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### **AN EXAMINATION OF THE MEDIATION PROCESSES OF INTERNATIONAL ADR INSTITUTIONS AND THE EVALUATION OF THE TURKISH CONSTRUCTION PROFESSIONALS' PERSPECTIVES ON MEDIATION**

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#### **Abstract**

Mediation is an alternative dispute resolution that is fast and economic, based on volunteerism and offers the parties win-win approaches and also protects relationships among the dispute parties. Also comparing with the other ADR methods, mediation is easy to apply and less formal. In this respect, this alternative dispute resolution is suitable for the construction sector. In Turkey, mediation began to spread with the adoption of the "Mediation in Legal Disputes Act and Regulations" in 2012. In 2014, Istanbul Arbitration Centre was established. This institution has a mediation service. However, this service is not as advanced or sectoral divided as the procedures of ADR institutions providing mediation services in the world. The literature on the use of mediation in the construction sector in Turkey is very limited and there is no study investigating the perspectives of Turkish construction professionals on institutions providing mediation services. This study aims to examine the structures of ADR institutions providing construction mediation services in the world and the benefits provided by these institutions throughout the mediation process. In this study, a brief explanation about structures of the chosen institutions AAA-ICDR (American Arbitration Association-International Centre for Dispute Resolution), CEDR (Centre for Effective Dispute Resolution) and JAMS (Judicial Arbitration and Mediation Services), which are prominent ADR institutions providing construction mediation services will be given. After that, their mediation processes will be examined. Furthermore, the advantages and disadvantages of non-institutional and institutional mediation will be analyzed by comparing them. In the last part, a survey's result will be shared searching the answers for following points: the dispute reasons that are experienced by Turkish construction professionals, the criteria of selection of the dispute resolution methods, whether they use mediation in the construction sector, the perspectives on institutions providing mediation services and the expected services from these institutions.

**Keywords:** ADR, Construction Mediation, ADR Institutions, Mediation Institutions

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## **1. Introduction**

Disputes are one of the biggest problems in the construction sector. Disputes can occur between the contractor and owner or sub-contractor and contractor etc. Disputed construction projects fail in terms of cost, time, quality and reputation of the dispute parties. For this reason, it is important to solve the disputes in the construction sector in a short time and at low cost. Judicial dispute solutions (Litigation, arbitration) are long-term and costly. On the contrary, ADR (alternative dispute resolution) methods which are flexible solutions, offer satisfactory results in a short time to the parties at low cost. Mediation is also one of the important ADR methods. Cheung and Suen (2002) define mediation as a flexible, confidential, low cost, win-win approach, fast ADR (Alternative Dispute Resolution) method.

Mediation in the world can be applied in 3 types which are private, court-annexed and judicial mediation. In private mediation, the dispute parties want to resolve their disputes through mediation at their own will. In court-annexed mediation, mediation structure characterized with the coordination of the court proceedings but separated on the procedural level from the court (Hopt and Steffek, 2013). Judicial mediation can be defined as bringing the parties together for a mediation at a private preliminary hearing before a trained judge who remains neutral and tries to assist the dispute parties in resolving their disputes, which may include remedies that would not be available at a hearing (ACAS, 2019). Court annexed mediation can be divided into two categories as voluntary and mandatory. In voluntary court-annexed mediation, one or two of the dispute parties to the court voluntarily may wish to solve their disputes by mediation. In mandatory court-annexed mediation, the court may refer the case to mediation regardless of the dispute parties' request. In the world, commonly private and court annexed mediation is used (Hopt and Steffek, 2013).

In private and court-annexed mediation, the dispute parties need to decide how to conduct the process. The dispute parties may manage the mediation process with the help of an institution or with their own organizations. If the dispute parties carry out the mediation process under the auspices of an institution, it will be called institutional mediation and if they organize the process themselves, it will be called non-institutional mediation. In private mediation, the dispute parties can decide freely whether they use institutional or non-institutional mediation but in court-annexed mediation, in some countries, such as the United Kingdom, the dispute parties have to carry out the mediation process with the help of the institutions chosen by the court (Hopt and Steffek, 2013).

The institutions providing construction mediation services in the world are generally large and international organizations based on ADR. In addition, there are institutions that are working only on mediation in the world. Whether these institutions were established for ADR or mediation, all of them have ADR/mediation procedures, rules, standard documents, payment schedule, mediator and arbitrator lists, training services to become mediators, and educational services about ADR and mediation. While the mediation process steps of these institutions are generally defined in a general framework, some institutions divide the mediation processes on a sectoral basis. Although the process steps are not divided on a sectoral basis, these institutions pay attention to conducting the process in accordance with the sectors while managing the disputes. These institutions provide services to the dispute parties applying to these institutions' mediation processes such as the appointment of the appropriate mediator, the organization of the standard documents that should be signed during the process, the determination of the meeting venue and the time of the mediation meetings, the planning of payments and the solution of problems that occur during the process. In addition, the neutrality, confidentiality, timing, flexibility of the process, whether the process is carried out in accordance with the basic principles of mediation and law are the responsibility of the institution. Provision of such services and guaranteeing the quality and efficiency of the process by the institution help dispute parties to focus on the problem rather than dealing with the procedures (AAA, 2019b; JAMS, 2019b; CEDR, 2019b).

For this reason, such institutes are important in terms of spreading the use of mediation. This research aims to examine the structure of the ADR institutions providing mediation services and the scope of the mediation processes in detail. Then, the benefits for users if they apply to the institutions for mediation will be summarized. For Turkey, construction sector professionals'

perspectives for mediation will be explored. Thus, a gap is tried to be filled in the Turkish construction literature.

## **2. The properties of non-institutional and institutional mediation**

Disputes can be defined as the visibility of conflicts between the parties. Disputes are the factors that can affect the success of projects, can lead to very successful projects to failure, in other words, determine the fates of the projects (Carmichael, 2002). If the disputes are not resolved quickly, tensions in the process escalate and ultimately turn into a situation where court proceedings are needed for resolution (Love *et al.* 2010). But court proceedings are very long and expensive processes that are in win-lose approach. According to the characteristic properties of the construction sector, it can be said that court proceedings are not appropriate for the construction sector. Therefore, there is a tendency towards alternative dispute resolution methods in the world for last 20 years (Ilter, 2010). Mediation is an ADR method to help overcome a wide range of disputes (Abdullah, 2015) and can be defined as a process involving the determination of the issue of the disputes and the priorities of the dispute parties and the production of different solutions in cases where the process is blocked (Kekec, 2016). One of the most important characteristics of mediation is the interest-based resolution of disputes (MoJ, 2019b). In mediation, the impartial person involved, i.e. the mediator, should endeavor for the dispute parties to agree on a common solution. Simultaneously, the dispute parties should also be willing to settle their disputes by acting voluntarily during the mediation process.

If the process is freely organized by the dispute parties, that can be named non-institutional mediation. In non-institutional mediation, the dispute parties choose a mediator and organize the process themselves. The advantages of non-institutional mediation are that all process is under control of the dispute parties and they do not pay any fee to an institutional service but they still have to pay to mediator and cover the costs of the process. However, the dispute parties who have not used mediation before and want to apply for mediation, are unlikely to know how to manage this process. This is the main disadvantages of the non-institutional mediation. The dispute parties and the mediator are responsible for the organization of all process management issues, such as the preparation of the documents required to be signed by the parties at all stages, the finding and selection of mediator who is expert and educated on dispute issue, and the agreement on the venue and time of mediation. Even if dispute parties are familiar about mediation, it is an intensive process to manage. The administrative disruptions experienced in such processes reduce the speed of the process and cause more problems for the dispute parties. Besides, if the dispute parties' countries do not have a law or regulation on mediation, the concepts of the mediator's duties, responsibilities and the reliability and confidentiality of the process are measured by the credibility of the parties' agreement with the mediator.

In institutional mediation, the dispute parties apply to institutions to settle their disputes through a systematic mediation process. In institutional mediation, the dispute parties do not need to be knowledgeable about mediation process. Because the institution organizes process on behalf of the dispute parties. The institution appoints mediator, organizes the mediation meetings venue and fees to be paid during the process. Also, it organizes the timing of the process. For example, in some institutions' mediation processes, time is limited. If the dispute parties do not reach an agreement in that limited time, the process will be cancelled by the institutions. In another example, the institutions limit the time that takes to select a mediator. But in non-institutional mediation process, if it is not limited by any regulation or law, the dispute parties must organize timing because the process time can extend if decision phases take too much time. Also in institutional mediation, the reliability and confidentiality of the process is under the protection of the institution. In non-institutional mediation, unless restricted by any law, the reliability and confidentiality of the process depends on the agreement between the dispute parties and the mediator. If there is a law or regulation about mediation, the reliability and confidentiality of the process depends on the articles of the law but still the dispute parties should check for any incidents that do not comply with the law during the process. In institutional mediation, regardless of whether there is a law or not, the institution has to control the reliability and confidentiality of the process (AAA, 2019b; JAMS, 2019b; CEDR, 2019b).

In institutional mediation, throughout the process, the main rules that the mediator and the dispute parties must follow are defined. But in non-institutional mediation, the dispute parties and the mediator must define the main rules in the beginning of the process. In institutional mediation, the institution appoints a mediator that is experienced about the dispute issues but in non-institutional type, the dispute parties must select and appoint a mediator before the process starts. However, in this case, the dispute parties should be certain of the mediator's experience on the dispute issue, because they are the only authority to control and organize it. Also in institutional mediation, the institution organizes the fees that have to be paid during the process step by step but in non-institutional mediation, the dispute parties must organize these payments. In institutional mediation, if dispute parties face with any problems during the mediation process, institution must resolve the problem or give support to dispute parties for resolving problems. But in non-institutional mediation, the dispute parties must resolve the problems by themselves without any help. The comparison of the mediation types services can be seen in Table 1.

**Table 1. The comparison of mediation types services**

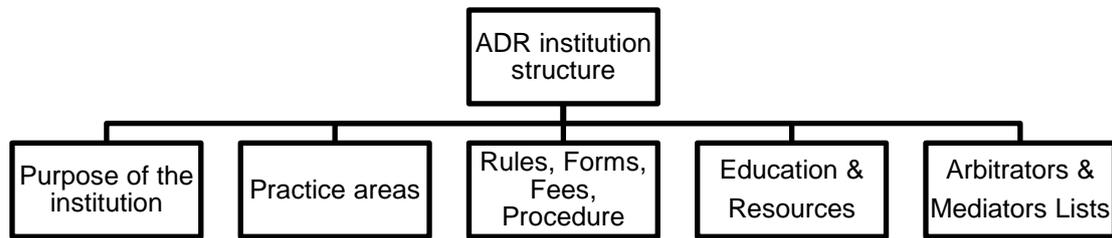
|  | <b>Institutional Mediation</b> | <b>Non-institutional Mediation</b> |
|--|--------------------------------|------------------------------------|
| To organize the mediation process  | Institution Does               | Dispute Parties Do                 |
| Preparation of the necessary documents for the mediation process             | Institution Does               | Dispute Parties Do                 |
| Mediator appointment   | Institution Does               | Dispute Parties Do                 |
| The experienced and practice-focused educated mediators about dispute issues | Yes                            | Up to the dispute parties          |
| Organizing venue of the mediation meetings                                   | Institution Does               | Dispute Parties Do                 |
| The timing of the process  | Institution Does               | Dispute Parties Do                 |
| The mediation rules obliged during the process                               | Institution Does               | Dispute Parties Do                 |
| The confidentiality of the process   | Institution Does               | Dispute Parties Do                 |
| Organizing fees to be paid during the process                                | Institution Does               | Dispute Parties Do                 |
| The privacy of the process   | Institution Does               | Dispute Parties Do                 |
| Support for the problems that occur during the mediation process             | Institution Does               | None                               |

In the world, the mediation is a popular method for solving disputes in the construction sector. U.S.A and U.K are strong countries for mediation and also they have strong institutions and acts for mediation. AAA-ICDR, JAMS and CEDR are some of the biggest and important ADR institutions providing construction mediation in the world. These institutions have standard documents and procedures for the mediation process for the different sectors including construction sector. Such kind of institutions are important for spreading use of the mediation in the construction sector.

### **3. About AAA-ICDR, CEDR, JAMS**

There are many national and international ADR institutions providing construction mediation services in the world. These institutions have mediation procedures. The AAA-ICDR, JAMS and CEDR selected for this study are among the largest ADR institutions providing both national and international services on construction mediation and ADR. In addition, these institutions have detailed mediation services. AAA-ICDR has a mediation procedure specific to the construction sector. CEDR is an expert institution in commercial disputes including construction disputes. In addition, although it provides services on ADR, mediation is a priority for CEDR and organizes trainings about mediation in many parts of the world. JAMS is one of the world's largest ADR service provider such as AAA-ICDR and CEDR. In addition, although the JAMS is an ADR institution, its focus is on mediation and arbitration. In addition, it is specialized in commercial disputes involving construction disputes. Serving all over the world, JAMS is an important institution for mediation. For the reasons mentioned above, in this study, these 3 institutions were selected for review (AAA, 2019b; JAMS, 2019b; CEDR, 2019b).

The structures of these institutions are similar in nature. Figure 1 shows the structures of these institutions.



**Figure 1. Structure of ADR Institutions**

Source: Authors' own preparation

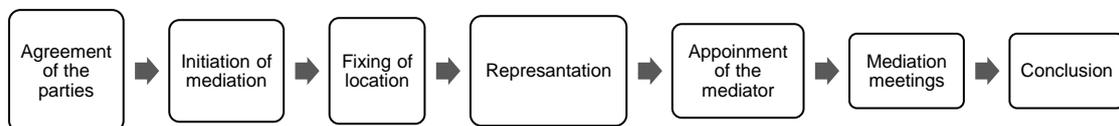
The structure of institutions consists of the following headings such as; the purpose of the institution, practice areas that services and sectors the institutions serve, the procedures prepared for ADR methods, standard documents, the institution's fee information, the institution's mediator or arbitrator lists, education and education documents (AAA, 2019b; JAMS, 2019b; CEDR, 2019b).

The structure of institutions is generally similar and they all have detailed processes for mediation. The mediation processes of these institutions are examined in detail below.

**3.1. AAA-ICDR (American Arbitration Association-International Centre for Dispute Resolution) mediation process (U.S.A)**

The AAA-ICDR is a non-profit organization founded in 1926, following enactment of the Federal Arbitration Act to implement arbitration as an alternative dispute resolution method other than litigation. In 1996, the AAA established ICDR (International Centre for Dispute Resolution) as its international part. AAA Mediation was launched in 2014 to provide greater access to mediators. AAA-ICDR is one of the largest private global ADR service providers in the world. The AAA-ICDR aims to give ADR services to the dispute parties and expand the use of ADR, improve the processes of ADR methods and sharing knowledge across the different cultures. The AAA-ICDR has national and international procedures and standard documents on ADR methods, lists of mediators and arbitrators, and services and documents on education about ADR (AAA, 2019b).

The AAA-ICDR has a special mediation process for construction disputes. According to this process (Figure 2), mediation under the auspices of the AAA-ICDR starts with the dispute parties' decision to resolve the disputes with AAA-ICDR mediation. At the beginning, the dispute parties may have decided to settle any disputes that may arise in the course of the contract with AAA-ICDR mediation. Or after the dispute has arisen, the dispute parties may decide to use the AAA-ICDR mediation process (AAA, 2019a).



**Figure 2. The AAA-ICDR mediation process**

Source: AAA (2019a)

For AAA-ICDR mediation, it is first necessary for one or both dispute parties to request mediation from AAA-ICDR. The party applying to the AAA-ICDR must also inform the other dispute party/parties at the same time. The application must include the dispute parties' name, address, mail address, etc. and a brief description of the dispute, information relevant to the characteristics that need to be found in the mediator. The dispute parties should then establish a location for mediation meetings. If the dispute parties cannot determine their location, AAA-ICDR

will set the venue for the mediation meetings. If there is a disagreement between the dispute parties, the mediation meeting location will be the closest city / district to the construction site.

The dispute parties shall elect their own representatives for mediation. The mediator will be chosen after dispute parties' representatives are identified. For AAA-ICDR mediation, the people who have been educated and trained as mediators from courses could be mediators. AAA-ICDR sends the dispute parties a list of mediators and requests that dispute parties select a mediator from this list, unless the dispute parties report otherwise. If the dispute parties cannot agree on a mediator, the dispute parties are asked to remove the people they have not approved from the mediator list and return the list to the AAA-ICDR. AAA-ICDR makes a choice among people whom the dispute parties find jointly acceptable. If these people are busy at that time, then AAA-ICDR will set up a mediator of their own. The mediator has to carry on his duty depending on the Model Standards of Conduct for Mediators (American general standards for the duties of the mediators). If the mediator cannot continue his duty under the circumstances such as tendentiousness, being unqualified about the dispute issue etc., the AAA-ICDR has the right to appoint another mediator unless the dispute parties indicate otherwise. The mediator must conduct the process in a manner that respects the rights of the dispute parties to decide freely and on a voluntary basis. In addition, the mediator should organize special and general meetings with the dispute parties before and during the process. These meetings can be held by telephone, teleconference etc. or face to face (AAA, 2019a).

The sharing of documents between the dispute parties and the mediator should be encouraged by the mediator. Information that the dispute parties do not want to share with each other, can be sent separately to the mediator. The mediator does not have the power to make decisions throughout the process, but should help the dispute parties to reach an agreement that will satisfy them. If the mediation process does not finish in the foreseen time and the dispute parties fail to agree on some issues, the mediator will continue to negotiate with the dispute parties so that a full agreement can be reached. The mediator cannot be the representative of any of the dispute parties to the mediation. The mediator is also responsible for setting the mediation meeting times and days throughout the process (AAA, 2019a).

The dispute parties are required to ensure the attendance of the representatives that they identify throughout the process to the mediation meetings. In addition, the dispute parties must volunteer for the process' success. The mediation process is a confidential process. For this reason, if a person other than the mediator and the representative is to attend the meeting, this person must pass the dispute parties' approval. Confidential information shared with the mediator should never be uncovered by the mediator. The mediation process should not be recorded. The mediator should not testify for the information shared by the dispute parties, in case the dispute parties apply for a judgement. The mediator must ensure that the dispute parties believe in the continuity of the trust. Mediation ends when the dispute parties have reached an agreement or the dispute parties and the mediator have no communication for 21 days or the mediator has come to the conclusion that the mediation process will not work for the solution of the dispute (AAA, 2019a).

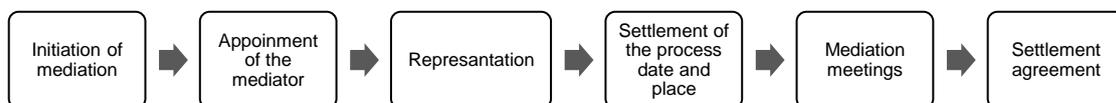
### **3.2. JAMS International (Judicial Arbitration and Mediation Services) mediation process (U.S.A)**

JAMS was founded in 1979 and is one of the world's largest private alternative dispute resolution (ADR) provider. JAMS aims to resolve and manage business and legal disputes by providing efficient, cost-effective and impartial ways of overcoming barriers at any stage of conflict. JAMS offers systemized dispute resolution services both national and international. JAMS handles approximately 15,000 cases every year in the world. JAMS has national and international procedures and standard documents on ADR methods, lists ADR professionals, and services and documents on education about ADR (JAMS, 2019b).

The mediation process in JAMS International starts with the commitment of the dispute parties to apply the JAMS International process and rules while using the mediation method. One or all of the dispute parties who wish to use the JAMS mediation must apply to JAMS International for mediation. If only one of the dispute parties has applied to JAMS International, JAMS

International invites the other dispute party to take part in the mediation process. The dispute parties shall also attach a brief statement to the JAMS International about the applicant disputes with the request of mediation. Also, the contact information of the dispute parties or representatives of the dispute parties should be included in the application. If the dispute parties apply to JAMS without consent to a joint mediator, JAMS International identifies 5 people who are experts on the basis of the dispute from the list of mediators, according to the countries of the dispute parties and the country where the mediation process will be conducted. The dispute parties shall inform JAMS International of the 2 mediator proposals from this list. For JAMS International mediation, the people who have been educated and trained as mediators from courses could be mediators (JAMS, 2019a).

Usually JAMS International makes 1 mediator assignment. However, JAMS International makes co-mediator assignments at disputes it deems necessary or with the request of the dispute parties. If any mediator appointed by JAMS International or elected by the dispute parties to the dispute is found to have personal interests in the proceedings or on the dispute parties, JAMS International shall appoint a new and appropriate mediator. In the mediation process, the dispute parties may elect any representative they deem appropriate to decide on the dispute. However, it is not preferable that the representative is a lawyer. Because mediation is a free and flexible process. The fact that representatives are lawyers can create tension during the mediation meetings. The mediator is responsible for setting the time of the mediation meetings. The meetings can be held at JAMS' office or at other places where the dispute parties and the mediator agree. In the mediation process, the mediator must make a description of the dispute and set out the dispute parties' wishes and make recommendations on how to reach the resolution as quickly as possible. The mediator has no authority to determine the outcome. The mediator may hold separate and joint meetings with the dispute parties. Mediation meetings are confidential. New participants to attend the meeting must be approved by the mediator and the dispute parties. The information that the mediator obtained during the process is hidden. Neither the mediator cannot testify in the light of this information in the courts nor cannot the dispute parties submit the information they have obtained during this process as proof of the application for judicial remedies. The mediator is responsible for following the rules of JAMS International throughout the process and maintaining the process in this way. The mediation process must be conducted in accordance with the laws of the country where the process was conducted. Dispute parties can be withdrawn from mediation whenever they want. When the dispute party is withdrawn from the mediation, they must transmit this information in written to the other dispute party. The process can end with the withdrawal of a dispute party or the parties reaching an agreement, or the mediator believes that the process is useless. The agreement that the dispute parties have in the mediation process is not binding. However, if they sign a contract that includes the terms of the agreement at the end of the process, the result will be binding (JAMS, 2019a) (Figure 3).



**Figure 3. The JAMS International mediation process**  
 Source: JAMS (2019a)

### 3.3. CEDR (Centre for Effective Dispute Resolution) mediation process (U.K.)

CEDR was published in 1989 in UK as a non-profit organization. Its aim is to provide society with skills and solutions for effective dialogue and to bring about sustainable change. Per year, CEDR is dealing with approximately 30,000 disputes, which is a huge number. CEDR offers ADR solutions, mediator training programs and educational documents to the people in both national and international areas. CEDR has ADR process documents, lists of ADR professionals, standard and education documents (CEDR, 2019b).

The CEDR mediation process starts with the referral of the dispute to the mediation. The referral of the dispute to the mediation can be done by different ways. The referral can be

voluntarily by the dispute parties or one party can be willing to referral dispute to the CEDR mediation. The referral can be done for the responding to a Pre-Action Protocol, Court Rules, a Court Order or a recommendation by a judge before trial or appeal, the provisions of an ADR clause in a commercial or government contract requiring the use of mediation as a step in the dispute parties' agreed dispute resolution process or the provisions for use of mediation within an industry or public sector policy framework (CEDR, 2019a).

The dispute parties may choose their own mediators, or they may choose one of the mediators in the CEDR panel. For CEDR mediation, the people who have been educated and trained as mediators from courses could be mediators. The dispute parties may also require the CEDR to appoint mediator candidates. Also, if there are court rules binding the dispute parties and the dispute parties cannot agree on the mediator, CEDR may appoint a mediator within 14 days. The mediator assigned by CEDR will be in accordance with CEDR rules and will be experienced and knowledgeable about the dispute. If the dispute parties have objections to the appointed mediation, they must inform CEDR as soon as possible. Dispute parties also have the right to request an observer mediator from CEDR. CEDR may require co-mediators to be assigned to disputes it deems appropriate. In this case, all applicable rules for mediators will also apply to co-mediators. Co-mediator assignments are as follows: there are more than 2 dispute parties involved in the dispute; disputes that require special technical expertise; the cultural backgrounds of the dispute parties; special interests of the dispute parties in this regard (CEDR, 2019a).

With the appropriate mediator, the dispute parties and CEDR begin the preliminary process for mediation. In this process, it is important the mediation agreement to be prepared by CEDR, approved by the dispute parties and prepared for the final form for signing. It is also necessary for CEDR to determine the names and roles of the participants for the circulation of the participants' form before the mediation takes place. In addition, CEDR prepares a facilitating agreement on the starting time of the meetings. CEDR should also do the documentation organization. All these arrangements and charges made by CEDR must have been accepted by the dispute parties to the dispute (CEDR, 2019a).



**Figure 4. The CEDR mediation process**

**Source:** CEDR (2019a)

There are also some rules in which the dispute parties are responsible for the mediation preparation process. According to these rules, the dispute parties should prepare a summary of their approach to dispute and share it with the other party. Dispute parties should also be willing to share all the documents that will be needed throughout the mediation process. The dispute parties must send the mediator or an address defined by CEDR to the summaries and documents they have prepared. This information must reach the mediator's hand at least 1 week before the process begins. Dispute parties should inform the mediator and the CEDR about the people to attend the mediation meetings and the roles. In addition, the dispute parties must include leading negotiators who will assist the dispute parties of the contract issues in the process. The dispute parties must notify each other and the mediator of any problems that limit the process (CEDR, 2019a).

During the mediation process, the mediator must check whether the proceeding complies with the CEDR rules and also participate in preparatory meetings, except for mediation meetings. In addition, the mediator must read the case summary and the documents sent to the dispute parties and communicate with them without starting the mediation process. Documentation in this process must be done by CEDR or the mediator (CEDR, 2019a).

During the mediation process, it is necessary for the dispute parties to have their own rooms and to negotiate privately with each other. It is also essential that there is a large venue where general mediation meetings can be held in the venue where the mediation process takes

place. The mediation process is managed by the mediator. During the process, the mediator must make private and general meetings with the dispute parties. In general, the process includes professionals such as lawyers. They can advise the dispute parties about the laws and rules throughout the process. It is forbidden for the dispute parties or the mediator to record the process. But the dispute parties can take notes for themselves. Involvement of people representing the dispute is important to the meetings in the mediation process. These people should participate in a meeting (telephone, video conferencing, etc.) in a chosen way (CEDR, 2019a).

The CEDR Model Mediation Agreement provides for the confidential treatment of the dispute parties, mediators and CEDR, including the terms of the agreement, unless the mediators are accepted in writing by the dispute parties. If the dispute is made by directing a public case, then the process is not kept secret. Furthermore, the mediation process is not confidential, in cases where it is legally necessary for the mediator or the disputant to legally disclose one or the representative of the dispute parties, and the mediator is concerned that the process will be harmful to the life of the person. In these cases, legal advisers should take the responsibility for the process and direct the dispute parties. The mediation process may be terminated by one or more of the dispute parties without mediation until the dispute parties have reached an agreement, saying that the mediator is unable to reach agreement with the dispute parties. The mediator should prepare the drafts of the dispute parties' signatures (CEDR, 2019a) (Figure 4).

Institutions such as AAA-ICDR, JAMS and CEDR, which are examined above, are important institutions providing mediation services in construction mediation. These institutions support the dispute parties who apply to them for systematic mediation. The processes of the institutions described above were taken from their own WEB sites and their phase names were not changed. In terms of processes, although there are some naming differences, the processes are generally similar. These institutions services during mediation process can be seen below in Table 2.

**Table 2. The institutions mediation services**

|                        | <b>AAA-ICDR</b> | <b>JAMS</b> | <b>CEDR</b> |
|------------------------|-----------------|-------------|-------------|
| Document management    | +               | +           | +           |
| Process management     | +               | +           | +           |
| Standard documents     | +               | +           | +           |
| Mediator appointment   | +               | +           | +           |
| Lists of the mediators | +               | +           | +           |

The services provided by the institutions to the dispute parties are summarized above. According to this;

- i. Document management is the organization of all paperwork that must be organized between the dispute parties, the institution and the mediator throughout the process. The institution shall organize the mediation application document of the dispute parties, the document regarding the selection of the mediator, the documents regarding the approval or rejection of the dispute parties for the meetings time and venue, the documents to be submitted to the mediator regarding the dispute, the meeting minutes, written documents submitted by the dispute parties or the mediator regarding the problems and objections experienced during the process, in the end of the process, the mediation agreement document behalf of the dispute parties.
- ii. Process management starts with the dispute parties applying for mediation. Throughout the process, the institution should organize the mediator appointment and objections to mediator, the determination of the representatives to participate in the mediation process, the organization of the time and venue of the mediation meetings, and the organization of the experts / consultants who should be included in the mediation process when deemed necessary. It is also responsible for the progress of the process in accordance with the rules set by the institution and if there is a mediation act in the country, it must ensure that the process proceeds in accordance with this act. Besides, the institution must protect the security, confidentiality of the process and the impartial conduct of the

process. In addition, it should solve the dispute parties and mediators' problems during the process.

- iii. Standard documents include documents prepared by the institution and required by the dispute parties to submit throughout the process. Standard documents include the application for mediation by the dispute parties, the document for the selection of mediator, the document for objection to the mediator (if any), the approval document for the time and venue of mediation, mediation minutes, mediation submissions, mediation agreement and all written documents made by the dispute parties during the process. Thus, during the process, the dispute parties do not try to prepare legally valid documents.
- iv. In the mediator appointment, the institution is obliged to appoint a mediator from the list of its own mediators to the process. Thus, the dispute parties do not have to look for a mediator at the beginning of the process who has experience about the dispute issue because it is guaranteed by the institutions.
- v. Such institutions have their own list of mediators. Mediators are selected from these lists according to the types of disputes.

The mediation processes of the institutions examined in this study are exemplary in terms of institutions providing on mediation in the world. The mechanisms by which institutions operate mediation processes are similar except for minor differences. This is for the nature of the mediation solution. The most important reason for the separation of mediation solution by sectors is that each sector creates its own specific disputes and priorities / tactics in the resolution of these disputes. For example, the reasons and technical details of the disputes in the construction sector cannot be the same as the reasons in another sector. This has led to the separation of mediation processes and mediators and experts involved in this process on a sectoral basis. Given the differences in the cultural, economic and political structure of each country, and even the climatic changes, the causes and approaches to disputes of the inhabitants of a country cannot be the same. For this reason, it is important for countries to have segregated mediation institutions on sectoral basis in terms of using mediation method.

Although mediation is becoming increasingly popular in the world, it is still a new and developing concept for some countries. The countries mentioned above, such as U.K and U.S.A, are developed countries with specialized institutions in this field and have laws on mediation. Referring to Turkey, mediation has become popular with the act "Mediation in Legal Disputes Act and Regulations" in 2012. But in Turkey, yet there is not a mediation institution specializing in the construction mediation.

#### **4. Mediation in Turkish construction sector**

In the Turkish construction sector, as in the world, disputes have become important problems. Disputes increase the cost of the projects and cause them not to be completed within the targeted period and disrupt the business relations between the project stakeholders. Studies have shown that the major causes of disputes in the Turkish construction sector are time extensions, changes, design errors and scope changes (Arici, 2012; Ilter, 2010; Deniz, 2010). According to these studies, the most commonly used solution for dispute resolution is litigation. Ilter (2010) stated that the most common dispute resolution method in the construction contracts is court litigation in Turkey while Arici (2012) showed that the public and private sector applied to litigation most after the negotiation process. However, the construction sector, which is accelerating day by day, requires a faster and cost-effective way to resolve disputes. This is a fact for all sectors in Turkey, including construction sector. The growing burden of the courts in Turkey, their high cost and win-lose mentality has led government to a new dispute resolution so in 2012, when "Mediation in Legal Disputes Act and Regulations" came out.

After "Mediation in Legal Disputes Act and Regulations" came out in 2012 in Turkey, mediation began to spread. After the enactment of this act, The Department of Mediation was put into service. The Department of Mediation provides drafts of standard documents, list of the mediators, the regulations and such kind of documents/services to the people who wants to involve in a mediation process (Arici Ustuner and Tas, 2018).

In 2015, "Istanbul Arbitration Centre" was established with government support in Turkey. This Centre mainly focuses on arbitration but it has also mediation process service. In Turkey there is no other institutions that provides people mediation services like in the other countries such as U.S.A or U.K. Additionally, there is no institution that focuses on construction mediation in Turkey. But in 2018, mediation in labor cases and in 2019, mediation in commercial disputes cases have become mandatory. With that practice, mediation in construction cases also became mandatory (ISTAC, 2019; MoJ, 2019a).

#### **4.1. The perspective of Turkish contractors about construction mediation**

The construction sector is suitable for conflicts and disputes because of its complexity and uniqueness. It is also same for the Turkish construction sector. According to 2018 statistical data of the 15th Civil Chamber of the Supreme Court of Appeals facing construction cases in Turkey, the average period of the cases brought to the Supreme Court is 258 days. Furthermore, according to the 2018 data of the Supreme Court of Appeals, 40% of the lawsuits in the 15th Civil Chamber are transferred to the following year (Coc, 2019). These long processes of the courts cause major financial losses to the dispute parties, damage the sectoral image, and even cause the court's winning party to become a loser with prolonged appeal processes. In short, the courts have two losers, not a winner.

For all these reasons, as in the world, there was a need for an economical, fast and harmless alternative dispute resolution method like mediation in Turkey. Since 2012, the mediation usage has begun to spread in Turkey but there is limited research conducted for the use of mediation in the construction sector and also for the perspective of Turkish contractors about construction mediation. In this paper, it is aimed to understand the perspective of the Turkish contractors about the construction mediation.

#### **4.2. Data and methodology**

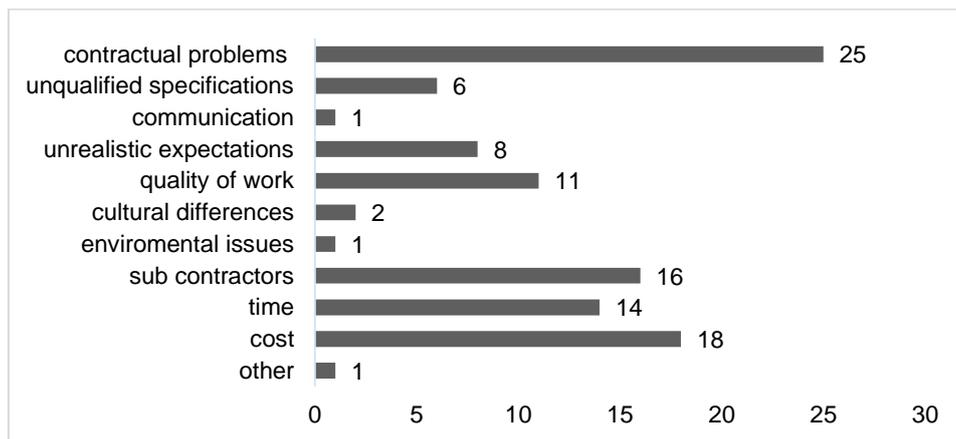
In Turkey, there is limited research about construction mediation and the perspective of the construction sector professionals about mediation. As described in this study, mediation is widely used all over the world and is particularly suitable for the construction sector. In Turkey, there is a mediation act and Istanbul Arbitration Centre (ISTAC) has a mediation process. However, ISTAC's mediation process is undifferentiated on a sectoral basis and not as detailed as the institutions mentioned in this research above and for the Turkish construction sector, the perspectives of construction professionals about mediation, thoughts of using mediation if they face with a dispute in the future and whether they need a mediation institution in construction sector specific and their expectations from that institution have not been investigated. In 2019, the mediation has been mandatory for the commercial disputes in Turkey. Thus, people who actually want to go to the litigation in the construction sector should first apply the mediation. Such situations also make mediation more important for the construction sector.

The survey focuses on understanding the main reasons that cause disputes in the construction sector, the perspective of the Turkish contractors about the construction mediation, their opinions for an institution that is working specially for the construction mediation, and services that contractors are expecting from a mediation institution.

The survey was conducted among Turkish contractors in 2019. The surveyed contractors are members of Turkey Contractors Associations. The questionnaire was designed by using the researches about ADR in Turkey and the world. Also, other questions were added to understand the perspectives of professionals to the mediation institutions. Questionnaires were sent online. Approximately, 120 surveys were sent and 31 people completed the survey. The participants were selected from the positions of legal consultants, construction managers etc. of the contractor firms, who were involved in the process in case of dispute. Results of the survey can be found below.

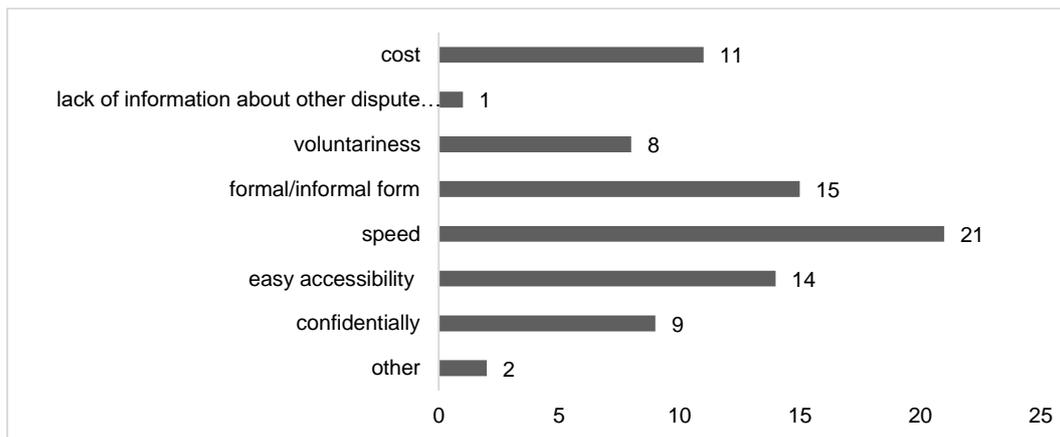
The participants were asked about the reasons of the disputes that they experienced most in the construction sector. According to their answers, in the Turkish construction sector, the contractual problems cause disputes frequently (Figure 5). In the study by Arici (2012), it is seen

that the biggest dispute causes in the Turkish construction sector is the attitude of the owner and the scope changes. In this study, it is seen that the most important dispute causes for contractors is contractual problems. Also as seen in the Figure 5, delays, sub-contractors and cost are important issues for the disputes. Yilmaz (2019) conducted a research about delay factors in the public construction projects in Turkey and suggested an estimation model that can determine the possible delay time for future projects.



**Figure 5. Causes of disputes**

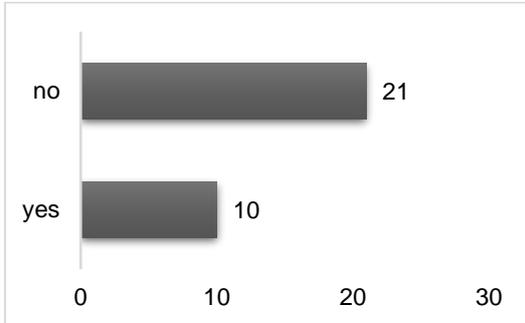
The participants were asked about the reasons for choosing dispute resolution methods. According to the answers given by the Turkish contractors, the main reason for the contractors to choose their dispute resolution methods is speed (Figure 6). In Turkey, according to statistical data as well as all over the world are known that the court proceedings are slow processes. According to Turkish contractors, speed is important in the selection of dispute resolution methods. Accordingly, it is clear that there is a need for a quick solution in the construction sector.



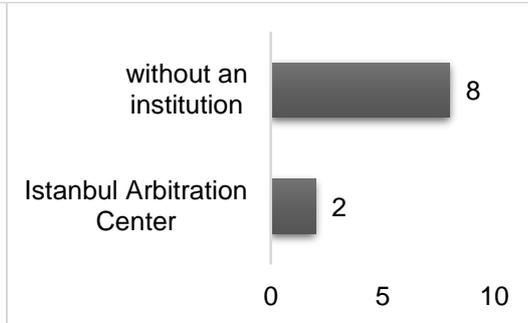
**Figure 6. The reasons for choosing dispute resolution methods (DRM)**

The participants were asked whether they have ever used mediation method in the disputes that they faced in the construction sector in Turkey. Accordingly, 10 of the 31 participants used the mediation method (Figure 7). This information is important data for the Turkish construction sector. After the mediation act came into force, there is no study on the use of mediation in the Turkish construction sector. This survey data shows that the mediation method has been used in the Turkish construction sector. In addition, the participants were asked how they had applied the mediation. Accordingly, 8 out of 10 people were applied non-institutional mediation, while 2 people applied to Istanbul Arbitration Centre's mediation process (Figure 8).

The mediation processes of the Istanbul Arbitration Centre are not divided on a sectoral basis. This Centre has a general mediation process. However, 2 of the applicants who have applied for mediation, have used this process.

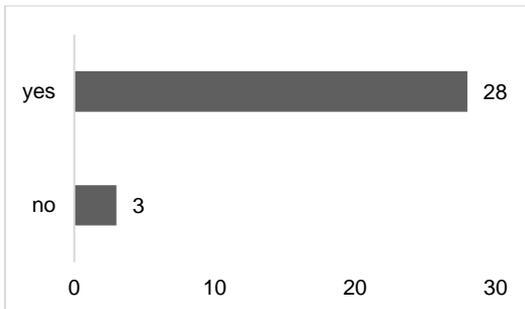


**Figure 7. The mediation usage**

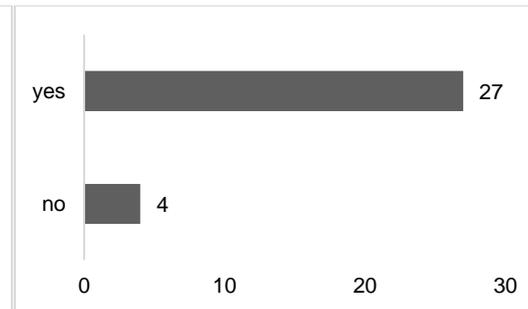


**Figure 8. The type of the mediation**

The participants were asked if they could use mediation in case of any disputes in the future. As seen in the Figure 9, most of the contractors declared that they will use mediation if they face with a dispute.



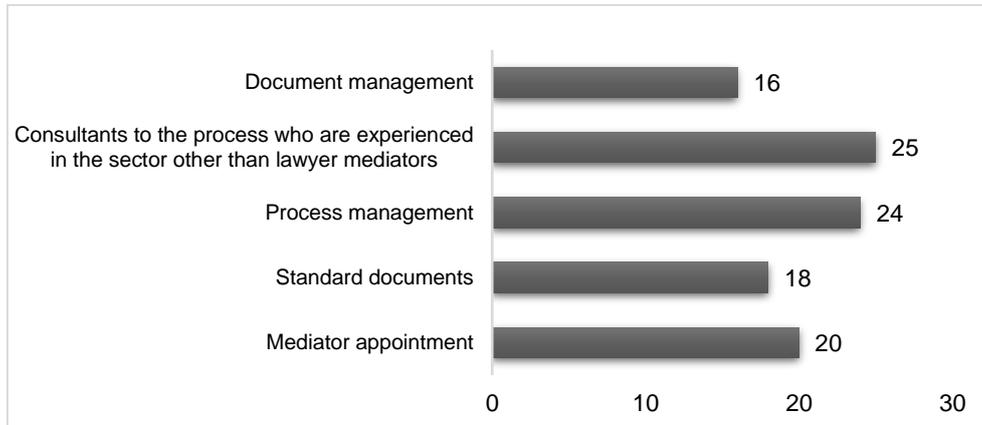
**Figure 9. Mediation usage in the future**



**Figure 10. Thought about benefit of use of a special mediation institutions**

Additionally, the participants were asked if they find a construction mediation institution in Turkey beneficial. Most of the participants stated that the presence of an institution working on construction mediation is beneficial for Turkish construction sector (Figure 10).

The participants were asked about their expectations from a construction mediation institution. According to their answers, Turkish contractors think that the mediation process should involve consultants experienced in dispute issue. In Turkish mediation system, only lawyers can be mediators so it is very difficult to find a mediator familiar with a construction dispute issue. So, consultants are important for the construction mediation processes in Turkey (Figure 11). Also, as seen in the Figure 10, process management is an important issue for the Turkish contractors.



**Figure 11. Types of Construction Mediation Institution Services**

### 5. Results

As seen from the survey results, in the Turkish construction sector, there has been a growing interest to the mediation in recent years. Turkish contractors declare that they will use mediation if they face with a dispute in the future. According to the results of the survey, the expectations of the Turkish construction sector from a mediation institution and the other institutions examined in the study are as follows. The items in Table 3 are listed from most needed to minimum for Turkish construction sector.

**Table 3. The expectations of Turkish contractors from a mediation institution**

|   | AAA-ICDR | JAMS | CEDR | The expected institution in Turkey |
|---|----------|------|------|------------------------------------|
| Consultants to the process who are experienced in the dispute issues other than lawyers | -        | -    | -    | +                                  |
| Process management  | +        | +    | +    | +                                  |
| Support for solving problems that occur during the process                              | +        | +    | +    | +                                  |
| Mediator appointment  | +        | +    | +    | +                                  |
| Standard documents  | +        | +    | +    | +                                  |
| Document management   | +        | +    | +    | +                                  |

The construction sector has an autonomous structure. Therefore, it is important that the institutions providing dispute resolutions including mediation on construction sector are specialized in the construction sector. In construction disputes, it may be important to have technical knowledge and the tactical maneuvers of the mediator. Therefore, construction disputes require different specializations and experiences. In addition, according to the survey results shared above, Turkish construction professionals welcome the existence of an institution that will work in construction mediation, and expect the services such as process management, document management etc. but one of the most striking results is that Turkish contractors want a consultant other than lawyers involved in the process. The mediators can be the only lawyers in Turkey so it gives rise to such a requirement. This is also a barrier for using of mediation in the construction sector.

Arici (2012) showed that the main dispute reasons in the Turkish construction sector were changing the scope of the project and the attitude of the owner. But in recent research, the construction professionals declared that the main dispute reason in the Turkish construction sector is contractual problems. There is no research that can compare the other results in the questionnaire so it cannot be compared. However, it is seen that sector professionals are willing for mediation.

Comparing with the other countries which have developed mediation systems, in Turkey, there is no strong institutions working on the construction mediation. The lack of a reliable

institution working on mediation in the Turkish construction sector is an obstacle for people experiencing dispute to apply mediation. The existence of a reliable institution to work in the construction sector in Turkey about mediation can provide the sector participants to turn to mediation. In a sector where disputes such as the construction sector are intense, it is an important step for everyone working in construction sectors to move towards mediation through formal and damaging ways such as court proceedings.

## **6. Conclusion**

Mediation is fast, flexible, reliable, low cost, easy to apply according to other ADR methods (DRB, Mini Trial, etc.). Mediation can be implemented as a process organized by parties who are in dispute. But the mediation practice with the expert institutions working on this subject is much more practical and easier for the dispute parties. The benefits of the mediation institutions are can be summarized as below;

- With the help of institutions, inexperienced people in mediation can easily implement mediation.
- The institutions organize the process for dispute parties by guiding them throughout the process. Thus, the dispute parties can focus on the solution of the problem instead of procedural work during the mediation process. According to Arici Ustuner and Tas (2018), the most expected services from institution by the dispute parties are the process management.
- In multinational projects, going to court in the resulting disputes causes more complex processes. The laws of each country are different. This makes the court process more challenging and complicated. Mediation provides non-binding solutions to dispute parties and frees them from dealing with the law.
- Institutions provide process rules and mediator lists to the dispute parties. In addition, by providing standard documents to the dispute parties, the parties are free from the responsibility of preparing the documents.
- Some institutions appoint advisors experienced in dispute-related matters with the request of the dispute parties or in the mediation processes they deem necessary. This is important and useful for a sector that requires expertise such as the construction sector.
- During the mediation process under the auspices of the institutions, the confidentiality, flexibility, neutrality and reliability of the process is guaranteed by the institutions.
- The institutions guaranteed the mediation processes quality and efficiency.

In Turkey, the mediation began to spread in 2012 when the mediation act came out. The government supports mediation because of heavy burden of the courts. The mediation had been mandatory in labor cases and commercial cases in Turkey to decrease the burden of the courts. With that move, the mediation became mandatory for the construction cases. However, in Turkey, there is no institution specialized in construction mediation. Therefore, people who want to use the mediation in the construction sector do not have much knowledge about this issue and have difficulty in applying for mediation or they are skeptical about the non-systematic mediation process made with the mediator appointed by government and are not willing enough during the process. In Turkey, the establishment of an institution for the construction mediation like the institutions AAA-ICDR, JAMS, CEDR exemplified above, will be in the nature of a guarantee for those who want to use the mediation in the construction sector.

The burden of the judiciary around the world is very high. There are many discrepancies that cannot be solved, long lasting cases and at least one dissatisfied party. Solving these disputes quickly without going to court will reduce project failures in the construction sector and contribute to the development of the sector. Therefore, the use of mediation in the construction sector is important. With the help of specialized institutions providing mediation processes, people will be more confident in their mediation and the mediation process will be easy to implement with the organizations of these institutions and the use of mediation will be increased.

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