A CALCULATED ALTERNATIVE TO DISPUTE RESOLUTION: "*MEDIATION CONTRACTS PRIOR TO DISPUTES*"

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ABSTRACT

While mediation is a novel institution regarding Turkish Law, its meaning and characteristics are not foreign to any society. Mediation is an institution which aims to resolve disputes between individuals through peaceful means. As such, individuals do not have to go through a corrosive litigation process and it ensures that the dispute is resolved in a fashion which satisfies them, even if in a limited manner.

Law No. 6325 on Mediation in Civil Disputes adopted in 2012 regulates the legal regime of the institution of mediation. The Law entered into force on the 22nd of June 2013. With entry into force of this legislation, the institution of mediation has become a more systematic field necessitating expertise.

This study examines the mediation contract covering the declaration of intent of the parties regarding their will to resolve their disputes by way of mediation, as well as the elements of this contract and other contracts prepared during the mediation phase. In practice, mediation contracts prior to disputes or for existing disputes are rarely observed. Considering that the ideal time to adopt mediation is before the existence of a dispute and that we live in a global age where contracts with foreigners are wide-spread, this article has been prepared in order to relay information on the functioning of mediation contracts under Turkish law and to eliminate any lack of information on the implementation of these contracts.

Keywords: *Law No. 6325 on Mediation in Civil Disputes, mediation contract, mediator contract, mediator, agreement document.*

UYUŞMAZLIK ÇÖZÜM YOLUNA PLANLI BİR ALTERNATİF: "UYUŞMAZLIK ÖNCESİ ARABULUCULUK SÖZLEŞMESİ"

ÖZET

Arabuluculuk Türk Hukuku açısından çok yeni bir kurum olmakla beraber anlamı ve mahiyeti bakımından aslında hiçbir topluma uzak değildir. Arabuluculuk

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Yayın Kuruluna Ulaştığı Tarih: 18.12.2019
Yayınlanmasının Uygun Görüldüğü Tarih: 14.06.2020

insanlar arasındaki uyuşmazlıkları barışçıl bir yolla çözmeyi arzu eden bir kurumdur. Bu sayede taraflar hem yıpratıcı bir dava sürecine girmez hem de kendilerini az da olsa mutlu eden bir yolla uyuşmazlığın sonlandırılmasını sağlarlar.

2012 yılında çıkarılan 6325 sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu ile arabuluculuk kurumunun hukuksal rejimi düzenlenmiş 22.06.2013 tarihinde ilgili kanun yürürlüğe girmiştir. Söz konusu kanunun yürürlüğe girmesiyle kurum daha sistemli ve uzmanlık gerektiren bir alan olmuştur.

İşbu çalışmada tarafların aralarındaki uyuşmazlıkları arabuluculuk yöntemiyle çözümlemek istediklerine ilişkin irade açıklamalarını kapsayan arabuluculuk sözleşmesi ve unsurları ile uyuşmazlık öncesi hazırlanan arabuluculuk sözleşmesiyle arabuluculuk sürecinde imzalanan diğer sözleşmeler incelenmiştir. Uygulamada taraflar arasında muhtemel çıkabilecek uyuşmazlıkların arabuluculuk yöntemiyle çözümleneceğinin kararlaştırıldığı arabuluculuk sözleşmeleriyle nadir karşılaşılmaktadır. Oysaki arabuluculuk kurumunun tercih edilmesi için en iyi zaman dilimi uyuşmazlık öncesi süre olduğundan arabuluculuk sözleşmesinin Türk hukukundaki işleyişini aktarmak ve yönteme ilişkin taraflarda bilgi eksikliğinin giderilmesini sağlamak adına yabancılarla iş birliğinin yaygın olduğu küresel çağda Türk hukukundaki işleyişin bilinmesi için iş bu çalışma hazırlanmıştır.

Anahtar Kelimeler: *6325 sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu, arabuluculuk sözleşmesi, arabulucu sözleşmesi, arabulucu, anlaşma belgesi.*

INTRODUCTION

States use their judicial organs for the resolution of disputes between individuals. These organs aim to resolve disputes in light of the rules of law and legal regulations in force. However, once judicial organs have been engaged for the resolution of the dispute, the outcome intended by the parties may not always be obtained. For example, sometimes adjudication takes beyond a reasonable time due to court workloads. This, in return, may result in the loss of a right. To solve this problem, alternative means of dispute resolution have been developed, in addition to state adjudication[2]. One of the best examples of such alternative means

[2] DELGADO, Richard/ DUNN, Chris/BROWN, Pamela/LEE, Helena/HUBBERT, David, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, **Wisconsin Law Review**, 1985, p. 1359-1404, p. 1362; TANRIVER, Süha, "Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabulucuk", **TBB Dergisi**, Y. 2006, S. 64, p. 151; WARBECK, Johannes, "Alternative dispute resolution in the world of business; a comparative analysis of the use of ADR in the United Kingdom and Germany", **Thae Arbitration and Dispute Resolution Law Journal**, Part 2, June 1998, s. 108; KURT, Resul, "İş Yargısında "Arabuluculuk", **TBB Dergisi**, Y. 2018/135, p.407; ILDIR, Gülgün, **Alternatif Uyuşmazlık Çözümü**, Seçkin Yayıncılık, Ankara, 2003, p. 30; BULUR, Alper, "Alternatif Uyuşmazlık Çözüm Yolları ve Arabuluculuk Yöntemi", **Ankara Barosu Dergisi**, Y. 2007, S. 4, p. 31; EDWARDS, Harry T., "Alternative Dispute Resolution: Panacea or Anathema", **Harward Law Review**, V. 99, N. 3, 1986, p. 669.; also *see* Yargıtay (Court of Cassation), 15. Hukuk Dairesi, T. 12.06.2019, E. 2019/1062, K.

is the institution of negotiation, adopted as an alternative to state adjudication. Beyond negotiation, other alternative means of dispute resolution have been developed in time, such as the conciliation procedure foreseen under the Attorneyship Law (Art. 35/A), the arbitration committee for consumer problems regulated under the Law on Consumer Protection (Art. 66) and the mediation procedure foreseen under the Law on Collective Labor Agreement, Strike and Lock-Out (Arts. 22, 23 and 34/1)[3].

Alternative means of dispute resolution are also methods used in the international field for the resolution of legal issues. Numerous means of alternative dispute resolution exist in the legal systems of the United States of America, Continental Europe and the Far East[4]. They are used in the resolution of disputes at the national level, as well as in the resolution of commercial disputes. In the most general sense, the concept of "Alternative Dispute Resolution" can be expressed as all means used for the resolution of disputes before they are taken to court or even during court proceedings[5]. Mediation, conciliation, early neutral evaluation, fact-finding, mini-trial, med-arb, compromise, negotiation can be cited as means of alternative dispute resolution[6].

Amongst the alternative means of dispute resolution cited above, mediation is the method most commonly engaged and in contrast to others, corresponds to the method in which the parties are most active from the beginning until the end[7].

2019/2725: "*there are alternative means of dispute resolution, there is Law No. 6325 on Mediation in Civil Dispute which is known as mediation, which is a method adopted by the legislator with the aim to decrease judicial workload*", https://www.corpus.com.tr/#!/Yargitay (Online 18.06.2020).

[3] KURT, p. 407; TANRIVER, p. 155; ÖZBAY, İbrahim, "Alternatif Uyuşmazlık Çözüm Yöntemleri", **Erzincan Üniversitesi Hukuk Fakültesi Dergisi**, Y. 2006, C.10, S. 3-4, p. 461; KÖSE, Yasin, "Hukuk Sistemimizdeki Yeni Patika "Arabuluculuk", **Terazi Aylık Hukuk Dergisi**, Seçkin Yayınları, 2013, 84, p. 91.

[4] ADAMS George W. /NAOMI L. Bussin, "Alternative Dispute Resolution and The Canadian Courts: A Time for Change", **The Arbitration and Dispute Resolution Law Journal**, Vol. 4, 1995, p.244; ARAS, Bahattin, "Genel Olarak Alternatif Uyuşmazlık Çözüm Yolları ve Temel Özellikleri", **AD**, Y. 2009/10, S. 35, p. 64.

[5] LIEBERMAN, Jeth K./HENRY, James F., "Lessons from The Alternative Dispute Resolution Movement", **The University Of Chicago Law Review**, V. 53, N. 2, 1986, p 426; TAŞPOLAT TUĞSAVUL, Melis, **Türk Hukukunda Arabulucuk**, Yetkin Yayınları, Ankara, 2012, p. 22; ÖZBAY, p. 460; CAMPBELL, Dennis / HEPPERLE, Winifred, **The U.S. Legal System-a practice handbook**, Netherlands, 1983, p. 60; KÖSE, p. 8; HALICI, Ali/ TOPRAK, Musa, **Hukuk Uyuşmazlıklarında Arabuluculuk**, Türkiye Barolar Birliği Yayınları, Ankara, 2016, p. 2, EDWARDS, p. 668.

[6] SHAVELL, Steven, "Alternative Dispute Resolution: An Economic Analysis"**, The Journal of Legal Studies**, V. 24, N. 1, 1995, p. 1; IŞIK, Olcay, "Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı Çerçevesinde Arabuluculuk Yönteminin Diğer Alternatif Uyuşmazlık Çözüm Yolları ile Karşılaştırılması", **Terazi HD**, Y. 2011/6, S. 64, p. 17; HIBBERD, Peter/NEWMAN, Paul., **ADR and Adjudication in Construction Disputes**, Blackwell Science, 1999, p. 123; J. WARE, Stephen, **Alternative Dispute Resolution**, St. Paul, Minn, 2001, p. 6; ILDIR, p. 77.

[7] ERTÜRK, Mustafa, **Arabuluculuk Sözleşmesi,** Adalet Yayınevi, Ankara, 2019, p. 24 KEKEÇ, Elif Kısmet, **Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler**,

"Mediation" appears to be one of the most preferred methods in those countries where means of alternative dispute resolution are widely practiced[8]. In other words, in numerous countries, mediation is commonly preferred between parties who have entered into a dispute. For this reason, alternative means of dispute resolution, including mediation, have been regulated through technical and legal tools and as such, procedures of alternative dispute resolution have been institutionalized both in common law and civil law systems.

When the historical development of mediation procedure is explored, it appears as a traditional institution of dispute resolution which has been applied in various forms by all societies. Institutionally mediation corresponds to the beginning of the 1900's. It entered into public agenda with the 1964 Citizenship Law and started to be conceptualized towards the end of the 1960's. Local justice centers were formed which provided their services for free or for a small fee. However, in lack of public acceptance, the workload of courts did not decrease. However, in time, interest in alternative means of dispute resolution developed and mediation became a part of centers for the resolution of judicial disputes[9].

In the 1970's the first attempts were adopted in countries where the civil law system is applied, such as in France and in Germany. Similar attempts were realized in England in the 1990's. However, for reasons such as the lack of a common language between European countries in which the civil law system is applied, cultural differences and adjudication costs prevented the rapid development of the method[10]. Yet, due to globalization, the requirements of international trade and practicality, the rate of development saw a serious increase[11].

Work on uniformization was brought up in two separate summits realized by the EU in 1998 and 1999. The "Green Book" was published by the European Commission in 2002, stipulating the general principles of mediation and the procedure began to become functional in EU countries[12]. In 2004 the "European Code of Conduct for Mediation Providers" was published[13]. In 2008 the Commission prepared Directive 2008/52/EG[14].

Adalet Yayınevi, Ankara, 2. Baskı, 2014, p. 37, TAŞPOLAT TUĞSAVUL, p. 21, DOĞAR, Mehmet, **Alternatif Uyuşmazlık Çözümü Sözleşmesi**, İstanbul Kültür Üniversitesi Sosyal Bilimler Enstitüsü Yüksek Lisans Tezi, İstanbul, 2008, p. 42

[8] ILDIR, p. 88.

[9] KEKEÇ, p. 31; YAZICI TIKTIK, Çiğdem, **Arabuluculukta Gizliliğin Korunması**, On İki Levha Yayıncılık, İstanbul, 2013, p. 15.

[10] ÖZBEK, Mustafa, **Alternatif Uyuşmazlık Çözümü**, Ankara, 2009, p. 263

[11] KEKEÇ, p. 33; ERTÜRK, p. 33

[12] See, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52002DC0196

[13] *See*, https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-cond uc/1680901dc6.

[14] Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters See, https://eur lex.europa.eu/eli/dir/2008/52/oj

At first glance, the institution of mediation and reconciliation appears to be a novel concept for the Turkish legal system. However, the concepts of conciliation, settlement agreement, conciliation attempt and conciliation incentives which exists under both material and procedural law are not foreign to the institutions of mediation and reconciliation[15].

In consideration of these developments, certain regulations have been adopted in our country to establish alternative methods to classic adjudication procedures. The most important step taken to this effect is the adoption of the Law No. 6325 on Mediation in Civil Disputes (LMCD)[16]. This development was followed with the entry into force of the Regulation on the Law on Mediation in Civil Disputes (RLMCD)[17]. As such, under Turkish Law, the legislator has enhanced the field of application of mediation as an alternative mean of dispute resolution.

While the systematic approach observed both in national and international regulations have not yet allowed for the engagement with mediation, these legal regulations aims to increase the implementation of alternative means of dispute resolution. For example, in Turkey, between the years 2013 and 2019, the number of cases involving voluntary disputes in which mediators were appointed was 239.927. 217.859 of these cases resulted with an agreement while 7.837 ended without an agreement. In labor disputes where it is legally required to exhaust mediation procedure before taking legal action, cases in which a mediator was appointed amounted to 739.255. 460.090 of these cases resulted with an agreement while 246.797 ended without an agreement. Regulation of mediation as a cause of action has been accompanied by fourfold increase in the number of applications in six years.

This article will only focus on mediation as an alternative mean of dispute resolution within the framework of Turkish Law and will explain the relevant regulations concerning mediation contracts under our legal system. For this end, the first part will provide general information on mediation and the second part will focus on the main subject of this study by examining the definition, form, legal nature and subject matter of mediation contracts, as well as the obligations of the parties to mediation contracts. The third part of the article will share information on other possible contracts separate from the mediation contract that would be prepared during the mediation process.

Considering that the formation of a mediation contract between the parties and respect for it is on a voluntary basis, albeit an extensive research on judicial

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[15] ÖZMUMCU, Seda, **Uzakdoğu'da Arabuluculuk Anlayışı ile Türk Hukuk Sisteminde Arabuluculuk Kurumuna Genel Bir Bakış**, On İki Levha Yayıncılık, İstanbul, 2012, p. 233.

[16] Work concerning alternative means of dispute resolution in Turkish Law began in 2004 with the "*Draft Law on Mediation in Civil Disputes*". The Law No. 6325 on *Mediation in Civil Disputes* (LMCD) was adopted on the 7th of June 2012 and entered into force on the 22nd of June 2012, RG. 22.06.2012-28331.

[17] Resmi Gazete (Official Gazette), 26.01.2013-28540.

practice with regards to these contracts, it has not been possible to identify any jurisprudence on the subject matter. Consequently, we are only able to provide limited space to judicial practice in this article. The study will thus essentially focus on Law No. 6325 on Mediation in Civil Disputes (LMCD), the Turkish Code of Obligations (Law No. 6098) and other relevant regulations, as well as expert opinions observed in legal doctrine.

1. THE CONCEPT OF MEDIATION

The word "mediation" comes from the Latin "*mediare*" and means to come in between and to find the middle ground[18]. Mediation is a mean of resolution of dispute which has been adopted as an option to state adjudication, yet which by itself is not binding. This method is based on an impartial third party bringing together the parties to a dispute, ensuring communication between them and if necessary, satisfying them in order to seek a common solution to the dispute in light of the concrete circumstances of the case[19]. Since mediation is a non-binding method parties reserve the right to apply to state adjudication if agreement is not reached at the end of the process[20]. In other words, mediation is a resolution method which is effective if the parties so desire and which in its merits excludes conflict and promotes compromise in human relations in order to reach a solution and terminates once a resolution is achieved which satisfies all involved parties[21].

According to the Law on Mediation in Civil Disputes mediation is defined as such[22]: "*Mediation shall mean a dispute resolution method carried out voluntarily, by employing systematic techniques, with the participation of an impartial and independent third person who brings the parties together to discuss and negotiate, who establishes a communication process between the parties in order to ensure that they understand each other and find their own solutions by this means, and who is specially trained*". Based on the definition as it appears in the Law, mediation is the resolution procedure of a dispute with the assistance of an impartial third person. The parties to a dispute come together with the

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[18] GARNER, Bryan A. **Black's Law Dictionary**, St.Paul, Minn 1999, p. 284.; ÖZMUMCU, p. 273; ILDIR, p. 78; ARAS, p. 64; IŞIK, p. 18; YILDIRIM, Ferhat, "Türk Hukuk Sisteminde Alternatif Bir Çözüm Yolu Olarak Arabuluculuk", **International Journal of Social Sciences and Education Research,** Y.2016/2(3), p. 749.

[19] BÖRÜ, Levent, "Kadına Karşı Şiddette Arabuluculuk Kurumuna İlişkin Bazı Değerlendirmeler", **TBB Dergisi,** Y. 2017 (Özel Sayı), p. 182; KÖSE, p. 87; BÜYÜKAY, Ferhat, **Arabuluculuk Anlaşma Belgesi ve İcra Edebilirlik Şerhi**, Adalet Yayınevi, Ankara, 2018, p. 46; ÖZBAY, p. 465; KARACABEY, Kürşat, "Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığı ve Uygulanabilirliğine Dair Sorunlar", **Ankara Barosu Dergisi**, Y. 2016/1, p. 451.

[20] LMCD art. 2/b; RLMCD art. 4/b. Mediation means: "*a dispute resolution method carried out voluntarily, by employing systematic techniques, with the participation of an impartial and independent third person who brings the parties together to discuss and negotiate, who establishes a communication process between the parties in order to ensure that they understand each other and find their own solutions by this means, and who is specially trained*.

[21] KARACABEY, p. 454; TANRIVER, p. 152; KURT, p. 415-416; SHAVELL, p. 4; KÖSE, p. 88.

[22] HUAK art. 2/b; HUAKY art. 4/b.

assistance of a mediator and express their desire and thoughts on finding a common ground[23]. In other words, the mediator ensures communication between the parties for the resolution of the dispute and thus brings them side by side. The mediator is a third person which only aims to assist the parties without relaying personal views and opinions on the subject matter. More clearly, the mediator does not press the parties in order to achieve a specific solution. To the contrary, concerning the resolution of the dispute, the mediator assists the parties in line with their own opinions. For this reason, in addition to impartiality, the mediator is also required to possess expertise in this field[24].

Another issue that must be dealt with is whether mediation is always a successful and fruitful mean of dispute resolution. As an alternative to state adjudication, mediation has advantages and disadvantages. As it can provide an opportunity for individuals to produce simple and rapid solutions with alternatives, it saves time[25]. In addition to time saving, in comparison with adjudication, mediation is also profitable in the material sense. The Parties would not incur expenses encountered during adjudication, such as those paid for witness testimonies, discoveries and litigation costs[26]. Contrary to state adjudication, the non-official, flexible and hospitable environment that mediation provides allows the parties the opportunity to better express themselves, to communicate and to participate in the process, resulting in the adoption of different approaches towards a solution to the dispute. The parties directly participate in the process and they retain their sovereignty over the process. Since the principle of win-win is applicable to the dispute resolution process, the relationship between the parties can be carried into the future[27].

Another important advantage is that choosing mediation does not prevent the right of the parties to also apply to court or arbitration. Moreover, the non-disclosure of those information and documents relative to the dispute during the mediation process permits the protection of privacy. As a consequence, this alternative mean of dispute resolution is preferred in order to avoid commercial secrets or private family information from becoming public. Thus, it serves the protection of peace in society and the promotion of a culture of compromise.

As well as advantages, all institutions also involve certain disadvantages. To list some; mediation may not prove satisfactory functioning in case of financial imbalance between the parties, in the sense that the financial situation of one of

[23] ÖZBAY, p. 465; KARACABEY, p. 451.
[24] KARACABEY, p. 452; TANRIVER, p.165.
[25] TANRIVER, Süha, Hukuk yargısının Temel Sorunları ve Bu bağlamda Alınması Gereken Önlemler, **Makalelerim II (2006-2010)**, Ankara, 2011, p. 115ff.
[26] ÖZBEK, p. 597; DÜR, Orhan, **Arabuluculuk Faaliyeti ve Arabulucuların Hak ve Yükümlülükleri**, Adalet Yayınevi, Ankara, 2018, p. 22.
[27] KEKEÇ, p.91ff.

the parties is considerably better or worse off in comparison to the other[28]. In addition, other examples of disadvantages of mediation include the fact that mediation process may be initiated in order to gain time for the non-resolution of the dispute, that the confidentiality principle could be disrespected and that solutions obtained by way of mediation do not constitute a coherent jurisprudence, resulting in different solutions to disputes with similar subject matters[29]. In our opinion, these criticisms do not directly aim the institution of mediation and involve the implementation of the method and the limited number of those who use it. We must not overlook the fact that such criticism may be circumvented by the proper operation of mediation.

This article has been prepared with the aim of promoting the institution of mediation as an alternative mean of dispute resolution. After sharing brief and core information on mediation, we have selected to study the mediation contract.

Mediation is realized in five phases. These are the preparation, beginning, examination, negotiation and conclusion / agreement phases. As expressed above, this article will study the mediation contract which resides in the first phase of the mediation process and is the instruments through which, either by way of contract or clause, the parties agree to resolve existing or future disputes between them by way of mediation.

The adoption of a mediation contract or the addition of a mediation clause to an existing contract between the parties before any dispute concerning the original obligation would provide the opportunity for mediation to work better. In other words, clarifying that mediation would be adopted as a dispute resolution method from the beginning of the contractual relationship will support the implementation of mediation. Concerns resulting from lack of information and ignorance on mediation method usually result in its non-adoption. If awareness can be created within society, disputes can be resolved by way of inclusion of mediation clauses into contracts, resulting in dispute resolution in a shorter amount of time, with less cost and with higher satisfaction for the parties involved. This article aims to play a part in the promotion of the wider adoption of mediation contracts for the resolution of disputes

2. MEDIATION CONTRACT

2.1. Definition of Mediation Contract

A mediation contract refers to the contract which covers the declaration of intent of the parties concerning their will to settle their disputes by way of mediation[30].

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[28] ÖZBEK, p.333; ALKAN, Pınar, **Arabuluculuk ve Deniz Hukukuna İlişkin İhtilaflarda Uygulanması**, Ankara, 2013, p. 37ff.

[29] ÖZBEK, p. 600; PEKCANITEZ, Hakan, "Alternatif Uyuşmazlık Çözümleri", **Hukuki Perspektifler Dergisi**, Y. 2005, S. 5, p.14.

[30] YAZICI TIKTIK, pp.190-191; AZAKLI ARSLAN, Betül, **Medeni Usul Hukuku Açısından Zorunlu Arabuluculuk**, Yetkin Yayınları, Ankara, 2018, p. 34; ŞAHİN, Tuğçem/ ÇELİK, Yasin/

As previously mentioned, mediation is applied by mutual agreement between the parties. The principle of freedom of will is dominant at every stage of the mediation process. The parties to a contract may insert into that contract a clause stipulating that any dispute arising from the performance of the contract is to be settled by mediation. Even if the parties do not include a mediation clause in the contract, once a dispute arises between them, they may settle their dispute by recourse to mediation, with or without the assistance of a court.

In other words, a mediation contract is concluded so that the parties to a dispute may resort to peaceful means of dispute resolution before engaging state adjudication. While the mediation contract can be concluded before the dispute, it can also be concluded once a dispute has arisen between the parties, during the state adjudication phase (RLMCD art. 17)[31]. Indeed, LMCD regulates that if the parties to the dispute declare jointly to the court that they intend to resort to mediation during litigation, the court will suspend litigation for a period of three months. Moreover, this period may be extended further for a duration of three months if the parties jointly apply to this effect (LMCD art. 15/5)[32].

The parties to the dispute may conclude the mediation contract as an independent contract. At the same time, by adding a clause to the contract based on the primary liability relation between the parties, they may decide to resolve current of future disputes deriving from that contractual relation by way of mediation[33].

If the mediation contract was established by way of a mediation clause to the primary liability relation between the parties, it is important to determine the relation between the mediation contract and the primary contract. A mediation contract in the form of a mediation clause is independent from the primary contract

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RUHİ, Ahmet Cemal, **Hukuk Uyuşmazlıklarında Arabuluculuk Rehberi**, Seçkin, Ankara, 2018, p. 54.

[31] According to article 17. of the Regulation on the Law on Mediation in Civil Disputes: "*(1) The parties may agree to resort to a mediator before the lawsuit is filed or during the court of the lawsuit. The Court may also enlighten the parties with regards to the essentials, process and legal consequences of mediation, and encourage them by reminding that resolution of the dispute by mediation social may have economic and psychological benefits.*
(2) Unless otherwise agreed, the proposal of one of the parties to resort to a mediator shall be considered to be rejected if such proposal is not answered within thirty days."

[32] According to article 15(5) of the Law No. 6325 on Mediation in Civil Disputes: "*Where the parties state that they will resort to a mediator jointly after a lawsuit is filed, the proceedings shall be postponed by the court for a period of not more than three months. This period may be extended for up to three months, upon the joint application of the parties*."

[33] GÖRKEM, Zeynep Ezgi, **Arabuluculuk Sürecinde Arabulucunun Hukuki Statüsü- Hakları-Yükümlülükleri**, Ankara, 2015, p. 29; ILDIR, Gülgün, "Alternatif Uyuşmazlık Çözümü ve Hak Arama Özgürlüğü", **TBB Dergisi**, 75. Yaş Günü İçin Prof. Dr. Baki Kuru Armağanı, Ankara, 2004, p. 390; EKMEKÇİ, Ömer/ ÖZEKES, Muhammet/ ATALI, Murat, **Hukuk Uyuşmazlıklarında İhtiyari ve Zorunlu Arabuluculuk**, On İki Levha Yayıncılık, İstanbul, 2018, p. 49; ILDIR, p. 64; TAŞPOLAT TUĞSAVUL, p. 101; POLAT, Malike, **Milletlerarası Usul Hukukunda Arabuluculuk**, Yetkin Yayınları, Ankara, 2010, p. 43-44; DÜR, p. 329; ÖZER, Serhat, **Uluslararası İnşaat Sözleşmeleri, Anlaşmazlıkları ve Çözüm Yolları**, Çağ Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Ana Bilim Dalı Yüksek Lisans Tezi, Mersin, 2012, p. 20.

and invalidity must be considered separately for both contracts. That is, a mediation contract is not established based on a previous substantive legal relation and as such, for the parties of the dispute the aim of establishing both contracts differ from each other. Concerning the mediation contract, the aim is for the resolution of the dispute with the assistance of a third person. For this reason, its validity must not be bound to the existence of the legal relation subject to dispute. If the substantive legal contract based on the primary liability relation designating the mutual rights and obligations of the parties terminates for some reason and a dispute arises due to this fact, this dispute must be resolved by the mediator according to the mediation contract concluded in line with the will of the parties. In addition, if the mediation contract is concluded as a separate contract from the primary contract, then the nullity of one would not affect the legal standing of the other. This is due to the fact that legally there exist two distinct contracts[34].

A mediation contract is concluded between the parties so that the dispute is resolved in the most expeditious and brief manner. For this reason, general rules with regards to the material dispute and the progress of the mediation phase are determined via this contract[35]. In general terms, the mediation contract regulates the provisions and rules applicable in light of the negotiation method and functioning, the relationship between the mediation phase and state adjudication and the legal relation which forms the subject matter of the dispute for which mediation was engaged[36].

Taking into consideration that the mediation contract is also a contract within the meaning of the law of obligations, the general conditions set forth for contracts must be satisfied. Accordingly, the mediation contract is concluded in line with the general rules on freedom of contract. These rules are foreseen under the Turkish Code of Obligations (TCO) articles 26 and 27. As such, it is not conceivable to conclude mediation contracts which are impossible or in breach of morality, public order and personal rights[37]. Moreover, the parties to the mediation contract must have acted in free will while concluding the contract. The foundation of the mediation contract is free will, as it appears under the law of obligations[38].

2.2. The Form of the Contract

In some circumstances the legislator has foreseen a specific form for a contract in order to determine whether it reflects the true intentions of the parties. The requirement to abide by this specific form for the declaration of intent aims to

[34] TAŞPOLAT TUĞSAVUL, p. 101-102; GÖRKEM, p. 41.
[35] STITT, Alan J., **Mediation-a Practical Guide**, London, 2004, p.10; TAŞPOLAT TUĞSAVUL, p. 102.
[36] YAZICI TIKTIK, p. 191.
[37] SEVİM, Onur Utku, **Avrupa Birliği Müktesebatı ve Türk Hukukunda Arabuluculuk**, Adalet Yayınevi, Ankara, 2016, p. 103; TAŞPOLAT TUĞSAVUL, p. 102.
[38] TAŞPOLAT TUĞSAVUL, p. 87; GÖRKEM, p. 43; KURT, p. 410.

make the contractual relation more determinable, to promote diligence and in the end provide convenience with regards to issues of evidence[39].

However, the general rule, as foreseen under article 12/1 of the Turkish Code of Obligations, is that the validity of the form of the contract is not subject to any specific form unless regulated otherwise under law. That is to say, the legal act is only subject to a specific form if such has been openly foreseen by law. Yet, while the general rule is freedom of form, in some circumstances the expression of intent has been bound to a specific form under law[40].

By virtue of the general rule on freedom of form, the mediation contract is not bound by any form. However, the parties to the dispute may foresee a specific form or the subject matter of the contract may be a legal relation subject to a specific form. In such cases, the mediation contract will be subject to a specific form[41].

Since the relevant legislation does not foresee any specific form, the parties may establish a mediation contract in writing or orally. However, it would be beneficial for the parties to prefer a written form. A written contract would provide ease and safety for evidentiary purposes. In fact, when comparative law is examined, we can see that both in England and the U.S.A., if parties wish to resolve their disputes by alternative means they can annex existing printed forms to their contracts pre-prepared by courts or by special institutions which provide services in this area[42].

Another subject concerning the form of mediation contracts involves which conditions should be applicable in case the contract is concluded in a foreign country. According to the general rule on form, as regulated under the Turkish Code on Private International Law, with the exception of public order rules, the conditions to be taken into consideration should be those foreseen under the applicable law chosen by the parties to the contract. Two possibilities exist if the parties have not clarified this issue within the contract. Either those conditions foreseen under law of the place of the conclusion of the contract or the law applicable to the essence of the contract should be respected. In other words, a mediation contract with a foreignness element should be valid as long as it is conform to the rules of form under the law of the place of conclusion of the contract or of those foreseen under the substantive law of the law applicable to the essence contract[43].

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[39] OĞUZMAN, Kemal/ ÖZ, Turgut, **Borçlar Hukuku Genel Hükümler**, Filiz Kitabevi, İstanbul, 2006, p. 117.
[40] AYDIN, Sezer/REMZİ, Mehmet, **Borçlar Hukuku Genel Hükümler**, İkinci Sayfa, 2013, p. 131.
[41] ILDIR, p. 66; TAŞPOLAT TUĞSAVUL, p. 103; KEKEÇ, p. 144.
[42] DOĞAR, p.76-77.
[43] ÇELİKEL, Aysel/BAHADIR, Erdem, **Milletlerarası Özel Hukuk: Genel Kurallar Milletlerarası Özel Hukuk Milletlerarası Usul Hukuku,** 11. Bası, İstanbul, 2012; DOĞAR, p.76.

2.3. The Legal Nature of the Contract

Contractual relations have been categorized as typical or atypical, depending on whether they have been regulated under law. The mediation contract has not been regulated under the Turkish Code of Obligations. In line with the rule on freedom of contract, the parties may conclude a contract which has not been regulated under law. The parties may conclude a distinctive contract which does not figure under law, or they may conclude a mixed contract arranged from those which do. Atypical contracts are those which do not possess the elements of typical contracts regulated under law. Since the mediation contract does not possess the elements of typical contracts regulated under law, it is considered an atypical contract[44].

Considering the performance undertaken by the parties with the mediation contract, in terms of a legal relationship, the primary obligation to perform is not instantaneous; it extends over time. If at least one of the primary obligations in a contractual relationship require continual, irregular or periodic performance, then it is considered a "continuous contract"[45]. Since the primary obligation to perform deriving from the mediation contract is not instantaneous and it is in fact executed by the parties by way of participation to the mediation process, a mediation contract is a continuous contract. The primary obligations of the parties in a contract establishing a continuing obligation relationship is not performed in a single instance, it is executed by continuing acts or behaviors. Consequently, since the parties of a mediation contract have undertaken to participate in the negotiations, they are considered to be under the obligation to perform this act as long as the negotiations continue[46].

As mentioned before, a mediation contract exists upon the mutual and conform declarations of intent of the parties on the resolution of an existing or future dispute between them by resort to third persons. Since the mediation contract is a contract under the law of obligations established by the mutual and confirm declarations of intent between two or more parties in order to obtain a specific outcome, the general conditions concerning this contract are addressed under the law of obligations[47]. Conditions such as the capacity of the parties, power of representation, nullification of the contract, annulment and execution are subject to the law of obligations. If only considered within this sense, the mediation contract can be evaluated as a substantive law – law of obligations contract. Since in this case the will of the parties is prioritized[48]. However, the fact that the mediation contract is a contract based on freedom of will is not sufficient for it to be considered a substantive law – law of obligations contract. Because while the

[44] ERTÜRK, p. 91; YAZICI TIKTIK, p. 194.
[45] OĞUZMAN/ÖZ, p. 44.
[46] YAZICI TIKTIK, p. 196.
[47] YAZICI TIKTIK, p. 191.
[48] TAŞPOLAT TUĞSAVUL, p. 103-104.

formation of a mediation contract in line with the free will of the parties corresponds to its substantive law aspect, some of its effects reside within the domain of procedural law.

For this reason, the mediation contract has a dual legal character. Its legal effects under substantive law is construed by the mutual and conform declaration of intent of the parties[49]. Its consequences with regards to procedural law are born out of the fact that it empowers a mediator to assist the parties in the resolution of a dispute between them and there is a possibility that the dispute may end after mediation negotiations[50].

The aim of the mediation contract is the resolution of the dispute between the parties by resort to a third person. The positive affect of the contract, that is the fact that recourse to state adjudication or arbitration is not precluded, manifests in the field of procedural law. Because under article 13(1) of LMCD parties may resort to mediation during litigation. If during the process the parties agree on the resolution of the dispute, then the mediation contract will have the function of terminating pending litigation. For this reason, the legal effect of a mediation contract primarily manifests in the field of procedural law[51].

In order to determine whether a contract is a procedural contract or a substantive law contract, it must be determined whether the main legal effects of the contract are in the field of procedural law or substantive law[52]. The general nature of procedural contracts is that their effects are born in the field of procedural law; they have procedural effects[53]. However, there are certain procedural acts which bear effects both under substantive law and procedural law. A contract must be considered part of the field in which its main effects manifest. It is difficult to discern the legal nature of mediation contracts since it contains provisions both concerning substantive law and procedural law. Consequently, mediation contracts are considered as mixed contracts.

Another aspect which supports the fact that a mediation contract is a mixed contract is the fact that parties may decide provisions concerning obligations under both substantive law and procedural law. Provisions concerning mediation have been foreseen under articles 137, 140 and 320 of the Law on Civil Procedure (LCP). The obligations of performance foreseen under mediation contracts generally appear as an obligation to refrain. For example, the parties may decide in the contract to refrain from acts such as applying to state adjudication during

[49] ERDOĞAN, Ersin/ ERZURUMLU, Nurbanu, **Hukuk Uyuşmazlıklarında Türkiye'nin Arabuluculuk Tecrübesi ve Zorunlu Arabuluculuk Taslağı**, SETA Yayınları, İstanbul, 2016, p. 13; ILDIR, p. 67; DÜR, p. 273.
[50] ILDIR, p.323; TAŞPOLAT TUĞSAVUL, p. 103; KEKEÇ, p. 588.
[51] ILDIR, p.68; TAŞPOLAT TUĞSAVUL, p. 104.
[52] GÖRKEM, p. 36.
[53] KARSLI, Abdurrahim, **Medeni Usûl Hukukunda Usûlî İşlemler**, İstanbul, 2001, p. 221; GÖRKEM, p. 36.

ongoing negotiations or, in order to protect confidentiality, bringing up certain facts and evidences during litigation after the mediation process[54].

One of the most important functions of a mediation contract with regards to procedural law is that it constitutes a declaration of intent according to which for a given period the parties will refrain from applying to court or arbitration during ongoing negotiations. Since only if parties do not apply to state adjudication during mediation would the latter have meaning and deliver the intended benefits. Thus, in line with freedom of contract, parties may foresee under a procedural contract their consent to be bound for a given period by the obligation to refrain from applying to agreed procedures[55].

The obligation to refrain from procedural acts may be concluded through an explicit or implicit declaration to not apply to courts or arbitration for a given period. It would be more correct for the parties to indicate this point in the mediation contract. However, even if this has not been specified explicitly, it would be more accurate to consider the existence of their implicit consent to such effect. Because by virtue of the contract, according to which the parties have decided to go to alternative means of dispute resolution rather than state adjudication, the parties have undertaken for a given period the obligation to refrain from all acts and behaviors that would endanger the success of the negotiations. Thus, even if the parties have not foreseen under the mediation contract the obligation to refrain from procedural acts, this obligation forms an integral part of the mediation contract. The duty to refrain from applying to litigation is not only limited to state adjudication but is also valid with regards to arbitration deriving from an arbitration contract or an arbitral clause. However, a provision precluding state adjudication for an indefinite period would not be valid[56].

Article 3 of LMCD foresees that the parties are free to apply to mediation, to continue negotiations, to conclude or to abandon the process[57]. However, the consequences of applying to state adjudication regardless of a valid mediation contract in force between the parties is an issue that has not been regulated[58]. As a result of this, except for circumstances in which, by law, alternative means of dispute resolution are considered a primary step, there is no definitive opinion on

[54] YAZICI TIKTIK, p. 198; EKMEKÇİ/ÖZEKES/ATALI, s. 31; ERTÜRK, p. 107; for a counter argument see. "*Due to its legal nature it must be defined as a contract of substantial law. Since the mediator does not possess the competence to resolve the dispute on his own, the contract is explained as not having effect in the field of procedural law*". DOĞAR, p.103.
[55] YAZICI TIKTIK, p. 198.
[56] YAZICI TIKTIK, p. 198.
[57] According to Article 3(1) of the Law on Mediation in Civil Disputes: "*The parties shall be free to resort to a mediator, to continue or finalize the process, or to renounce such process*."
[58] TAŞPOLAT TUĞSAVUL, p. 106.

the consequences of applying to state adjudication by a party while a valid mediation contract is in force between the parties[59].

There are distinct opinions on the decision to be taken by courts in case state adjudication is engaged in contravention of the obligation to refrain from procedural action. Özbek[60] is of the opinion that if litigation is sought in violation of a mediation clause the defendant should bring up a mediation defense and just like in arbitration, the judge should refuse the case on procedural grounds. Kuru[61] indicates that in case of a mediation clause or an independent contract, the mediation phase should take priority, yet, does not specify how courts should decide once faced with such a situation. According to Kekeç[62], due to the principle of *pacta sunt servanda*, if a contract has been concluded to resort to mediation in case of a future dispute, then litigation should not be sought before exhausting this mean. According to Doğar[63], a mediation contract is a procedural contract concluded to affect litigation. The party acting in violation of the rules of the contract should be considered wrongful. Yazıcı Tıktık[64] is of the opinion that in case one of the parties engages litigation before resorting to mediation and the other party brings forward the provisions of the mediation contract during litigation, the court should not refuse the case based on procedural grounds but should suspend litigation for a given period based on the principle of judicial economy.

According to another opinion[65], the mediation contract should implicitly dissolve. Alternative means of dispute resolution and thus mediation should not be seen as methods which replace state adjudication. These methods aim to supplement the will of the parties as an alternative to state adjudication and thus resolve the dispute according to their own opinions. Besides, alternative means of dispute resolution cannot provide the judicial assurances provided by state adjudication[66]. As an institution, the judiciary provides public assurance to individuals. Under article 8 of the Constitution the judicial power is exercised by independent courts in the name of the Turkish nation. For this reason, it cannot be said that alternative means of dispute resolution provide institutional assurance. As such, the parties may engage state adjudication even though a valid mediation contract has been concluded. Accordingly, in line with the character of the institution of mediation, engagement of state adjudication by one of the parties should be understood as

[59] GÖRKEM, p. 40; TAŞPOLAT TUĞSAVUL, p. 105.
[60] ÖZBEK, p. 344; Same opinion: ATALI, Murat/ERMENEK, İbrahim/ERDOĞAN, Ersin, **Medenî Usûl Hukuku Ders Kitabı,** Ankara, 2018, p. 774-775.
[61] KURU, Baki, **Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı Hakkında Görüş ve Öneriler**, Mihder 2010/2, p. 245.
[62] KEKEÇ, p. 133.
[63] DOĞAR, p. 99.
[64] YAZICI TIKTIK, p. 200.
[65] ILDIR, p. 65.
[66] PEKCANITEZ, Hakan/ ÖZEKES, Muhammet/ AKKAN, Mine/ TAŞ KORKMAZ, Hülya, **Medenî Usûl Hukuku**, 15. Bası, 2. Cilt, İstanbul, 2017, p. 1112; PEKCANITEZ, p. 15.

demonstrating the fact that the parties had not agreed to resolve that dispute with the assistance of a third person, that is, the will of both parties were not mutually conform. In such a case, there can be no doubt that the mediation contract implicitly dissolves[67].

When comparative law is explored with regards to engagement of state adjudication by one of the parties despite the existence of a mediation contract exists: On 8 April 2009 the French Court of Appeals decided that concerning the clause in the contract which was the subject of the case and which foresaw mediation in case of dispute, adjudication before engaging in mediation could not be accepted[68]. In the Netherlands, mediation contracts constitute an impediment to bringing legal action before state courts[69]. In Germany, in case a party objects based on the contractual clause foreseeing mediation concerning the subject of the dispute, the case may be dismissed if the court engages mediation[70]. In Belgium, the parties may include a clause in the contract providing for the resolution of the dispute by way of mediation. If one of the parties asserts this clause during a lawsuit, the judge may suspend the case procedure so that mediation can go forward[71]. Finally, in Switzerland, the parties may agree to attempt mediation in case a dispute arises between them for a specific time period for the resolution of the dispute before applying to court. According to the dominant position in doctrine and practice, this agreement is valid. In Switzerland, the party which violates this obligation would be the responsible party. However, this contract would not bound the court. Since, the right to remedy is not within the discretion of the parties. Any of the parties may bring legal action notwithstanding the mediation clause in the contract[72].

While the parties may agree to be bound by the mediation clause by way of contract, the mediation clause would still not be binding. Clear, definitive and detailed legal regulation is necessary for a mediation clause to be considered binding, as is the case with regards to arbitration clauses. Only in such a case would courts accept resort to mediation as a cause of action and would be able to halt litigation. It is for this reason that this study has not included Turkish jurisprudence since there aren't any contentious cases brought before courts due to claims on mediation contact violations.

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[67] TAŞPOLAT TUĞSAVUL, pp. 105-106.
[68] FERRAND, Frederique, "Regulation of Dispute Resolution in Belgium: Workable Solutions? Steffek/ Unberath/Genn/Greger/Menkel-Meadow (Eds), **Regulating Dispute Resolution ADR and Access to Justice at the Crossroads**, Oregon, 2013, p.192.
[69] PEL, Machteld, **Referral to Mediation, A Practical Guide for an Effective Mediation Proposal,** Sdu Uitgevers by The Hague,Kindle Edition, 2013, p.308.
[70] DÜR, p. 332.
[71] VEROUGSTRAETE, Ivan, "Regulation of Dispute Resolution in Belgium: Workable Solutions? Steffek/ Unberath/Genn/Greger/Menkel-Meadow (Eds), **Regulating Dispute Resolution ADR and Access to Justice at the Crossroads**, Oregon, 2013, p.106.
[72] DÜR, p. 332.

In our opinion, the initiation of legal action by one of the parties without applying to mediation is a reflection of the principle of freedom of will. The contrary would mean the implementation of compulsory mediation by way of contract, which in return would correspond to the limitation of the scope of the principle of freedom of will. The principle of freedom of will regulated under article 3 of LMCD does not foresee the right of the parties to agree otherwise and that the scope of principle of freedom of will could be restricted. In lack of a regulation under the law, it is not possible to refuse or suspend a case brought by one of the parties on procedural grounds based on the provisions of the mediation contract.

At the present, if the parties violate a mediation contract on subjects which they are free to dispose of, the solution could be found by way of interpreting the will of the parties and recourse to the general rules of the law of contracts. For example, in case participation to the mediation process is refused and litigation is engaged in violation of an existing mediation clause in a contract, this behavior constitutes the violation of an obligation deriving from the contract (breach of obligation). As a result of such a refusal the judge may refuse a defense concerning the performance of other provisions of the contract. Similarly, refusal to participate in mediation may be considered as a violation of the good faith obligation[73].

2.4. The Subject of the Mediation Contract

In Turkish Law there are views that civil procedure law belongs to the domain of public law. However, when the field of civil procedure law is examined, it can be seen that, under the dominance of the principle of disposition – party control over the scope and nature of the proceedings, the will of the parties has priority. In disputes arising from private law relations to which civil procedure will apply, the Court cannot act *ex officio*. Nonetheless, adjudication law does carry public law character, but is not absolutely mandatory. Consequently, civil procedure law captures qualities deriving from both public and private law. For this reason, this domain is considered distinct. However, the limitations to freedom of will is established with the "public order" stipulation. Thus, applying to mediation for the resolution of a dispute between the parties is possible as long as this does not violate Turkish public order[74].

Mediation contracts find application in works subject to the desires of both parties. Accordingly, in order to conclude a mediation contract, the dispute should not constitute a violation of public order and the parties should have authority to freely act on the subject of dispute. At the same time, for the validity

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[73] ÖZBEK, Mustafa, "Avrupa Birliğinde Alternatif Uyuşmazlık Çözümü", **TBB Dergisi**, Y. 2007, S. 68, p. 299; ERSEN PERÇİN, Gizem, "Alternatif Uyuşmazlık Çözüm Yöntemlerinden Arabuluculuğun Hukuksal Düzenlemelerdeki Yeri", **Public and Private International Law Bulletin**, Volume: 31, Issue: 2, p.183.

[74] EDWARDS, p. 671; TAŞPOLAT TUĞSAVUL, p. 108; GÖRKEM, p. 42; AKDOĞAN, Muzaffer, **Avrupa Birliği Kamu Alımlarında Sözleşme Sonrası İhtilafların Çözüm Yolları ve Türkiye Uygulaması**, On İki Levha Yayıncılık, İstanbul, 2015, p. 567.

of the mediation contract, the dispute must be "suitable for mediation". Because the resolution of a dispute by mediation is directly related to the rules of public order of the country in which mediation is applied[75]. As a matter of fact, Article 1(2) of LMCD clearly states that the mediation method may only be applied to subjects on which the parties are free to act, including those with a foreign element[76].

When there is a subject on which the parties are free to act and which can be settled by means of compromise, a mediation contract can be concluded. Accordingly, mediation contracts cannot be concluded with regards to cases such as those involving divorce, paternity and non-contentious jurisdiction. Nonetheless, it is possible to conclude mediation contracts for disputes involving debt, compensation claims and movable property since the parties may freely act on the dispute by way of acceptance and compromise[77]. The phrase "*acts or proceedings which the parties may freely dispose*" under article 1(2) of the LMCD is not foreign to our legal system. The LCP article 408 indicates that "*other transactions of which the parties cannot dispose of on their own will are not convenient for arbitration*". According to the institution of compromise under LCP, similarly, is only applicable with regards to transactions which the parties can dispose of on their own free will. The Attorneyship Law article 35(a) includes the provision "[…] *may invite the other party to conciliation* […] *provided that such conciliation pertains exclusively to matters that the parties may elicit of their own will*"[78].

The disputes which may become the subject of conciliation since they reside within the free disposition of the parties is debated both before the Court of Cassation and in legal doctrine. For instance, the Court of Cassation does not except lawsuits involving the determination of rent as a dispute which resides within the free disposition of the parties. Accordingly, the Court has accepted the determination of rent as a dispute concerning public order[79]. Again, the Court of Cassation is of the same opinion with regards to disputes concerning condominium property. Accordingly, this type of dispute is a situation which

[75] TAŞPOLAT TUĞSAVUL, p. 109. The Constitutional Court has determined that "*While not provided for in the text of the Article, there is no doubt that subjects relative to public order remain in the field which the parties may not freely dispose of*" Anayasa Mahkemesi (Constitutional Court), T. 10.07.2013, E.2012/94, K. 2013/89, Resmi Gazete (Official Gazette), 25.01.2014, Sayı 28893.
[76] KÖSE, p. 88-89. According to article 1(2) of the Law No. 6325 on Mediation in Civil Disputes: "*This Law shall be applied in private law disputes, arising solely from the acts or proceedings which the parties may freely dispose, including those possessing the element of foreignness, in so far as disputes containing domestic violence are not suitable for mediation*."
[77] COOGLER, O. J./WEBER, Ruth E./MCKENRY, Patrick C., Divorce Mediation: A Means of Facilitating Divorce and Adjustment**, The Family Coordinator**, V. 28, N. 2, 1979, p. 255-256; GÖRKEM, p. 42.
[78] ATALI /ERMENEK/ERDOĞAN, p. 333; TAŞPOLAT TUĞSAVUL, pp. 110-112.
[79] Yargıtay (Court of Cassation), 3. Hukuk Dairesi, T. 02.12.2004, E. 2004/13018, K. 2004/13409.

involves public order and which the parties may not freely dispose of[80]. We are of the opinion that limiting the possibility of mediation for cases involving both determination of rent and condominium property would only limit the concept of public order which in fact changes and develops in light of current circumstances. For example, we can easily estimate that in the near future issues involving neighbor relations or maintenance fees could be solved in company of a mediator.

According to LMCD, a determination is made regarding which lawsuits are suitable for mediation. To this respect, it is impossible to dismiss constitutive lawsuits by mediation. Constitutive (formative) lawsuits request the creation, amendment or dissolution of a legal situation[81]. Since in constitutive lawsuits the legal consequences are only born by way of judgment, such lawsuits, including paternity, divorce or nullification of marriage, are closed to mediation. Declaratory actions are brought in order to determine the existence (positive declaratory action) or non-existence (negative declaratory action) of a legal relation. These types of cases do not include a substantial law request. They correspond to a special procedural law for the elimination of doubts concerning a legal relation. For this reason, it is not possible to resort to mediation in these types of lawsuits. It is not possible to execute a judgment which accepts the procedural requests faced in these types of lawsuits[82]. Because in these cases the judgment is declaratory, an executionary judgment is not provided. Since the declaratory judgment does not include a performance order, the judgment cannot be executed by way of enforcement with a court judgement. According to article 18(3) of LMCD, in case agreement is reached as a result of mediation negotiations, the conclusion provided for the execution of the agreement should be suitable for enforcement[83]. Unlike constitutive lawsuits and declaratory actions, actions for performance are suitable for mediation. Actions for performance aim to provide a substantial law request based on the claims of the plaintiff. In other words, in an action for performance the subject of the case is a substantial law request which can be expressed as to provide something, to perform an act or to refrain from an act[84]. When an action for performance is filled, the court will first determine the

[80] Yargıtay (Court of Cassation), 15.Hukuk Dairesi., T.23.09.2002, E. 2002/4321, K.2002/4067; Yargıtay (Court of Cassation), 5. Hukuk Dairesi, T. 23.02.1981, E. 1981/813, K. 1981/11641.
[81] ERCAN, İsmail, **Medeni Usul Hukuku**, On İki Levha Yayıncılık, İstanbul, 2011, p. 169.
[82] ALANGOYA, Yavuz/ YILDIRIM, M. Kamil/ DEREN YILDIRIM, Nevhis/, **Medeni Usul Hukuku Esasları**, Beta Yayınları, İstanbul, 2009, p. 202.
[83] According to article 18(3) of Law No. 6325 on Mediation in Civil Disputes: "*The issuance of the annotation of enforceability is an undisputed judicial act and the examination concerning this may be carried out through the file. However, in family law disputes suitable for mediation, the examination shall be held in hearings. The scope of such examination shall be limited to whether the content of the agreement is suitable for mediation and compulsory enforcement. Where an application is made to the court for the issuance of annotation of enforceability for the agreement document, and the concerned party appeals the decisions given upon such application, a fixed fee shall be collected. If the parties wish to use the agreement document in another official act, without obtaining an annotation of enforceability, a fixed stamp duty shall also be collected.*"
[84] ALANGOYA / YILDIRIM / DEREN YILDIRIM, p. 201.

existence of a right. In case the existence of a right is determined, the court may sentence the defendant to perform an act or refrain from an act relative to the right in question[85]. The judgment obtained at the end of an action for performance is suitable for enforcement. If the judgment is not carried out by the defendant, the plaintiff can have it performed by way of compulsory execution. Consequently, mediation is possible with regards to action for performance[86].

On the other hand, the type of dispute subject to the mediation contract must be specified in order to determine whether the dispute involves public order, or it relates to a dispute which the parties have competences to freely dispose of. If the subject of dispute has not been specified, then the mediation contract is not valid. If a contract is concluded foreseeing that all future disputes between the parties are to be resolved by mediation, in lack of a dispute subject, this contract would not be considered as valid[87].

In our view, in the sense of suitability for mediation, "*disputes which the parties may freely dispose of*" should be interpreted as extensively possible. Because the fundamental aim of mediation is to provide by way of the consent of the involved parties a solution which satisfies both. In case of a narrow interpretation of this expression it would be concluded that the will of the parties are not deemed important

In fact, there is a tendency in developed countries to not limit the resolution of disputes by mediation based on criteria such as public order. For example, in Belgium, all disputes open to amicable settlement between the parties may be subject to mediation[88]. In Germany, the scope has not been limited to civil and commercial disputes[89]. In Switzerland, according to article 197 of SwzZOP, conciliation of the parties before a conciliation official is the general rule for all civil suits. The exceptions are regulated in the following article. According to article 213 of SwzZOP, since all disputes subject to conciliation may also be resolved by way of mediation, it is possible to resolve disputes by way of mediation. In Japan, court connected mediation is foreseen for all legal disputes[90].

As observed in comparative law, not limiting the resolution of disputes by way of mediation would conduce a change in the fundamental culture with regards to dispute resolution and decrease judicial workload.

2.5. The Obligations of the Parties in Mediation Contracts

[85] TAŞPOLAT TUĞSAVUL, p. 120.
[86] ERCAN, p. 167.
[87] ILDIR, p. 67; TAŞPOLAT TUĞSAVUL, pp. 120-121; ILDIR, **Hak Arama Özgürlüğü**, p. 390.
[88] VEROUGSTRAETE, p. 106.
[89] HESS, Burkhard/PELZER, Nils, "Regulation of Dispute Resolution in Belgium: Workable Solutions? Steffek/ Unberath/Genn/Greger/Menkel-Meadow (Eds), **Regulating Dispute Resolution ADR and Access to Justice at the Crossroads**, Oregon, 2013, p. 223.
[90] DÜR, p. 169.

The aim of alternative means of dispute resolution is not to resolve a dispute between the parties only by way of this method and force the participation of the parties. Because the success of alternative means of dispute resolution depends on the willingness of the parties. From this perspective, the benefit of rendering the conditions of alternative means of dispute resolution binding is open to debate.

The main outcome desired by the parties to a mediation contract is to undertake to apply to mediation as an alternative mean of dispute resolution to courts instead of engaging state adjudication for the resolution of the dispute. Thus, the parties to the mediation contract are under the primary obligation of resorting to mediation and contributing and participating into this process[91].

One of the conditions for the success of mediation is the voluntary participation to the mediation process and the negotiations. The parties must perform their obligation to participate to the mediation process in good faith. Because if participation takes place only to perform an obligation then it is highly probable that the mediation process will not end with an agreement between the parties and the mediation process will result with an unnecessary loss of effort, time and money. However, it must be noticed that the obligation to participate in the mediation process should never be understood as an obligation to agree[92].

The applicable sanction to the violation of the obligation to participate to the mediation process is compensation within the meaning of substantial law. However, since the amount of compensation is prone to disagreement, the parties to the mediation process may include in the contract a provision on this subject and may also agree to a penal clause[93].

Indeed, contract clauses foreseeing resort to mediation before engaging state adjudication may set back the free exercise of the right to access to courts or may limit the right to legal remedies. Consequently, resort to mediation must not hinder enjoyment of the right to access to justice as it is foreseen under article 6 of the European Convention on Human Rights and article 47 of the Charter of Fundamental Rights of the European Union[94].

Another obligation deriving from the mediation contract is the reciprocal confidentiality obligation. The parties may regulate this obligation under the mediation contract to be concluded between them. A clear stipulation by the parties of the framework of the confidentiality obligation and subjects to be considered as confidential is necessary and important for the applicability of the obligation. While information and documents shared orally or in written form between the parties during the mediation process are considered to be within the scope of the confidentiality obligation, information and documents obtained

[91] YAZICI TIKTIK, p. 202.
[92] GÖRKEM, p. 42; KÖSE, p. 87; EKMEKÇİ/ÖZEKES/ ATALI, p. 25; SEVİM, p. 67.
[93] YAZICI TIKTIK, p. 203.
[94] ÖZBEK, **Avrupa Birliğinde**, p. 298.

through other sources should not be considered within this framework. Consequently, information which the other party would still have obtained even if the mediation process had not been engaged are not dealt with under this framework[95].

The consequences of not stipulating a confidentiality obligation in a mediation contract remains unclear. However, there is a majority opinion defending that even in such a case a confidentiality obligation exists. For example, those who accept mediation contracts as ordinary partnership contracts have come to the conclusion that parties are under a confidentiality obligation even if they have not explicitly agreed upon such an obligation, taking into consideration that a mediation contract is based on good-faith and mutual trust and that ordinary partnership involves a loyalty obligation. Truly, there is consensus in doctrine that under Turkish Law ordinary partnership is interpreted as explicitly including a loyalty obligation even though the latter doesn't appear under a specific law. This is due to the fact that such a partnership is based on the principle of mutual trust and good-faith. However, those who do not consider mediation contracts as ordinary partnership contracts also do not accept the default existence of a confidentiality obligation[96]. From their perspective, in order to not give ground to doubt, the confidentiality obligations framework and exceptions must be agreed upon under the mediation contract in a clear manner.

On the other hand, it is beneficial for the distinct mediation contract or mediation clause to be formulated in the most brief and flexible manner, as long as it includes the necessary content guiding the parties with regards to how the process is to be conducted. The parties may also mutually determine and agree upon secondary obligations such as mediation expenses and how the mediator would be compensated. In order to avoid future problems, it would be appropriate to include provisions on issues such as the identity of the mediator, the procedure of the negotiations, as well as, who is to be held liable for the expenses and how such liability is to be met[97].

3. OTHER CONTRACTS PREPARED DURING MEDIATION

A mediation contract for the resolution of the dispute between the parties by way of mediation is different from a mediator contract concluded between the parties and the mediator.

As long as another procedure has not been agreed upon by the parties to the mediation contract or clause the mediator is selected by the parties (LMCD art. 14, RLMCD art. 18). While selecting, the parties may choose one or more mediators who they trust with regards to impartiality and independence, as well as personal capacity to resolve disputes. The total of mediators does not

[95] YAZICI TIKTIK, p. 205.
[96] YAZICI TIKTIK, pp. 205-206.
[97] EKMEKÇİ/ÖZEKES/ ATALI, p. 49; KEKEÇ, p.126; ÖZER, p. 21.

necessarily need to correspond to an odd number. Generally, a single mediator is preferred, however in complicated disputes which necessitate expertise or in multilateral disputes more than one mediator can be designated.

While the parties may select an individual whom they may trust, in order for the implementation of legal procedure and obtain trust-worthy results an individual who is registered with the mediator registry must be chosen. In order to become a mediator, under article 20 of LMCD, the individual must be a Turkish citizen, must have graduated from a law faculty, must have at least five years of experience, must be in full capacity, must not have been convicted of a crime, must have passed mediator training and must have succeeded in the exam.

A mediator contract is a contract between an impartial third person and the parties demonstrating that the latter have brought an offer and that the mediator has accepted this offer in order to be assigned to the dispute[98]. The relationship between the parties and the mediator can be perceived as a private law relationship subject to substantive law. By virtue of this contract the mediator undertakes the obligation to provide mediation services and the parties undertake the primary obligation of compensation for the fees and expenses. It is thus a distinct contract for works and services. However, since there is no commitment such as it exists between an employer and an employee, it would not be correct to qualify the relation between the mediator and the parties as an employment contract. The mediation contract is more similar to an agency contract. Since in the latter there is no time element and it only requires the agent to exercise intensive effort for the completion of a work or achievement of a result while a specific result is not guaranteed. As a result, while it does not manifest the typical characteristics, the provisions relative to agency contracts which are included in contracts for work and services (TCO art. 502 ff.) is applied by way of analogy to the contract between the mediator and the parties[99].

The contract with the mediator will include the identity information of the parties and the mediator and may designate which rules of confidentiality are to be applied. Moreover, determination of the mediation fee would be beneficial for avoiding future hesitations on this subject. The fee is generally decided on an hourly or daily basis. Unless otherwise agreed, the parties equally compensate the mediation fee[100]. The mediator has a right to demand the fees and expenses for the activity and may also request payment in advance (LMCD art. 7). However, during the mediation phase the mediator may not function as an intermediary for specific individuals or be compensated for having recommended specific individuals; acts in violation of this prohibition will be considered null and void (LMCD art. 7/3).

[98] GÖRKEM, p. 47.
[99] KEKEÇ, p. 139; TAŞPOLAT TUĞSAVUL, p. 121.
[100] GÖRKEM, p. 48.

In addition to the mediation contracts prior to the disputes and the mediator contract, a possible third contract is the agreement document drawn up if the mediation process concludes with an agreement[101]. In case the parties reach an agreement, the mediator drafts an agreement document. Usually the content of this document is prepared by the mediator. It must be clear and must be prepared as soon as possible. While the mediator is responsible for drafting this document, the framework of the agreement achieved after negotiation is to be determined by the parties and the document is to be signed by the parties and the mediator (LMCD art. 18/1)[102]. At the same time, while drafting the document the rights and obligations of the parties should be written so as to leave no room for doubt[103].

On the other hand, the agreement document is not legally binding. However, in order to promote mediation and award the effort put into the process, the legislator has foreseen the possibility to grant the document binding force once certain procedures are satisfied[104].

Furthermore, it must be noted that the legal nature of the agreement document signed between the parties after the completion of the mediation phase becomes important in case of breach of agreement of failure of compliance. Since, once resolution of the dispute is requested by way of litigation, in case of request, the evidentiary weight of the agreement and in case of violation, its enforceability will be brought up[105].

Moreover, the parties may request the issuance of an annotation regarding enforceability to the proceedings of the agreement reached at the end of mediation. The authority to which this request is to be directed depends on whether mediation was conducted before or during litigation. If mediation was conducted before litigation, then issuance of an annotation regarding the enforceability of the agreement must be requested from the court with competence to adjudicate the main dispute. In case of mediation invoked during litigation, it must be requested from the current relevant court[106].

An examination of the annotation regarding enforceability is limited to whether the agreement is suitable for mediation and compulsory execution. Apart from this, the court does not consider issues such as whether the agreement is lawful or whether it is in due form. Provision of an annotation regarding enforceability by

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[101] KÖSE, p. 90; ÖZMUMCU, p. 344.
[102] According to article 18(1) of the Law No. 6325 on Mediation in Civil Disputes: "*The scope of the agreement reached at the end of the mediation activity shall be determined by the parties; in case of preparation of an agreement document, this document shall be signed by the parties and the mediator*".
[103] TANRIVER, Süha, **Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı'nın Getirdikleri ve Değerlendirmesi Makalelerim II**, Adalet Yayınevi, Ankara, 2011, p. 205; TAŞPOLAT TUĞSAVUL, p. 183.
[104] KÖSE, p. 90.
[105] TAŞPOLAT TUĞSAVUL, p. 184.
[106] KÖSE, p. 91.

the court is a judicial act since it examines whether the content of the agreement resides within the domain of things which the parties may freely dispose of and that the agreement document is in accordance with procedure, form and public order. Consequently, it grants the document the authority of a writ (document considered to be a writ). In other words, if the court finds that the agreement is suitable for mediation and enforceability and issues an annotation regarding enforceability to the agreement document then this document becomes a document considered to be a writ[107].

If the agreement concluded after the mediation process does not contain one of the required foundations necessary in a contract, it will lose applicability. This has been clearly mentioned under article 27 of the TCO. Accordingly, it is not possible to conclude contracts in violation of morality, public order or personal rights or which are impossible. Claims of mistake, fraud and threats which are valid with regards to other type of contracts can also be brought up with regards to the agreement. In other words, the law of contracts is applied. If one of the parties is of the belief that the agreement violates the law, that party may apply to court with a claim of invalidity[108].

CONCLUSION

While mediation is a novel institution regarding Turkish Law, its meaning and characteristics is not foreign to any society. However, while familiar to society, the formation of its legal basis is very recent. The Law on Mediation in Civil Disputes (Law No. 6325) regulating the legal regime of mediation was adopted in 2012 and entered into force in 22.06.2013. With entry into force, most deeds and acts in this respect were afforded a legal foundation.

Mediation is an alternative mean of dispute resolution which aims to bring together parties to a dispute by establish communication and negotiation between the parties and hopes to create a common understanding between the parties. As such, it is effectively carried out on a voluntary and discretionary basis with the contribution and assistance of an absolutely independent, impartial and expert third person who has received training on the subject and who facilitates the communication between the parties so that they may “find their own solution”.

The mediation contract is a contract which reflects the declaration of intent of the parties to solve their disputes by way of mediation. The parties may conclude this contract for the peaceful resolution of their disputes before engaging state adjudication or it can be concluded during the state adjudication phase.

The lack of regulation on the consequences of engaging state adjudication regardless of an existing mediation contract between the parties is an important deficiency. For this reason, explicit legal regulation must be adopted clarifying

[107] ÖZMUMCU, p. 345; KÖSE, p. 91.
[108] ÖZER, p. 21.

what would happen if one of the parties engages state adjudication regardless of a valid mediation contract.

In our view, within the framework of the institution of mediation, if one of the parties applies to state adjudication this would demonstrate the fact that the parties have not accepted resolution of the dispute with the assistance of an independent third person. In other words, this would mean that the will of the parties are not conform to each other. In this case, we must accept that the mediation contract has implicitly dissolved. However, the party which has acted in violation of the contract must also pay a price. If not, mediation contracts prior to disputes would not carry any value for the parties. Obliging compensation for the violation of the contract might increase the adoption and implementation of mediation contracts.

Another deficiency in the legal framework is the regulation foreseen under LMCD which determines that parties may only engage mediation with regards to subjects which the parties may freely dispose of and not those involving public order. However, limitations on the subject matter of mediation contracts should be exceptional. Since, as a prompt, friendly and less expensive means of dispute resolution centered on rights, resolution of disputes by mediation would be more beneficial in the service of public good. In fact, if disputes between parties are resolved based on peaceful and conciliatory methods rather than on contention and conflict, more personal and social gains could be attained. At the same time, the decrease in the workload of the judiciary would protect the right to a fair trial.

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