

## Evaluation of Litigation Process in Turkish Construction Industry from the Perspective of Judicial Actors

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Received: 12.05.2019

Accepted: 24.07.2019

Published Online: 24.07.2019

**Abstract:** Although the rapidly growing construction sector is a sign of emerging economies for the countries, numerous events of disputes which may conclude with litigation might be encountered in projects more often. Additionally, grounded in our previous study regarding the construction cases between 2007 and 2017 in Turkey, it is detected that Court of Cassation rejected the determination of Court of First Instance by 96%. Concerning this, there appears the question if the legal actors playing crucial roles in litigation process are technically qualified to the extent of satisfactory level. This problem necessitates investigating the qualifications and competency levels of judicial actors. Studies conducted concerning this matter are limited. Hence, to detect the qualifications and competency levels of judicial actors, semi-structured interviews with the major actors of the construction related cases such as judges, lawyers and contractors are conducted in this study. The interviews are analysed through content analysis to address the competencies and qualifications of the judicial actors. One of the remarkable findings is that the young judges and the lawyers accepting all kinds of cases instead of specializing on particular subjects tend to make wrong assessments due to insufficient legal and technical knowledge concerning construction. Additionally, summoning a technical person as an expert witness to all kinds of cases related to construction without considering his/her main specialized area such as construction management, geotechnics, hydraulic, structure etc. contribute to wrong assessments of the cases.

**Keywords:** Construction Related Judicial Process, Disputes in Construction, Qualifications and Competency Levels of Judicial Actors

### 1. INTRODUCTION

Due to unique nature of projects, claims between the stakeholders mostly occur during the course of the projects. If the claim cannot be resolved on a satisfactory basis, dispute arises. Disputes are necessary to be settled in order to prevent from the losses in terms of time and cost. There are two main dispute resolution methods, which are widely adopted in the world, namely Judicial Dispute Resolution (JDR) and Alternative Dispute Resolution (ADR) as provided in Table 1.

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**Table 1.** Dispute resolution methods

Judicial Dispute Resolution (JDR)		Alternative Dispute Resolution (ADR)						
Litigation	Arbitration	Adjudication	Conciliation	Mediation	Mock-Trial	Dispute Resolution Board (DRB)	Expert Determination	Negotiation

Despite large spectrum of widely conducted studies concerning not only strong and weak sides of dispute resolution methods but also selection criteria of dispute resolution methods by the researchers (İlter & Dikbaş, 2011), (Keršuliene, Zavadskas, & Turskis, 2010), (Chan, Suen, & Chan, 2006), (Chong & Zin, 2012), limited studies have investigated the litigation process concerning construction. Although, Turkish economy is driven by the construction industry (Oxford Business Group, 2017), (Arditi, Akan, & Gurdamar, 2006), unfortunately dispute resolution processes concerning construction mainly result in time, cost and as well as arguable results. With respect to our previous study %96.1 of the decisions given by Courts of First Instance are rejected by Courts of Cassation in Turkey. This finding necessitates questioning the competency levels of judicial actors. Actors such as lawyers and judges are expected to be qualified with technical and judicial knowledge. Qualifications of judicial actors define their skills which are to be ruled by legislations and equipped to act as concerned actors. By the same token, qualifications of a judicial actor are expected to deal with the requirements of resolving disputes successfully. Judicial actors participating in construction related cases get bachelor's degrees of law without concentrating on construction which results in inefficiency in resolving disputes in litigation process. Concerning the obstacles resulting from judicial actors' lack of construction related technical knowledge; qualifications of judicial actors related to their vocation are to be questioned. Additionally, there have been many unsuccessful cases concerning construction industry in terms of the quality of performed works. This also necessitates questioning the competency levels of judicial actors.

Participants in litigation process meet numerous problems related to time and cost consumption (İlter & Dikbaş, 2009), (İlter & Dikbaş, 2011). Despite these problems encountered in litigation process, project contracts mostly refer to the 'Civil Courts' to resolve the concerned disputes without pointing out the other alternative dispute resolution methods which are more faster and time saving compared to litigation. Hence, in order to take necessary precautions for the bottlenecks of litigation process in advance, this study intends to define the qualifications and competency levels of judicial actors for construction related cases in Turkey. The data obtained from semi-structured interviews is believed to help improvement of litigation process which is adopted as the main dispute resolution method in Turkey.

## 2. METHODOLOGY

In judicial process concerning construction related disputes, many actors are involved such as expert witnesses, lawyers, judges, prosecutors, claimants and defendants etc. These actors' opinions with respect to qualifications and competency levels of judicial actors who play crucial roles in resolving disputes are essential. Therefore, in order to achieve the main objective of this research, a qualitative analysis is adopted. Hence, semi-structured interviews are made with lawyers, judges and contractors as actors taking part in litigation process concerning Turkish construction industry in order to identify the qualifications and competency levels of judicial actors. The reasons behind choosing lawyers, judges and contractors as interviewee in this research are that judges and lawyers are the main actors in resolving disputes in judicial process and contractors are commonly seen as claimants and defendants in the judicial process.

In order to reach the root of the problems concerning the qualifications and competency levels of judicial actors, an in depth examination was needed. Apparently, the opinions of judicial actors taking part in litigation process concerning construction industry is crucial to shed light on the current qualifications and competency levels of judicial actors and the areas where judicial process are to be improved. To serve this purpose, the technique of face to face interaction is adopted in order to obtain relevant data from each interviewee; thus, as a qualitative method, semi-structured interviews are preferred.

Questions of the interviews were directed to the participants verbally and responses were instantly recorded as notes on the personal computer of the interviewer. The interviews were conducted with 4 lawyers, 4 judges and 10 contractors. Each semi-structured interview took almost one hour with each participant. The data gathered via semi-structured interviews were analysed through content analysis.

Even though supplementary questions were produced to elaborate the opinions of the respondents, the following are major questions directed to the judicial actors namely judges and lawyers taking part in the construction related cases;

- 1- Have you ever encountered any difficulties in understanding the construction terminology and associating the laws with the construction process etc. during the litigation process concerning construction?
- 2- At what level do you need the expert witness report during the cases concerning construction?
- 3- Do the petitions of claimants and defendants make the case subjects clear enough? What are the effects of these petitions on the determination phases of the cases?
- 4- What is your opinion about the decisions of reversal given by Courts of Cassation with respect to determinations of Courts of First Instance?
- 5- What are your suggestions to make the judicial process more effective and efficient?
- 6- What is your opinion about the qualifications and competency levels of judges, lawyers and expert witnesses taking part in construction related cases?

The semi-structured interviews' questions directed to judges and lawyers and the corresponding objectives are tabulated in Table 2 below.

**Table 2.** Questions of semi-structured interviews directed to the judges and lawyers and the corresponding objectives

Questions	Objectives
1	To detect the qualifications and competency levels of judges and lawyers
2	To detect the qualifications and competency levels of judges and lawyers
3	To detect the qualifications and competency levels of lawyers
4	To detect the qualifications and competency levels of judges, lawyers and expert witnesses
5	To detect the qualifications and competency levels of judges, lawyers and expert witnesses
6	To detect the qualifications and competency levels of judges, lawyers and expert witnesses

Questions directed to contractors participating in the litigation process are as follows;

1. Do the courts summon the qualified expert witnesses according to subjects of the disputes concerning construction?
2. Do the petitions of claimants and defendants make the case subjects clear enough?
3. With respect to technical issues, what is your opinion about the qualifications and competency levels of judges, lawyers and expert witnesses taking part in construction related cases? What do you suggest for these matters?

The semi-structured interviews' questions directed to contractors and the corresponding objectives are tabulated in Table 3 below.

**Table 3.** Questions of semi-structured interviews directed to the contractors and the corresponding objectives

Questions	Objectives
1	To detect the qualifications and competency levels of judges
2	To detect the qualifications and competency levels of judges and lawyers
3	To detect the qualifications and competency levels of judges, lawyers and expert witnesses

After the data are gathered, the main ideas of legal actors are categorized. By doing this, common emphasised opinions of these legal actors are defined and coded accordingly in order to detect qualifications and competency levels of litigation actors namely, expert witnesses, lawyers, judges. Hence, significant replies of the participants including opinions and advices are quoted to support the findings of the study.

### 3. ANALYSIS OF THE SEMI-STRUCTURED INTERVIEWS WITH THE JUDICIAL ACTORS

In order to detect the qualifications and competency levels of the judicial actors taking part in construction related litigation process, semi-structured interviews with the judicial actors namely, contractors, lawyers and judges are conducted. All the findings gathered via the replies of the participants are analysed and the content is coded to access the hard core relevant to the objective of this study. The irrelevant outcomes are excluded in order not to digress the main objective of the study. As well as the predetermined list of interview questions, extra questions are directed for clarification of the replies given by the participants during the interviews. The data is obtained from the interviewees' replies concerning the questions which are both predetermined and restructured during the interviews. Common ideas of participants are coded and tabulated in Table 4 below.

**Table 4.** Common ideas of the participants taking part in the semi-structured interviews

Emphasized Statements by the Judicial Actors	Judges (Over 4)	Lawyers (Over 4)	Contractor (Over 10)
Judicial actors have inadequate knowledge of construction terminology	4	3	
Courts mostly need expert witnesses' reports during the cases concerning construction	4	4	
Petitions of claimants and defendants do not make the case subjects clear enough			7
Workloads of the judges are too much. Judges do not have enough time for the cases to review	3	3	
Clauses of project contracts are not detailed and clarified adequately	2	1	
Developing a Standard Contract such as FIDIC is expected to reduce the number of disputes			7
Qualified and correct expert witnesses are to be chosen according to case subjects	4	4	10
Asking additional expert witnesses' reports which is sometimes encountered prolongs the cases unnecessarily			8
Utilizing the private experts are beneficial to produce understandable petitions		1	
Judges expertise areas should be considered during the rotations of judges	3	2	
Vocational specialization of judicial actors are recommended	2	3	
Young judges tend to give wrong determinations due to inadequate experiences	3	4	
Training the judicial actors about technical issues in construction is believed to reduce wrong judgements in construction related cases.	2	2	
'Contract of Work' is proposed to be a part of law education	1		

Since qualifications and competency levels of judicial actors are aimed to be detected, the findings are elaborated separately under the following three sections as per concerned judicial actors namely, judges, lawyers and expert witnesses respectively.

#### 4. DEFINING THE QUALIFICATIONS AND COMPETENCY LEVELS OF JUDGES

To begin with, in this section, it is aimed to figure out the qualifications and competency levels of judges via the output obtained from the semi-structured interviews made by not only judges but also lawyers and contractors.

As the reason behind the inadequate investigations of case documentations including claimants' and defendants' petitions, Judge #1 and Lawyer # 3 express that workload of the judges are too much and this reduces the unit/time of reviewing the cases before the hearing.

Except Judge #3, all the judges and lawyers interviewed express that young and inexperienced judges tend to make mistakes. Lawyer # 3 contributes to this matter by stating that *"In the first year of judges, their decisions are reversed almost by 50% due to lack of experience."* In addition to this, Lawyer # 3 also takes the attention to the issue concerning the appointment of the judges by expressing that *"Sometimes a criminal judge is relocated as a civil judge, and this requires him/her to gain new experience which of course will take some time. The issue related to appointment of judges to the new areas increases wrong determinations due to lack of experience in their new fields."*

Moreover, all contractors are of the opinion that expert witnesses mostly are not summoned to the cases considering their main expertise areas, and a judge tend to assign an expert witness who used to work with the concerned judge.

Furthermore, majority of the contractors believe that judges tend to ask additional expert witnesses' reports upon any queries directed by any of the parties or their lawyers due to having inadequate technical knowledge concerning construction. This causes unnecessary prolongation of litigation process.

#### 5. DEFINING THE QUALIFICATIONS AND COMPETENCY LEVELS OF LAWYERS

With respect to quality of claimants' and defendants' petitions, Judge #1 expresses that *"Sometimes there are some petitions that we do not understand anything. It's very important indeed. We sometimes don't understand the petition enough and only understand the subjects of petitions during the field investigations. Petitions have vital importance in terms of preparation of field investigation. Otherwise, they negatively affect the processes of the cases."* Lawyer #1 also agrees with this belief and states that *"Of course, a case is lost or won through petitions. For this reason, the demands and quantities in the petitions should be taken very seriously as the parties tie themselves up with these petitions. In general, if the concerned petition is not initiated by a lawyer correctly, it won't be clear."* Furthermore, Most of the contractors emphasize that sometimes lawyers struggle to understand the technical knowledge with respect to construction related issues. To support this statement, Contractor #1 expresses that *"Almost %10 of lawyers write petitions without completely understanding their clients and this prolongs the cases accordingly."* In conclusion, claimants' and defendants' appropriate claims via well prepared petitions are essential for satisfying awards by the courts, therefore; it is highly beneficial to encourage the parties to get the lawyers to initiate petitions at the outset of the case. Moreover, lawyers should closely pay attention to the contents of the claims through deeply understanding their clients, and prepare the related petitions correspondingly in order not to mislead and prolong the process of litigation unnecessarily.

#### 6. DEFINING THE QUALIFICATIONS AND COMPETENCY LEVELS OF EXPERT WITNESSES

An expert witness is the only person who can lead the judge concerning the technicality of a case. Lack of expert witnesses' reports mostly misleads the judges, and determinations of these kinds of cases are rejected by the Courts of Cassation as investigated by our previous study. The questions to figure out the qualifications and competency levels of expert witnesses are directed to judges, lawyers and contractors. The replies are coded as per their contents by excluding the irrelevant replies; moreover, relevant replies are quoted to support the findings.

One of the significant findings is related to the expertise areas of expert witnesses. It is suggested by the one of the lawyers who participated in the interviews that expert witnesses should define their main expertise areas more specifically like such as structure, dam, historical buildings etc. and should be summoned to the cases according to their defined expertise fields. In addition to this, most of the outcomes obtained from the interviews are on the same direction that the technical knowledge of expert witnesses concerning their specific fields in construction has to be sufficient to direct the courts correctly by presenting appropriate reports. Lawyer #3 also makes contribution to this statement by expressing that *"I think the reports of the expert witnesses who are not academics do not reflect the fact very much because of lack of specific technical knowledge. What's more, the knowledge of expert witnesses should be tested in terms of their competencies concerning their fields for defined periodic intervals."* It is thought

that assigning the correct expert witnesses to the cases according to their expertise areas is beneficial to increase the success of the cases.

## 7. DISCUSSION AND CONCLUSION

Disputes are part of the nature of the construction projects. However, the judicial system and its actors seem to contribute to the problem rather than solve it in a timely, cost effective and mostly in a fair manner. This research argues that the course of judicial proceeding is a significant part of the problematic areas in dispute resolutions.

It is derived from the findings that construction contract is the most common dispute source in construction (Bvumbwe & Thwala, 2011); because, analytical approach is not mainly adopted for the preparation of the majority of a contract at the outset of the project (İlter, 2010). Additionally, of the contracts prepared in construction sector in Turkey, 70% of the contracts were drafted without considering any type of standard contracts (İlter, 2010). Close attention is to be paid to preparation of contract of the projects in order to prevent the amount of potential disputes by eliminating the ambiguities. This analytical outcome is also supported by the opinion of Judge #4 by expressing that emphasizes this issue based on his experiences by expressing that an unclear contract is also one of the major factors of reassessment decisions given by Courts of Cassation for the determinations of Courts of First Instance. Additionally, most of the contractors claim that not only a poorly prepared contract but also not having a standardized project contract mostly result in dispute and this increases the density of litigation process as well as increasing the workloads of the concerned judicial actors. It is believed that obliging a standard form of contract to the project such as FIDIC contract is believed to reserve the rights of both sides of the project parties; therefore, it is highly beneficial for construction projects to utilize standard contracts according to project types in order to take significant precautions against negative impacts of potential debates. As a result of this, the amount of disputes related with contracts and the number of prolonged cases would be reduced. In addition to this, improving the qualifications of the judicial actors related with contractual issues of projects is believed to contribute to the success of the litigation process.

One of the most remarkable findings concerning the qualifications and competency levels of judicial actors is that the young judges and the lawyers accepting all kinds of cases instead of specializing on particular subjects tend to make wrong assessments due to insufficient legal and technical knowledge concerning construction. Whereas, construction industry has its own characteristics like industries of Medicine and Information Technology (IT) and requires specific knowledge in order to resolve any dispute concerning construction. It is suggested by Judge # 1 that Contract of Work is to be an integral part of law education. Additionally, judges and lawyers are to be occupationally branched. Furthermore, judges' main area of expertise such as Criminal Courts, Civil Courts, Consumer Courts, Commercial Courts etc. are to be considered during their rotations to the other courthouses and this is believed to improve the control of the judges on the cases. Encouraging the judges and lawyers to specialize on a specific subject is believed to skyrocket the success of the litigation process and diminish the burdens of Courts of Cassation correspondingly. Additionally, it is believed that in addition to judicial knowledge, equipping the judges and lawyers with technical and process based knowledge concerning construction would also decrease wrong determinations and lengthy process of litigation considerably.

All the judges participating in the interviews reach a consensus on the point that judges mostly have lack of technical knowledge concerning construction industry; therefore, qualified expert witnesses are to be assigned to the cases. Otherwise, judges can be misled. The regulation related to expert witnessing released on 03<sup>rd</sup> August 2017 hinders the legists in most cases to be expert witnesses but paves the way for the specialists to be expert witnesses for the cases related to their own fields. This new legislation is believed to reinforce the qualifications and competency levels of expert witnesses, and it is thought to reduce the expert witnesses' defective reports in the upcoming cases. However, this is not thought to be sufficient to bring the cases about construction industry to successful conclusions. Expert witnesses' own expertise areas such as geotechnics, hydraulics, transportation etc. must also be taken into consideration while resolving the cases related to construction. This statement is also supported by one of the lawyers taking part in the semi-structured interviews. This is thought to increase the success of the cases by eliminating expert witnesses' defective reports. In order to improve the process of assigning correct expert witnesses to the cases, Judge #1 also suggests in this matter that *"Responsibility of assigning the right expert witnesses to the cases should be given to professional chambers."* By doing this, amounts of unsuccessful reports and unaccepted cases by Courts of Cassation are believed to diminish. Assigning wrong expert witnesses mostly result in wrong assessment by the courts and prolongation of the litigation process respectively. The rate of assigning correct expert witnesses according to case subjects can be increased by educating the judges in terms of construction terminology and process.

Next, it is derived from the interviews that inadequate number of judges is believed to contribute to wrong assessment due to spending less time on each case. Considering the outcomes, increasing the number of the judges is

highly beneficial for dispute resolutions concerning construction projects. By doing this, the quality of litigation process concerning construction industry would be increased through reliable awards in a timely manner.

At the outset of the case, improving the claimants' and defendants' petitions is believed to prevent lengthy and unsatisfying litigation process. Therefore, these petitions are proposed to be initiated by lawyers and it is suggested that lawyers not mislead the courts by giving unnecessary and irrelevant claims in the petitions. These are thought to reduce additional correspondence between the judicial actors and thus expedite the judicial process.

In the future, this study can help the parties having dispute to recognize litigation process before attempting. Moreover, judicial actors and law-makers benefit from outcomes obtained from this study to improve the bottlenecks of litigation process and qualifications and competency levels of judicial actors.

This study investigates qualifications and competency levels of judicial actors from judicial actors' perspectives. This study provides supportive information for the future studies being out of this limitation. For instance, contributions of other judicial actors like expert witnesses, claimants, defendants etc. are also crucial to detect the objective of this study from different aspects.

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