are at the complete disposal of the parties speedily, simply, and effectively with the lowest possible cost, to ensure the resolution of these disputes through alternative methods such as mediation rather than judicial proceedings reflecting the latest developments in comparative law to Turkish procedural law. The first Draft Law was prepared in September 2007 by the Ministry of Justice and submitted to the relevant authorities in order to be discussed. This first version was heavily criticized especially for two reasons; firstly, the directly enforceable nature of the mediation agreement signed by the parties and the mediator; and secondly, the possibility of becoming a mediator after a training for all professions (it was not a privilege given to lawyers only). The first critique was recognized by the committee preparing the Draft Law and therefore, one of the most important changes in the second version, which was prepared in 2008, is the provision of certification

⁵ Ministry of Justice Draft Administrative Procedure Law, <http://www.kgm.adalet.gov.tr/gorus/giuk.htm>.

⁶ Ministry of Justice Draft Mediation Law, <http://www.kgm.adalet.gov.tr/gorus/huakt.htm>.

of the agreement by the courts to make it enforceable. However, second critique was not recognized and second Draft Law also gives the right to become a lawyer to all professions.

4. Comparison of the Draft Law with the EP Directive

Several model laws were analyzed in the preparation of the Draft Law such as the mediation laws of Austria, Germany, Bulgaria, Hungary, Slovakia and UNCITRAL Model Law on Commercial Conciliation. However the EC Green Paper and the EP Directive were the principal reference documents, which require the laws prepared in the Member and Candidate States to comply with them. Therefore, a comparison is made in the table below between the Draft Law and The EP Directive to determine the extent of compatibility between them and the key legal challenges awaiting.

Table 1: Comparison of the Draft Law with the EP Directive

		EP Directive on Mediation	Draft Turkish Mediation Law
1	objective	To facilitate access to ADR 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.	To facilitate the resolution of disputes speedily, simply, and effectively with the lowest possible cost, to ensure the resolution of certain disputes through alternative methods such as mediation rather than judicial proceedings, and to reflect the latest developments in comparative law to Turkish procedural law.
2	scope	Civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law.	Private law disputes arising from transactions and rights which are at the complete disposal of the parties including disputes with a foreign element.
3	mediation definition	A structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.	A voluntary alternative dispute resolution method which is overseen by an independent and impartial trained expert third party who brings the parties together in systematic negotiations and promotes their understanding of one another and accordingly establishes a means of communication in order for the parties to reach mutual solutions.
4	mediation by a judge	Includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute, excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute.	Not defined.
5	mediator definition	Any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person and the way in which the third person has been appointed or requested to conduct the mediation.	A real person who is engaged in mediation and is registered before the Ministry of Justice's mediator's register.
6	initiation of mediation	The process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of the Member State.	The parties may initiate the mediation process before or throughout the duration of the judicial process. The court may suggest and encourage the parties to apply to a mediator.
7	court initiation	A court before which an action is brought may invite the parties to use mediation in order to settle the dispute and also invite parties to attend an information session on the use of mediation.	
8	ensuring the quality of mediation	The development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services is encouraged.	The Mediation Department Presidency keeps the registry of real persons who have the right to act as mediators in private law matters and sends written warnings to those who are determined to act in breach of the obligations stipulated by this law; in the event the mediator does not comply with the said warning, the defense of the mediator is obtained and if necessary, it is requested from the Board that the relevant mediator is removed from the registry. Furthermore, the General Directorate of Law Affairs

			may employ auditors for the supervision of all transactions and applications in relation to the rendering of mediation services and the mediation training institutions and mediators.
9	training of mediators	The initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties should be provided.	Mediator training is a minimum of 150 hours of training encompassing the fundamental information for the realization of mediation, communication techniques, negotiation and dispute resolution techniques, behavioral psychology and other theory and practical information stipulated by a regulation, realized after the finalization of four years of undergraduate studies.
10	compulsory mediation	The directive makes the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.	The Draft stipulates voluntary mediation and therefore it is accepted that the parties apply to mediation without any coercion through their own freewill.
11	enforceability of agreements	Possibility for the parties to request that the content of a written agreement resulting from mediation be made enforceable is ensured. (unless the content is contrary to the law of the Member State where the request is made)	The content of the agreement reached at the end of the mediation process may be made enforceable through the application of the parties to the competent court of enforcement which is competent to resolve the dispute. The agreement which has the enforcement seal of the said court is accepted to have the effect of a judicial decision.
12	certification of the agreement	The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State. Member States should inform the Commission of the courts or other authorities competent to receive these requests.	
13	confidentiality of the process	It should be ensured that unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process.	Unless the parties agree otherwise, the mediator is under the obligation to keep all information, documents obtained directly or indirectly and records within the administration of the mediation process confidential. Unless agreed otherwise, the parties are also under the confidentiality obligation. A person acting in breach of this obligation which has caused damages to an interest of a party protected by the law shall be sentenced to a prison sentence from six months to two years.
14	limitation and prescription periods	Parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.	The time starting from the initiation of the mediation process until its finalization is not included in the calculation of limitation or prescription periods. In the event the parties declare that they shall apply to mediation after the judicial process has been initiated, the court adjourns the judicial process for three months. This period may be extended another three months with the mutual application of the parties.
15	publicity of mediation services	Member States shall encourage the availability to the general public, in particular on the internet, of information on how to contact mediators and organizations providing mediation services.	The Mediation Department Presidency realizes publications regarding mediation and promotes and supports scientific studies. Realizes the presentation of mediation as an institution and informs the general public, and organizes national and international conferences, symposiums, seminars. Lists the mediation training institutions and registered mediators, and publishes them in particular in electronic format.
16	audit of the legislation	The Commission shall submit a report on the application of this Directive no later than 2016. The report shall consider the development of mediation throughout the EU and impact of this Directive in the Member States.	The Mediation Department Presidency, supervises the mediation activities throughout the country, compiles the necessary statistics and realizes their publications.
17	transposition	Member states shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 21 May 2011.	The establishment and institutionalization shall be completed within two months as of the publication of this Law in the Official Gazette.

The comparison made above shows that the Draft Law is generally compatible with the Directive and the only difference is about the compulsory mediation. Although the Directive makes the use of mediation compulsory, or subject to incentives or sanctions; the Draft law accepts mediation as a voluntary process therefore does not involve any provisions for compulsory mediation or sanctions. However, more resolute incentive mechanisms could have been used to promote mediation for successful deployment without prejudice to voluntariness attribute of the process proposed. As a result of this analysis, it can be concluded that the Draft Law covers all the issues related to mediation and provide the main directions for possible implementations in the Turkish construction industry.

5. The Use and Perceptions of Mediation in the Turkish Construction Industry

The findings of a recent workshop done with 20 members of the Turkish construction industry, comprising contractors, employers, consultants and legal advisors, reveal that mediation is still a very new phenomenon in the Turkish construction industry. 85% of the respondents said they have never used any form of ADR, showing that there is still little actual experience of mediation and other ADR methods. 90% of the respondents said that they would consider using mediation and other forms of ADR, and the remaining 10% said they did not know (Table 2). Even this small number of “don’t knows” seems to be the result of the lack of knowledge since only 25% of the respondents said that they had enough knowledge of mediation. None of the respondents said they would not use mediation. These results seem to be in tune with the results of a survey done by Brooker and Lavers (1997) when ADR was rather new in the UK construction industry. 96.1% of the respondents said they had not used ADR and 70% said that they would consider using ADR to help resolve a construction dispute in the UK survey in 1997. Based on these results, Brooker and Lavers (1997) concluded that, there is not the widespread suspicion of ADR as some have suggested, nor is there any evident intransigence towards it. Likewise, the results of the workshop done in Turkey reveal that there is a widespread interest in ADR in the Turkish construction industry. These similar results obtained are however, the first group of results of the Turkish construction industry survey and the percentages may vary a little as the sample size targeted for the study is reached.

Table 2: Respondents who would consider using ADR to help resolve a construction dispute

	Yes	No	Don't Know	Total
Frequency	18	0	2	20
Percentage	90	0	10	100

The answers to the question whether the respondents saw a need to move away from the adversarial methods of dispute resolution in construction industry also support the findings above. All of the respondents saw this need in the private sector and 19 of 20 respondents saw this need in public works. The average point given was 4,93 for private and 4,50 for public works, where 5 is very

appropriate, 3 is neutral and 1 is very inappropriate. Respondents thought mediation is the most appropriate method for resolving construction disputes in the private sector whereas adjudication (and other binding forms of ADR) is the most appropriate in public works. 65% of the respondents said they were aware of the Draft Mediation Act, while others had not heard of it before.

The findings of this workshop reveals the intention of the industry members to move away from the adversarial dispute resolution methods and the openness to adapting new methods for this purpose. Although mediation and other forms of ADR are quite new and very few have actual experience, the widespread dissatisfaction with its long-established `rivals' speaks in favour of ADR; many respondents who had never used ADR expressed an interest in doing so and ADR was perceived as enjoying real advantages over litigation and arbitration.

6. Conclusion

This paper has attempted to provide an analysis of the context enfolding the rather new mediation phenomenon in the Turkish construction industry. This analysis is believed to be very timely because:

1. There is a raising interest in the subject and members of the Turkish construction industry see a need to move away from the adversarial methods of dispute resolution (litigation and arbitration) in both private sector and public works.
2. A Draft Mediation Law has been prepared by the Ministry of Justice in 2007 which was criticized heavily. The Ministry submitted a revised version of the Draft Law, which is predicated on the EP Directive on Mediation, to the Parliament in May 2008.

The analysis done in this paper includes a brief of the developments regarding ADR in the EU, the legal background of mediation in Turkey, the Draft Mediation Law and the comparison of the Draft Law with the EP Directive to determine the compatibility and key legal challenges awaiting the Draft Law and finally the perceptions of mediation in the Turkish construction industry.

The findings reveal that the Draft Law is generally compatible with the Directive and covers all the issues for the successful adaptation of the legislation. However, the Draft Law only determines the main directions and there still is a genuine need to develop effective models for viable implementation of mediation and other ADR methods in the Turkish construction industry, since the lack of institutional framework hinders the wide acceptance despite the intention of the industry members to move away from the adversarial dispute resolution methods and their openness to adapting ADR methods for this purpose.

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