



An analysis of the key challenges to the widespread use of mediation in the Turkish construction industry

Widespread use of mediation

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Abstract

Purpose – The Turkish Ministry of Justice submitted the Draft Law on mediation in legal disputes, which was predicated on the European Council (EC) Directive on certain aspects of mediation in civil and commercial matters, to the Turkish Parliament in June 2008. Contentious arguments have followed on the provisions of the Draft Law as well as on the overall applicability of mediation in Turkey. The purpose of this paper is to examine the context surrounding the new mediation phenomenon in order to identify the key challenges awaiting its widespread use in the Turkish construction industry.

Design/methodology/approach – Two complementary approaches were adopted in this paper. First, an analysis of the most debated papers of the Draft Law is carried out to determine the potential problems associated with the legislation by making comparisons with the EC mediation directive and mediation laws in some of the member states. Second, a series of structured interviews are organized among the Turkish construction industry to gain better insight on prevalent perceptions of mediation, assess pertinent demand and determine the sector specific challenges.

Findings – The comparative analysis of the Draft Law and the empirical results obtained from the industry indicate a promising platform for the deployment of mediation. However, the adverse attitude of lawyers, inadequate financial incentives, the lack of an industry specific institutional framework and low level of knowledge on mediation in the industry hinder wide acceptance despite the growing interest, as evidenced in the results of the interviews.

Originality/value – This paper is aimed to be a timely contribution to the process of the establishment of mediation in the Turkish construction industry. The paper provides a comprehensive analysis of the Draft Law through comparison with other legislation and furnishes original data on the perceptions of mediation in the Turkish construction industry in the quest for making projections for its further development.

Keywords Alternative dispute resolution, Construction industry, Mediation, Turkey

Paper type Research paper

1. Introduction

Preparation of the Draft Law on mediation in legal disputes (“the Draft Law”) by the Turkish Ministry of Justice in 2008, has opened a new era in the deployment of alternative dispute resolution (ADR) methods in Turkey. It was a very important milestone in the actions of the government in promoting ADR, displaying its resolve for the institutionalisation of mediation in Turkey. Predicated on the European Council (EC) Directive on certain aspects of mediation in civil and commercial matters (“the Directive”), the Draft Law started a heated debate, not only on the provisions introduced by the Draft, but also on the overall applicability of mediation in Turkey.



On the other hand, these developments also caused a considerable surge in the interest in mediation, as evidenced by the rising number of seminars, discussions, articles, education programs, and even new businesses related to mediation.

The Directive defines mediation as:

[...] 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[1].

According to the Directive:

[...] mediation can provide cost-effective, quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties and agreements resulting from mediation are more likely to be complied with voluntarily and help preserve an amicable and sustainable relationship between the parties[2].

Richbell (2008, p.19) defines mediation in the construction industry as “a voluntary, 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.”

Wherever mediation is put into use, it has found wide application in the construction industry, if not the widest; not surprisingly there is now a growing interest in mediation in the Turkish construction industry. However, no research has been carried out to investigate the implications of the Draft Law for the Turkish construction industry. In view of these developments, this paper analyses the context enfolding the rather new mediation phenomenon in Turkey by investigating the Draft Law in terms of the requirements of the Directive, presents empirical data on the current perceptions of mediation in the Turkish construction industry and, identifies the key challenges facing the widespread adoption of mediation in the industry.

2. The Directive

The European Commission presented a Green Paper on ADR in civil and commercial law[3] in 2002, initiating wide-spread consultations with the member states and interested parties on possible measures to promote the use of mediation and launching broad consultations on the measures to be taken. The main purpose of the Green Paper was to come up with answers to the delicate question of the balance to be achieved between the need for flexibility and the need to guarantee quality of results, and the harmonious relationship with court procedures. It also highlighted the existing achievements and initiatives in this area both in the member states and in the community. The questions put forward in the Green Paper concerned the decisive elements of the different forms of ADR, such as clauses providing agreements to go to ADR, the problem of periods of prescription and limitation, the need for confidentiality, the validity of consent, the effect of resulting agreements particularly for enforcement,

[1] Council Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3, Article 1(1).

[2] Council Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/6, Article 6 of the explanatory memorandum.

[3] COM (2002) 196 final.

training for mediators and other third parties, their accreditation and the rules governing their liability (http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm).

This consultation resulted in the proposal for a Directive[4] in October 2004, seeking to facilitate access to dispute resolution by promoting the use of mediation, which is among the most widely used methods of ADR. The proposal for a Directive sought to further the use of mediation by making certain legal rules available within the legal systems of the member states. These rules cover the areas of confidentiality of the mediation process and of mediators as witnesses, enforcement of agreements for settling disputes as a result of a mediation and the suspension of the running of periods of prescription and limitation of actions while a mediation is in process. This latter possibility removes one potential disincentive to the use of mediation. The fact that there is no attempt to regulate or harmonise the laws of the member states encourages the adoption of training of mediators and the adoption of norms of conduct to secure the quality of mediation on a consistent basis throughout the Union (http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm).

Finally in 2008, the European Parliament and the Council adopted the Directive on certain aspects of mediation in civil and commercial matters[5]. The objective of this Directive is 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 (www.europarl.europa.eu/oeil/file.jsp?id=5210432¬iceType=null&language=en). The Directive applies to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. 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. The provisions of the Directive are analysed in detail in Section 4.

3. The Draft Law

As a part of the adoption of the European Union (EU) acquis process, a Draft Mediation Law has been prepared by the Ministry of Justice predicated[6] on the Directive and this constituted the first comprehensive legislation on mediation in Turkey. The objective of this Draft Law is determined as:

[...] facilitating the resolution of private law disputes by 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[7].

The Ministry of Justice prepared the first Draft Law in September 2007 and submitted to the relevant authorities in order to be discussed. This first version was heavily

[4] COM (2004) 718 final.

[5] Council Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

[6] Legal grounds of the Draft Mediation Law (www.kgm.adalet.gov.tr/tbmmkom/tbmmkom.html).

[7] Ministry of Justice Draft Law on mediation in legal disputes 2008 Article 2(1)(a).

criticised by the bars for two reasons in particular. First, because the mediation agreement signed by the parties and the mediator was in the nature of a court decision and directly enforceable; second, becoming a mediator as a profession was not a privilege given to lawyers only, but open to individuals from all professions after a training. Some unclear points regarding the limitation periods, court initiated mediation, training of mediators, and training institutions were also criticised.

After the collection of the opinions and the discussions, the codification commission, consisting of scholars in law, Supreme Court judges, experts of the Ministry of Justice and representatives from bars and chambers, made some revisions on the Draft Law and sent the second version to the Parliament in June 2008. The revised version of the Draft Law is now being examined by the Parliamentary Commissions of Justice, Planning and Budgeting, and EU adaptation. The most important revisions made in the second version of the Draft Law are inclusion of the provision for the certification of the mediation agreement by the courts to render it enforceable and some clarifications about the processes such as training, initiation, etc. However, despite the objections, no change has been made regarding eligibility of people of all professions to becoming a mediator. The critiques focused on the following points in the second version of the Draft Law:

- The title of the Draft Law (the Draft Law on mediation in legal disputes) is criticised for not clearly indicating the scope of the Law as civil disputes (Gurseler, 2009)[8].
- It is suggested that the right to become a mediator should be given to lawyers only (Gurseler, 2009; Eskiyyoruk, 2008)[9].
- Article 2(1)b has been criticised, which requires all mediators to be registered before the Ministry of Justice's mediator's register, for limiting the disputants right to choose any person to mediate their dispute (Sipka, 2008).
- It is proposed that the institutional framework for mediation should be part of the bars or the Union of Turkish Bar Associations instead of the Ministry of Justice, in order to preserve its autonomy (Gurseler, 2009; Sipka, 2008).
- There is criticism of the lack of financial incentives to promote the use of mediation.
- The lack of sector-based infrastructure that should be in place before the Draft Law becomes effective (Sipka, 2008).

4. A comparative analysis and pertinent suggestions

Mediation laws in some member states and UNCITRAL Model Law on commercial conciliation were used as reference in the preparation of the Draft Law, however the Directive was the principal reference document. Therefore, a comparison is made in Table I between the Draft Law and the Directive to determine the extent of compatibility, and based on this, the problems associated with the legislation, as well as the critiques mentioned above, and suggestions for their resolution are discussed below.

[8] Secretary General of the Union of Turkish Bar Associations.

[9] Based on the report of Adana Bar Association on the Draft Law.

	The directive article	Art no.	The draft law article	Art no.
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	Art. 1-1	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	Art. 1(a)
2	Scope Civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law	Art. 1-2	Private law disputes arising from transactions and rights which are at the complete disposal of the parties including disputes with a foreign element	Art. 1(1)
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	Art. 3-a	A voluntary ADR 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	Art. 2(1)a
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	Art. 3-a	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	Art. 3-b	A real person who is engaged in mediation and is registered before the Ministry of Justice's mediators' register	Art. 2(1)b
6	Recourse to 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	Art. 3-a	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	Art. 13(1)
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	Art. 5-1		

(continued)

Table I.
Comparison of the Draft
Law with the Directive

	The directive article	Art no.	The draft law article	Art no.
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	Art. 4-1 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 defence of the mediator is obtained and if necessary, it is requested from the Board that the relevant mediator is removed from the registry	Art. 19(1) 21(2) 29(2)
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	Art. 4-2 Mediator training is a minimum of 150 hours of training encompassing the fundamental information for the assimilation of mediation, communication techniques, negotiation and dispute resolution techniques, behavioural psychology and other theory and practical information stipulated by a regulation, achieved after the completion of four years of undergraduate studies	Art. 22(1)
10	Compulsory mediation	The Directive is without prejudice to national systems making 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	Art. 5-2 The Draft stipulates voluntary mediation and therefore it is accepted that the parties apply to mediation without any coercion through their own freewill	b
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)	Art. 6-1 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	Art. 18(2)
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	Art. 6-2 6-3	

(continued)

	The directive article	Art no.	The draft law article	Art no.
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	Art. 7-1	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	Art. 4(1) 4(2) 33(1)
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	Art. 8-1	The time starting from the initiation of the mediation process until its finalisation 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	Art. 15(5) 16(2)
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	Art. 9	The Mediation Department Presidency produces publications regarding mediation and promotes and supports scientific studies. Presents mediation as an institution, 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	Art. 30(b) 30(c) 30(e) 30(f)
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	Art. 11	The Mediation Department Presidency, supervises the mediation activities throughout the country, compiles the necessary statistics and publishes them	Art. 30(d)

Sources: ^aThe Turkish Ministry of Justice website (www.kgm.adalet.gov.tr/tbmmkom/tbmmkom.html); ^blegal grounds of the Draft Mediation Law (www.kgm.adalet.gov.tr/tbmmkom/tbmmkom.html);

4.1 Objective

As evidenced by Table I, the Draft Law and the Directive indicate the same need for the improvement of the existing dispute resolution processes by adopting mediation in civil disputes. In order to overcome the prejudiced opinion of the lawyers, it should be made clear, however, that mediation is an additional and supplementary method to litigation, not a method to substitute it.

4.2 Scope

Both the Draft Law and the Directive apply to civil matters including all commercial and in particular construction disputes. However, as mentioned among the critiques in Section 4.1, the title of the Draft Law could have more clearly indicated the scope of the law as civil disputes.

4.3 Mediation definition

Both the Draft Law and the Directive involve facilitative mediation as a supportive process comprising a mediator who is a neutral person independent of the parties. The mediator assists the parties in reaching a mutually accepted settlement without making an evaluative interpretation of the dispute. This type of mediation is more on the facilitative side than the evaluative (Brooker, 2007). Pieckowski (2006) however, claims that in order to be productive, every mediation must contain certain elements of evaluation by the mediator.

4.4 Mediator definition and training of mediators

The question of who can become a mediator has been one of the mostly debated issues in the Draft Law. As mentioned in the critiques, many lawyers, bar associations and the Union of Turkish Bar Associations demanded that the privilege of becoming a mediator be accorded to lawyers only. However, academia defended the Draft Law in this regard, and criticised the lawyers' approach for being contradictory with the purpose of mediation as an institution. Sipka (2008) wrote that while lawyers focus only on the justness of one party by the law, mediation involves conflict management, behavioural psychology, communication, negotiation techniques and voluntariness. She explains that, indeed, a psychologist may be more helpful for the parties in a family dispute or an engineer may be more successful in mediating a technical dispute than a lawyer. Dispute Resolution Services Director of CEDR[10] Andy Grossman says that more than half of the mediators registered in CEDR are non-lawyers and while mediating, non-lawyers benefit from the advantage of not having an adversarial predisposition in resolving disputes[11].

In the Belgian Law on mediation, mediation activities are classified into family disputes, social disputes and commercial disputes, and a person can mediate only in one of these three groups, with the exception of lawyers who have the privilege to work in all groups as a mediator (Demeyere, 2006). Such an arrangement can be a compromise point for the on-going debate and ensure that people mediate the disputes belonging to their field of expertise.

[10] Centre for Effective Dispute Resolution.

[11] Minutes of the interview with Andy Grossman (May 2007).

On the other hand, the prejudiced opinion of the lawyers and bar associations against mediation can be changed by raising the level of knowledge on mediation. The training programs[12] organized with the support of the European Commission in Turkey are very important developments in this context. This series of training targets the completion of basic mediation training of a thousand Turkish lawyers in 2009. However, as long as the law gives the right of becoming a mediator to all professions, such training should be available for individuals from all professions as soon as possible.

4.5 Registry of mediators

Article 2(1)b of the Draft Law requires all mediators to be registered before the Ministry of Justice's mediator's register and limits the disputants right to choose any person to mediate their dispute. Sipka (2008) proposes to distinguish voluntary mediation from court initiated mediation and allow the disputants to use any person as a mediator in voluntary mediation while bringing the registry restriction in the court initiated mediations.

This proposal follows the approach in the Belgian Law on mediation that distinguishes between two types of mediation: voluntary mediation and court initiated mediation. Voluntary mediation relates to mediation that is not linked to existing legal proceedings and any person chosen by the parties can mediate in these, whereas court initiated mediation takes place within the framework of existing proceedings and only registered mediators are able to work in this type (Demeyere, 2006).

4.6 Quality assurance

The Directive calls upon member states to build control and supervisory mechanisms to raise the professional level of mediation and undertake concrete steps aimed at establishing and improving standards of conduct for mediators and organizations offering mediation services. The Draft Law gives the duty of assuring the quality of mediation services to the Mediation Department Presidency and the Board as explained in Table I. The Board consists of the President of the Mediation Department, judges, and representatives of the association of notaries, bars, chambers, universities, and mediators. The duties of the Board are determining the code of conduct, the principles of training and accreditation of the mediators, the rules of auditing the mediators, the fees for the registration of mediators, adjudicating the Presidency's demands on removal of mediators from the registry and cancellation of the permits of the training institutions. The Presidency, on the other hand, is established within the Ministry of Justice and executes the decisions of the Board in cooperation with the third parties where needed, promotes research and publications on mediation, informs the public about mediation, monitors the performance of mediation services and keeps the related statistics, keeps the mediators' registry, audits the mediators, determines the minimum wages for mediators, and keeps a copy of all mediation agreements. This framework determined by the Draft Law has been the target of the critiques as mentioned in Section 2. Bar associations and academia declared that the institutional

[12] EuropeAid/123555/D/SER/TR organized by the international consortium headed by ADR Center, Rome.

framework for mediation should not be structured within the Ministry of Justice but within the bars and the Union of Turkish Bar Associations in order to preserve its autonomy. This view is especially important in terms of the audit of mediators which, it is argued, should be performed by an autonomous institution to preserve impartiality.

4.7 Financial incentives

Although the Directive is without prejudice to national systems making the use of mediation compulsory or subject to incentives or sanctions, these mechanisms are the determining factors of the rate of use especially if awareness level is low. The Draft Law is less than satisfactory in the promotion of mediation through financial incentives. In this regard, Polish Mediation Law constitutes a successful example, where the drafters intended to make mediation highly attractive to parties. According to the Polish Law, if a mediation settlement is reached in a case filed in the court, the legislation provides that the plaintiff will recover three quarters of the court fee already paid (Pieckowski, 2006). Such financial incentives could be planned as part of the promotion activities when the Draft Law becomes effective.

4.8 Institutional framework

In her paper, Sipka (2008) drew attention to the lack of sector-based frameworks which need to be in place before the Draft Law becomes effective. The successful deployment of new practices depends on the planning and realization of the related institutional framework as much as the adaptation of legislation. However, this sector-based infrastructure is often neglected (Ilter *et al.*, 2007). Therefore, it will be necessary to set up the necessary mechanisms to promote mediation, formulate sector-specific incentives and produce codes of conduct and accreditation criteria for the Turkish construction industry, where the growing interest is already evident in the empirical data given in Section 5.

As a result of the analysis above, it is suggested that the Draft Law provides a promising platform for the successful deployment of mediation, compatible with the Directive. However, the second phase, which is the institutional development of mediation in the industry, has to be planned and executed as carefully as the implementation of the legislation phase in order to overcome the key challenges that await.

In Section 5, the findings of a series of structured interviews are presented to provide the first set of data on the perceptions of mediation and identify the sector specific challenges to the wide spread adoption of mediation in the Turkish construction industry.

5. Empirical analysis in the Turkish construction industry

Semi-structured interviews were conducted with thirty-five Turkish Contractors in 2009. A significant portion of the large contractor firms in the industry are represented in this sample, as participants were selected from top managerial positions of the largest Turkish contractor firms.

The contractors were asked questions in five areas:

- (1) Their view on the need to move away from adversarial methods of dispute resolution in the industry.

- (2) The current use of mediation in Turkish construction industry.
- (3) Whether they would consider using mediation in the future.
- (4) Their knowledge about mediation.
- (5) Their awareness of the Draft Law.

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The results of these interviews reveal the following findings.

Among the interviewed contractors 28 of them, meaning 80 percent of all respondents, agreed that there is a need to move away from adversarial methods of dispute resolution in the construction industry. The most frequently specified reasons behind this statement were; seeking a short and low cost process, the fear of bad reputation in the sector during litigation, trying to avoid the deterioration of the close relationships they have with other parties, trying to avoid the work hours spent for the preparation of litigation or arbitration, and the fear of losing in litigation due to the tendentious contracts prepared by employers. Despite this tendency, however, only a small percentage of the contractors had actual experience with mediation. As seen in Table II, only 11 percent of the contractors said that they have used mediation in their projects before. On the other hand, the fact that 85 percent of contractors consider using mediation in the future (Table III) indicates that the low rate of current use does not result from a negative attitude towards mediation but rather a low level of knowledge on mediation (Table IV). Indeed, only 14 percent of the contractors think they have sufficient knowledge on mediation and 80 percent think they do not, while 6 percent do not know.

	Frequency	Percentage
Used mediation	4	11
Not used mediation	31	89
Total	35	100

Table II.
Contractors' current use
of mediation in Turkish
construction industry

	Frequency	Percentage
Yes	30	85
No	1	3
Do not know	4	12
Total	35	100

Table III.
Contractors'
considerations for using
mediation in the future

	Frequency	Percentage
Sufficient	5	14
Not sufficient	28	80
Do not know	2	6
Total	35	100

Table IV.
Contractors' view on their
knowledge on mediation

One other remarkable finding is about the contractors' awareness about the Draft Law. Although the Draft Law has been discussed for nearly two years, only 29 percent of the contractors said they were aware of the Draft Law. The low levels of knowledge on mediation and awareness of the Draft Law indicates the importance of sector-based promotion and training. Although the respondents' experience with arbitration and litigation directs them to move away from the adversarial methods, the lack of a sector-based institutional framework to promote and execute mediation hinders the actual use of this new practice in the industry.

6. Conclusion

This paper is aimed to be a timely contribution to the process of the establishment of mediation in the Turkish construction industry because there is a rising interest in the subject, as is evident from the empirical data provided and members of the Turkish construction industry see a need to move away from litigation and arbitration. A Draft Mediation Law has been prepared by the Ministry of Justice and was submitted to the Parliament for evaluation in June 2008 and this was followed by contentious arguments focusing on both specific provisions of the Draft Law and the overall applicability of mediation in Turkey. The comprehensive analysis of the Draft Law and the arguments that followed indicate a promising platform for the deployment of mediation but also some key challenges to the widespread use of mediation in the Turkish construction industry. These key challenges were identified from the analysis of the Draft Law and the empirical data obtained from the industry through the interviews with contractors and grouped into two as general and sector-specific. The general problems recognised and the pertinent suggestions presented are as follows:

(1) Adverse attitude of lawyers and bar associations:

- The adverse attitude of the lawyers and bar associations can be changed by raising the level of knowledge on mediation. The training programs organized with the support of the European Commission in Turkey are very important developments in this context. This series of training targets the completion of basic mediation training of a thousand Turkish lawyers in 2009. However, this training should be supported by the government until the required level of awareness is reached, not only among lawyers but also individuals from other professions.

(2) Inadequate financial incentives:

- The Draft Law is less than satisfactory in the promotion of mediation through financial incentives. In order to make mediation highly attractive to parties, incentives should be designed both in voluntary mediation such as subvention of mediator fees and court initiated mediation such as the recovery of court fees in case of a settlement.

The sector-specific problems determined and the suggestions presented for their solution are as follows.

(3) Low level of awareness about mediation in the industry:

- The slow adaptation of the construction industry to new practices requires special effort to raise the awareness in the construction industry about mediation. This can be achieved through promotion, which shows actual results and associated benefits encouraging the use of mediation.

(4) The lack of an industry specific institutional framework:

- Many researchers drew attention to the lack of sector-based frameworks, which should be completed before the Draft Law becomes effective. Therefore, necessary mechanisms should be set up with the aim of formulating sector-specific incentives, codes of conduct and accreditation criteria as well as promoting mediation in the Turkish construction industry, where growing interest is already evident in the empirical data presented.

The findings of the interviews reveal the intention of the industry members to move away from the adversarial dispute resolution methods and their openness to adapting mediation. Although mediation and other forms of ADR are quite new and few contractors in the industry have actual experience, many respondents who had never used mediation expressed an interest in it because of the widespread dissatisfaction with litigation and arbitration. If the key challenges identified in the paper are surmounted, mediation can be a real alternative for the fast, cheap, and mutual resolution of disputes in the construction industry within the framework proposed by the Draft Law.

References

- Brooker, P. (2007), "An investigation of evaluative and facilitative approaches to construction mediation", *Structural Survey*, Vol. 25 Nos 3/4, pp. 220-38.
- Demeyere, L. (2006), "The Belgian law on mediation: an early overview", *Dispute Resolution Journal*, November 2006-January 2007, pp. 89-92.
- Eskiyoruk, S. (2008), "Adana Barosunun Hukuk Uyumlanliklarinda Arabuluculuk Kanunu Tasarisi Hakkindaki Son Gorusu", available at: <http://arsiv.adanabarosusu.org.tr/duyurudetay.asp?id=790> (accessed March 20, 2009).
- Gurseler, G. (2009), "Avukatlar ve Alternatif Uyumlanlik Cozum Yollari Baglaminda Arabuluculuk Kanunu Tasarisi Uzerine", available at: www.arabulucu.com (accessed March 20, 2009).
- Ilter, D., Lees, M. and Dikbas, A. (2007), "Alternative dispute resolution: suggestions for application in the Turkish construction industry", in Hughes, W. (Ed.), *Proceedings of Construction Management and Economics: Past, Present and Future*, University of Reading, Reading, July 16-18.
- Pieckowski (2006), "How the new Polish Civil Mediation Law compares with the proposed EU directive on mediation", *Dispute Resolution Journal*, August/October, pp. 66-72.
- Richbell, D. (2008), *Mediation of Construction Disputes*, Blackwell Publishing, Oxford.
- Sipka, S. (2008), "Hukuk Uyumlanliklarinda Arabuluculuk Kanunu Tasarisinin Degerlendirilmesi", *Journal of Istanbul Commerce University Institute of Social Sciences*, Vol. 6 No. 12, pp. 163-75.

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