



EVALUATION OF LITIGATION PROCESS IN TURKISH CONSTRUCTION INDUSTRY FROM EXPERT WITNESSES' PERSPECTIVE

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Abstract

A project contains numerous tasks coordinated with associated resources to achieve specific goals. The nature of a project depending on its density of multidisciplinary tasks is considered to be very sophisticated. Therefore, encountering many challenges and risks is probable. When the number of tasks and resources along with their interactions are considered, dispute in a project could be inevitable. In this situation, project parties mostly tend to resolve their disputes through litigation. Nevertheless, in our previous studies, it was detected that 96.1% of the cases were rejected by the Courts of Cassation due to inadequate expert witness, lack of expert witness report, missing review or wrong assessment etc. Hence, it is thought that examining the actors of litigation process is vital in terms of their qualifications and competency levels. Expert witnesses are inevitable parts of litigation process as they play significant roles in the cases concerning construction. Judges mostly rely on the opinions of expert witnesses for the cases containing technical and specific subjects like construction related cases. To investigate the qualifications and competency levels of these actors in detail, semi-structured interviews were made with expert witnesses as a qualitative study. Consequently, via analysing the opinions and advices of the expert witnesses, the lack of knowledge in construction terminology and process have been detected for the concerned judicial actors as well as insufficient qualifications and their levels of competency.

BİLİRKİŞİ GÖRÜŞLERİNE GÖRE TÜRK İNŞAAT SEKTÖRÜNE İLİŞKİN YARGI SÜRECİNİN VE AKTÖRLERİNİN DEĞERLENDİRİLMESİ

Anahtar Kelimeler

Nitelikler, Yeterlilik Düzeyleri, Adli Aktörler, İnşaat Uyuşmazlıklar, Hukuki Süreç,

Öz

Projeler, belirlenmiş hedeflere ulaşmak için, ilişkili kaynaklarla koordine edilmiş çok sayıda çalışmayı içerir. Birden çok disiplini bünyesinde barındıran projelerin doğası gereği karmaşık yapıda oldukları düşünülmektedir. Bu nedenle projelerde birçok zorluk ve risk ile karşılaşılması olağandır. Proje bünyesindeki işler ve bu işler ile ilişkili kaynaklar arasındaki etkileşimler göz önüne alındığında, proje içinde çatışma kaçınılmaz olabilmektedir. Bu durumda, taraflar uyuşmazlıklarını mahkeme yoluyla çözüme eğilimindedirler. Ancak Önceki çalışmalarımızda, yetersiz bilirkişi raporu ya da bilirkişi raporunun olmaması, eksik inceleme ve yanlış değerlendirme gibi nedenlerden dolayı davaların % 96.1'inin Yargıtay tarafından reddedildiği tespit edilmiştir. Bu nedenle, yargı sürecini aktörlerin nitelikleri açısından incelemenin önemli olduğu düşünülmektedir. Bilirkişiler inşaatla ilgili davalarda çok önemli rol oynadıkları için yargı sisteminin ayrılmaz bir parçasıdır. Hakimler, inşaat davaları gibi özel ve teknik bilgi gerektiren davaların karar aşamasında çoğunlukla bilirkişi raporlarına güvenmektedir. Bu aktörlerin nitelikleri ve yeterlilik düzeylerini ayrıntılı olarak incelemek amacı ile bilirkişiler ile nitel bir çalışma olan yarı yapılandırılmış görüşmeler yapılmıştır. Sonuç olarak,

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bilirkişilerin fikir ve tavsiyeleri analiz edilerek, ilgili aktörlerin nitelikleri ve yeterlilik seviyelerinde eksikliklerin yanı sıra, inşaat terminolojileri ve süreçlerine de tam hakim olmadıklarının tespiti yapılmıştır.

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1. Introduction

Projects are temporary endeavours to achieve specific goals by means of dedicated finite resources. Projects contain numerous complications depending on their project actors' interests during the finite project life cycle, and would result in dispute. Although, Turkish economy is derived by Turkish construction industry (oxfordbusinessgroup, 2017), unfortunately, construction sector is identified as a dispute ridden industry. In order to resolve dispute via litigation, a dispute should be evaluated as per the contract and the fact. Therefore, accommodating experienced professionals to the case in order to elaborate dispute in terms of the project contract and the fact is highly crucial for an appropriate determination. In order to eliminate the potential inadequacy with respect to litigation process, necessary precautions should be identified for this matter. Although dispute resolution processes considering Turkish construction industry have been widely discussed in literature, studies considering the investigation of the actors taking part in the litigation processes are limited. This study intends to shed light on the qualifications and competency levels of judicial actors of construction related litigation process in Turkey. Asking for Judicial actors' opinions is vital to detect the current qualifications and competency levels of judicial actors, and arrive at an appropriate determination on how to improve the litigation process by means of their advices. Thus, semi-structured interviews are conducted with 10 expert witnesses as a qualitative method and analysed via content analysis.

2. Literature Review

2.1 Litigation Process

Civil Courts of General Jurisdiction and Specialized Courts representing Courts of First Instance are the first courts for which the claimant can apply for the resolution of construction related disputes. In case of any unsatisfying award by any Courts of First Instance

for the claimant or defendant, Regional Courts of Justice and Courts of Cassation are the authority for appeal respectively. Hierarchical organization of Judicial Justice is depicted in Chart 1 below (Gözler, 2014; Yargıtay, 2017).

In this table, the courts marked in blue conduct the construction related disputes. These relevant courts evaluate the construction related cases according to the private law which is specifically provided by "Contract of Work" in "Obligation Code". While legal subjects are evaluated as per Contract of Work by the judges and lawyers, technical subjects which mostly show up in the construction related cases are evaluated by the expert witnesses. Expert witnesses' reports are the most essential supportive factors for the judges' determinations of the cases involving technical knowledge on construction.

2.2 Litigation Actors

In this study, current qualifications and competency levels of litigation actors namely, lawyers, judges and expert witnesses are intended to set out. Therefore, at the outset, definitions of concerned litigation actors are made below;

Defendant: A person or a company accused of illegality in a case.

Claimant: A person or a company making a claim in the court.

Trial Judge: A public official determining the right and wrong side of the hearing, and sentencing. With respect to the current qualifications of judges defined in law, to be a trial judge, candidates who are lawyers shall have minimum 3 years of experience, pass the written exam and interview and not be over 45 years old as of 1st January of the year of exam (TBMM, Hakimler ve Savcılar kanunu, 1983).

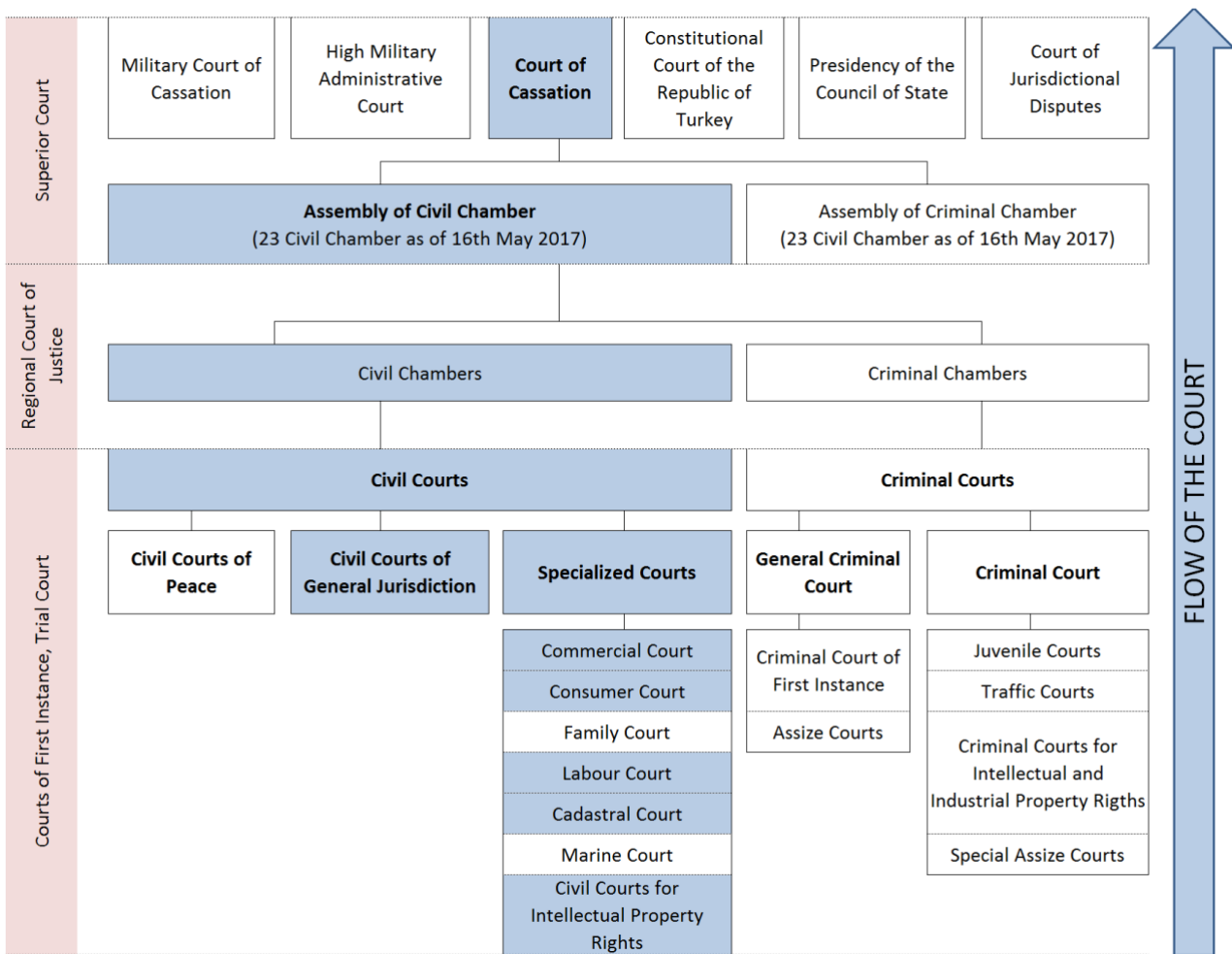


Chart 1 - Organization of Judicial Justice in Turkey

Lawyer: A person who defends the defendant or claimant in a court. For the lawyer one year internship after the graduation of Bachelor's degree is required in order to enroll to Bar Association and therefore, become a legal lawyer. (TBMM, Avukatlık Kanunu, 1969).

Expert Witness: A person who has a technical knowledge to prepare a report for the judge during the judicial process. A regulation related to expert witnessing was released on August 03, 2017 through Official Gazette (Directorate-General-for-Legislation-Development-and-Publications, 2017). An expert witness shall comply with the following regulations;

- The training of expert witnessing is given to a person who has five years of professional seniority. The training constitutes fundamental courses which are theoretical and practical.
- The fundamental courses consist of minimum 18 hours of theoretical and 6 hours of practical courses.
- Theoretical courses contain fundamental rules of jurisdiction, regulation of expert witnessing, qualification of expert witness, liability and authorization of expert witness, ethical principles, principles and procedures of expert witnessing and proofing, segregation of issues as per the law and technical subject, and writing an

expert witness report.

- Practical Courses contain using the Expert Witness Portal, and preparing an expert witness report or a group of expert witnesses report for a case study through using specific systematic technics.
- Expert witnesses are to attend minimum 6 hours training for every three years for renewing their licences of expert witnesses.

3. Methodology

In order to achieve the objective of this study, semi-structured interviews are conducted with 10 expert witnesses with whom each interview takes about an hour. Each expert witness interviewed is numbered from 1 to 10 and their replies are coded and quoted accordingly. The obtained data is elaborated via content analysis as qualitative research method. The main purpose of content analysis is to gather similar data into groups with the help of defined contents in order to make the subject more understandable for the reader, thus; themes of the interviews are coded with inductive approach via this analysis (Yıldırım & Şimşek, 2013). Questions directed to expert witnesses are depicted below;

Q1- Have your assignments made by the courts always been relevant to your expertise and while

preparing your reports, have you encountered any difficulties accordingly?

Q2- Have the requirements of the judges and the case documentations provided been understandable for you in order to prepare your reports?

Q3- Have the subjects of the cases become clear enough with complaint and defendant letters prepared by lawyers? What are the effects of these letters on the determination phases of the cases?

Q4- What is your opinion with regards to qualifications and competency levels of judges, lawyers and expert witnesses?

While questions 1 and 2 intend to determine the current qualifications and competency levels of judges, question 3 aims to define the current qualifications and competency levels of lawyers. Question 4 is constructed for the determination of qualifications and competency levels of all the concerning judicial actors namely, judges, lawyers and expert witnesses.

4. Findings

With respect to question one, all expert witnesses participating in the interviews indicate that they have mostly encountered with the wrong assignment of expert witness by the courts in conjunction with the case subject. It is mostly believed that this results from the lack of technical knowledge of the courts. Concerning this issue, Expert Witness #8 claims that *"A structure concerning the case can be related to building, dam, renovation of a historical structure, but; judge thinks that civil engineers are the master on the all the construction related subjects. For instance, historical structure is not an obligatory course in our engineering education. To sum up, when the courts summon the expert witnesses, courts should consider civil engineers' expertise areas. Due to the lack of knowledge of judges with respect to construction terminology, the judge may summon wrong expert related to the case subject. However, most of the expert witnesses tend to obtain all the cases even they are not related to their expertise because of the money paid for their reports"*. Also, Expert Witness # 5 supports this statement and continues that *"In addition to assigning a wrong expert, during a case, judges mostly ask for additional reports from concerned expert witnesses upon any objections by any side of the case without considering that the query is relevant or not."* It can be concluded that the resolution process of the cases are extended because of not questioning the requirement of an additional report asked by any side of the case.

With regards to the second question directed to the expert witnesses, all the expert witnesses reach a consensus on that judges' requirements are mostly not clear. To support this point, for instance, Expert

Witness #5 states that *"Documentation containing missing information or ambiguity should be asked by the judge to be clarified by the concerning parties. Mostly, the documentations of the cases transferred to the expert witnesses are not completed. This may mislead the expert witnesses, and also prolong the preparation process of expert witness reports due to additional correspondences."*

Regarding the question three, majority of the expert witnesses interviewed agree on the statement that defendant and claimant petitions don't clarify the case subjects enough and mislead the cases. The most remarkable answer is given by Expert Witness #8 by highlighting that *"While preparing the defendant and the claimant petitions, they exaggerate a lot of things. For me, mostly, they emphasize the subjects which are not relevant to their indictment and repeat the same irrelevant subjects several times in a different way in their petitions. Sometimes, lawyers may not be honest with these issues."* Expert Witness #3 also expresses that *"If the lawyer does not initiate the claimant petition clear enough and the defendant doesn't answer the petition correctly, they could mislead the case and determination of the court can be unsatisfying correspondingly. These kinds of cases mostly are carried to Courts of Cassation. In law, there is a statement as 'Judicial Economy'. 'Judicial Economy' defines a rapid process along with a satisfying award. In order to implement the Judicial Economy, claimants' claims should be clear, evidences should be enough and presented on time. The judge also shouldn't allow any prolongation. Duration of written notices should be shortened. If 'Judicial Economy' is implemented enough in litigation process, justice manifests."* Claimants' and defendants' appropriate claims are essential for satisfying awards by the courts and lawyers are to direct their claims correctly at the outset of the case. For the question four, with respect to the qualifications and competency levels of expert witnesses, all outcomes obtained from interviews are on the same direction that expert witnesses should define their expertise areas more specifically. On this issue, Expert witness #9 states that *"An expert should apply for an expert witness in line with his/her expertise area. Civil Engineers tend to handle all the construction related cases. This is wrong"*.

With regards to the qualifications and competency levels of lawyers which are intended to be set out by Question Four, three of the expert witnesses, who are #1, 3, 6, comment on this issue and suggest that lawyers should accept the cases according to their expertise areas and thus, accept the cases which are more relevant to their jobs and reject the ones which are out of their expertise. Expert witness #1 believes that *"Lawyers should not accept each case, not open unnecessary cases in order not to slow down justice process and shouldn't guarantee the result of the case for his/her client. Lawyers should accept the cases according to their expertise area. As in medicine,*

lawyers also should specialize as per the case subjects." With respect to the qualifications and competency levels of judges, all expert witnesses have the same consensus. As defined by Expert witness #6. "Claims of the claimants and defendants are not elaborated by the judges before sending these documents to the expert witnesses". As suggested by expert witness #6, judges must elaborate these claims for the documents sent to the expert witnesses to be clear. This finding also sheds lights on the second question as to whether the documentations provided by judges are clear enough. Expert Witness #6 questions the clarity of the documents sent to expert witnesses.

5. Results and Discussions

In this study, initially, expert witnesses as judicial actors taking part in construction related judicial process in Turkey are interviewed through using semi-structured interview technique. The interviews are elaborated in order to detect the problematic areas in the competency levels and qualifications of judicial actors participating construction related cases in Turkey. As a consequence, inadequate qualifications and competency levels of judges, lawyers and expert witnesses in terms of their expertise on specific subjects in construction are detected.

The regulation related to expert witnessing released on August 03, 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. However, this is not thought to be sufficient to bring the cases about construction industry to successful conclusion. Expert witnesses' own expertise areas such as geotechnics, hydraulics, transportation etc. must also be taken into consideration while resolving the cases related to construction. Similarly, Ulukapı (2001) also expresses that expert witnesses should be expert on the subjects in which they identified in the expert witness list and assigning correct expert witnesses according to the case subjects would reduce the cost and time consumptions. With the help of the findings derived from the expert witnesses interviewed, it is also recommended that expert witnesses who take part in the resolution of the cases concerning construction industry accept to be expert witnesses only for the cases which are related to their own expertise area and reject the ones about which they are not specialists. This is believed to improve the qualifications and competency levels of expert witnesses to direct the judges correctly and bring the cases concerning construction industry to successful conclusion.

It has been derived from the analysis that 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. Expert Witness #8 advises in this matter that "Judges

should at least be aware of specifications and tendering regulations concerning construction industry in order to assign the correct expert witness as per the source of problematic area of construction, and to be able to evaluate the validity of expert witnesses' reports." What is more, Expert Witness # 2 states that "Assigning the correct expert witness definitely results in satisfying awards." Hence, this may reduce the amount of unaccepted cases by Courts of Cassation. Wrong expert witness mostly results in wrong assessment by the court and prolongation of the litigation process respectively.

Improving the claimants' and defendants' petitions is thought to prevent lengthy and unsatisfying litigation process at the outset of the case. Therefore, these petitions are proposed to be initiated by lawyers. Petitions initiated by lawyers should be clear and directly point to the main subject. Similarly, Altundiş (2008, p.154) states in his study that "Lawyers shouldn't write whatever they think and should write the petitions with a maturity level". Additionally, involvement of private experts in petition process written by claimant and defendant may help clarify the intentions of parties. This process is thought to reduce additional correspondence between the judicial actors and thus expedite the judicial process.

Encouraging the judicial actors as judges, lawyers and expert witnesses to become specialists in construction industry is highly beneficial for construction projects, and overall duration of litigation process related to construction industry would be reduced. By the same token, According to Odaman and Özer (1999), specializing in a specific subject for judicial actors concerning lawyers and judges may let them monitor the new developments in their specific fields. This would definitely improve their knowledge in their expertise area and quality of dispute resolutions in litigation process accordingly.

Clarifying the case subjects by the Judges to the Expert Witnesses is crucial in order that appropriate reports be produced as per case subjects by the Expert Witnesses. By the same token, Ulukapı (2001) supports this point by telling that the judge should clarify the case subject to the expert witness in writing if necessary verbally as well.

Conflict of Interest

No conflict of interest was declared by the authors.

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