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## Challenges In The Construction Mediation

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### Abstract

The construction sector, unlike other sectors, can be defined as a sector where technical competencies are at the forefront, crowded in terms of stakeholders participating in the project process, and open to all kinds of external influences. Therefore, it is possible to experience disputes between the parties during construction projects. The dynamics and interests-based structure of the sector necessitates the quickest resolution of these disputes. Studies in the literature show that this rapid dispute resolution method can be mediation in terms of the construction sector. Mediation can be defined as an impartial third party entering the process and guiding the parties to resolve their dispute. Whether this complex and difficult structure of the construction sector differentiates these mediation processes from the processes of other sectors is not a subject that has been extensively researched in the literature. Therefore, in this study, it is aimed to determine the challenges and differences experienced in the construction mediation processes. Within this scope, surveys were conducted with the mediators who are experienced in the construction mediation. In this study, which reached 38 mediators, the mediators evaluated their construction mediation processes that they have experienced. As a result of the study, it has been determined that the interest-based structure of the construction sector, involvement of multiple stakeholders in projects and the fact that the disputes in the sector are generally based on technical issues are among the challenges of the mediation processes in the construction sector.

**Keywords:** Dispute Resolution, ADR, Construction Sector, Challenges.

### 1. Introduction

One of the most used ADR methods in the construction sector is mediation (Brooker and Wilkinson 2010; Ilter *et al.* 2016). The construction sector shows different characteristics from other sectors. Therefore, the use of mediation in the construction sector is different from other sectors. For example, human behavior is always an important factor in decision making, but in the construction sector, "human" is involved in the process in a different way. This sector is carried out with business performance indicators and measurements, unlike the other sectors such as music, advertising and even health where emotions are reflected in the business. Therefore, disputes in the construction sector are more based on data, measurements, and interests that can be measured more clearly. In addition, after the disputes in the construction sector, it is unclear how the project will continue when judicial remedies are applied (Saleh 2019). This raises the question of specific situations for construction sector and whether the mediation processes carried out in the sector have different conditions. This study seeks to answer this question.

### 2. Construction Mediation

There are studies on mediation in the construction sector in the literature. It is seen that these studies are mostly carried out by researchers from Hong Kong and the UK, and the mediation process and issues related to the mediator are mostly covered in these studies. In these studies, the tactics that the mediator should use in the mediation processes in the construction sector, and the development of the mediation processes in the sector are examined (Arici Ustuner 2020). Although all these studies give important data on mediation in the construction sector, no research has been found in the literature on whether the crowded and technical characteristic of the sector causes any difficulties and differences in the mediation processes. Therefore, to reveal these differences, a survey was conducted with the mediators who have taken part in the construction mediation processes. The contact information of the mediators was reached via the website, which has an important place in professions in the world and the survey was sent to the mediators digitally. A total of 150 people were sent a survey and 62 people filled it. The number of valid responses was determined as 38. The remaining 24 forms were excluded from the evaluation on the grounds that not all the questions were answered. Thus, the return rate of the survey was determined as 25.3%.

### 3. Findings

The survey participations' countries, professions, the department they graduated from, their professional experience, education level and the sector they operate in can be summarized as follows. Of the 38 mediators who participated in the survey, 13 operate in the UK, 8 in the USA, 4 in Canada, 2 in France, and 2 in India. Other mediators are from the Netherlands, Greece, Cambodia, Croatia, Hong Kong, Italy, Belarus, and Russia. A mediator who

completed the survey did not share his/her country of residence for security and privacy reasons. It is seen that 21 of 38 mediators who participated in the survey are lawyer. The remaining mediators have graduated from departments such as architecture, engineering, business administration, cost/construction management, semiotics, social sciences, psychology, educational sciences, and foreign languages. When the education levels of the mediators are examined, it is seen that 12 of them are doctorate, 13 of them are graduate, 10 of them are undergraduate and the remaining 3 people are high school/associate degree graduates. Of the 38 mediators, 28 have 15 or more years of experience in their profession.

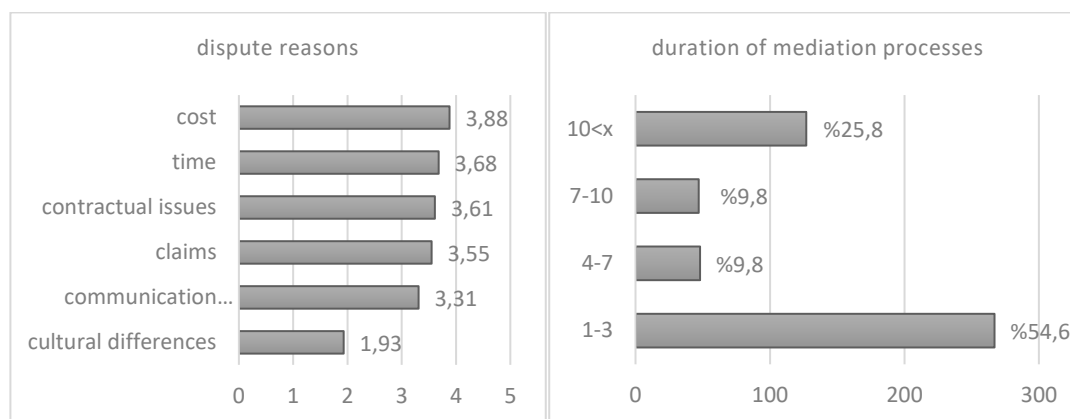


Figure 1 and 2. Dispute reasons and duration of mediation processes

Figure 1 shows the causes of disputes that mediators face in the mediation processes in the construction sector. The mediators evaluated this question with a number between 1 (minimum)-5 (maximum), and it has been revealed that mediators mostly act as mediators in disputes in the construction sector due to cost. Some of the mediators who answered the survey stated that in addition to the reasons shown in Figure 1, there were disputes in the construction sector due to changes, quality of work and technical specification problems.

In Figure 2, the mediators evaluated the duration of the mediations they led and concluded in the construction sector. Accordingly, 54,6% of the processes managed by the mediators and resulted in a positive result were concluded within 1-3 days. This data is important to understand the duration of mediation in the construction sector. In the construction sector, where disputes are still tried to be resolved by court proceedings, the possibility of reaching a resolution within 1-3 days through mediation is a very advantageous situation for the dispute parties.

When Table 1 is examined, it is seen that the mediators' evaluations regarding the difference between the mediation processes in the construction sector and other sectors' mediation processes. This question was asked to the mediators as open-ended, and categories were created according to the answers given. From the responses received, it has been seen that the evaluations of mediators from different countries of the world on the difference in the construction sector mediation processes are generally similar. Accordingly, the answers given are grouped under five main headings. These titles are interest-based structure of the construction sector, the nature of the construction sector, the multi-participatory nature of the construction projects, the technical characteristics of the construction sector, the attitudes of the construction sector participants. Accordingly, the detailed explanation of the headings in Table 1 is as follows;

✓ Interest-based structure of the construction sector: According to the mediators who participated in the survey, the size of the interests in the construction sector distinguishes the mediation processes in the sector from other sectors. Mediators stated that in the construction sector, the interests that are the subject of the mediation process are huge, and accordingly, the bigger the interests, the more difficult it is to come to an agreement and compromise. In addition, mediators indicated that public interests gain importance in public projects, which differentiates mediation processes.

✓ The nature of the construction sector: Mediators stated that the differences in the nature of the construction sector distinguish the mediation processes of the sector from other sectors. Mediators explained these differences because of the time limitations in the construction sector, the uncertainty of the conditions in the sector, the complexity of the disputes, the need for long preparations time before the mediation process, too many documents, too many subcontractors in the process, in some cases the employer is not familiar with the construction sector, and each project has unique characteristic features. Mediators indicated that these features of the construction sector affect the mediation processes in the sector.

✓ Multi-participatory nature of construction projects: According to mediators, another reason why mediation processes in the construction sector differ from other sectors is that the processes are multi-participatory. Construction projects represent multi-participant and crowded processes. The difference of this situation from the mediation processes where there are two parties to the dispute is the difficulty of organizing the process. If a mediation process with too many participants is not well planned, chaos will prevail. Therefore, these processes must be carefully planned.

**Table 1 The differences of construction mediation**

THE DIFFERENCES OF CONSTRUCTION MEDIATION	
Interest-Based Structure of The Construction Sector	having huge interests having public interests
The nature of the construction sector	time limitations complexity of the disputes the need for long preparations time having too many documents having too many sub-contractors unfamiliar owners with the construction sector uncertainties unique characteristic features of the sector
Multi-participatory nature of construction projects	multi-participatory of the processes
Technical characteristics of the construction sector	need for the mediator to have a good command of construction terms, literature, and techniques need for experts in the processes the differences of the main subjects of construction mediation small problems leading large claims quality of the work long progress payment process evaluative mediation suits better
Attitudes of the construction sector participants	dispute parties are result-oriented suppressed feelings of dispute parties conflictual process oppositional attitudes of the people cultural differences barrier to apologizing the effect of the positions the unspoken and unrealistic expectations the egos of the people communication problems trust issues

✓ Technical characteristics of the construction sector: Mediators stated that the technical characteristics of the construction sector also affect the mediation processes. According to mediators, it is important for the mediator to have a good command of construction terms, literature, and techniques in mediation processes in the construction sector. This makes the mediation processes in the construction sector different. Because in the construction sector, which is a sector that includes technical knowledge, even the mediators' understanding of the subject of disputes is directly proportional to their dominance in the construction sector. If the mediator is not knowledgeable or experienced in the construction sector; usually some experts are needed during the process and these experts are included in the process later. Another reason why the technical characteristics of the construction sector affect the mediation processes in the sector is that small problems can lead to large claims. In addition, mediators stated that the problems experienced in the sector regarding the quality of the work and long progress payment process distinguish the mediation processes of the construction sector from other sectors. Another difference revealed by the mediators is that the technical characteristics of the construction sector are more suitable for the evaluative

mediation model. In the construction sector, it is important that disputes are resolved as quickly as possible. For this reason, mediators indicated that evaluative mediation gives better results in disputes in the construction sector, which is an important factor that distinguishes mediation processes in the sector from other sectors.

✓ Attitudes of the construction sector participants: The mediators stated that the attitudes of the people in the construction sector also differentiate the mediation processes in the sector. Mediators indicated that the dispute parties in the construction sector are result-oriented, not process-oriented. The mediators explained that other differences depending on the attitudes of the people are that the mediation in the construction sector is very conflictual and people have very oppositional attitudes. In addition, cultural differences, the effect of the positions of the participants in the process, the unspoken and unrealistic expectations of the dispute parties, the egos of the dispute parties, communication problems and the barrier to apologizing in the construction sector also differentiate the mediation processes in the sector from other mediation. The mediators stated that some of these problems are encountered in other sectors as well, but that such problems are experienced intensely in the construction sector. In Table 1, the differences of the mediation processes in the construction sector are summarized in terms of the mediators participating in the survey. Although all the items in the table are important conditions that distinguish the mediation processes in the construction sector from other processes for the mediators, the most important differences among these items are the need for the mediators to have a good grasp of construction terms and techniques; very high interests in the construction sector; multi-participatory nature of the mediation processes; the need for specialists in the process often; the dispute parties are result-oriented rather than the mediation process.

## 5. Conclusion

The unique structure of the construction sector differentiates the mediation processes in the construction sector. One of the differences revealed by the study is that there are huge interests in the process. Accordingly, the mediator can speed up the process by managing the process based on interests and ensure the satisfaction of the parties from the process. The study has shown that the nature of the construction sector makes a difference in the mediation process. Therefore, it is important that mediation processes are modeled in detail based on the construction sector and defined in a way that can be applied by people who are not familiar with the construction sector.

The fact that the construction sector has a technical characteristic is one of the issues that differentiate the mediation process. On the other hand, including mediators experienced in the construction sector in the mediation processes, predetermining the experts to be involved in the process, and explaining the concept of evaluative mediation to dispute parties who do not have a knowledge of mediation will be among the measures that facilitate the process. With this study, it has been seen that mediation processes in the construction sector require different expertise. Therefore, these issues should be considered in construction mediation.

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## Conflict of Interests

The authors declare no conflict of interest.

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