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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Principles of Mandatory Mediation in Commercial Disputes in Turkish Law with Determinations and Comments on its Applications

Türk Hukukunda Ticari Uyuşmazlıklarda Zorunlu Arabuluculuğun İlkeleri ile Uygulamalarına İlişkin Tespitler ve Değerlendirmeler

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Abstract

Mediation is based on voluntariness, having developed in due course to eventually become widespread. Mandatory mediation has become an exception to voluntary mediation with the elimination of the principle of voluntariness. Mandatory mediation has been applied in Turkish law in the field of labour law since its acceptance with Article 3 of Law No. 7036 on Labour Courts. After the initial obtaining of successful results, it was accepted by the Turkish Commercial Code as well. In this study, various comments and evaluations are made regarding the principles and applications of the mandatory mediation model prescribed by the Turkish Commercial Code. Within the framework of these comments and evaluations, some explanations of relevant opinions are provided. We also consider whether mandatory mediation is in compliance with the general principles of commercial law.

Keywords

Mandatory mediation, Turkish commercial law, Turkish Commercial Code Art. 5/A, principles of mandatory mediation, applications of mandatory mediation in Turkish commercial law

Öz

Arabuluculuk, niteliği gereği gönüllülük ilkesini içeren ihtiyari arabuluculuk modeli ile ortaya çıkmış, gelişmiş ve yaygınlaşmıştır. Zorunlu arabuluculuk ise, ihtiyari arabuluculuğun aksine gönüllülük ilkesini bertaraf eden istisnai bir arabuluculuk modeli olarak, genel arabuluculuk modeli olan ihtiyari arabuluculuğun karşısında yer almıştır. Zorunlu arabuluculuk Türk hukukunda önce İş hukuku alanında 7036 sayılı İş Mahkemeleri Kanunu (İMK) m 3 düzenlemesi ile kabul edilerek uygulanmıştır. Elde edilen başarılı sonuçlar üzerine Türk ticaret hukukunda da kabul edilmiştir. Bu çalışmada Türk ticaret hukukunda ortalama olarak 1,5 yıldır uygulanmakta olan zorunlu arabuluculuk modelinin kuramsal içeriğine, ilke ve uygulamalarına ilişkin tespitler ve değerlendirmeler yapılmıştır. Bu tespit ve değerlendirmeler çerçevesinde konunun içerdiği başlıca hukuki sorunlara ve çözümlerine yönelik kendi görüşümüzle beraber çeşitli görüşlere ilişkin açıklamalara yer verilmiştir. Bu tespitler, değerlendirmeler ve açıklamalara dayanılarak zorunlu arabuluculuğun Türk ticaret hukukundaki ilkelerinin yerindeliğine ve uygulamaların etkinliğine ilişkin çıkarsamalar yapılmıştır.

Anahtar Kelimeler

Zorunlu Arabuluculuk, 6102 sayılı Türk Ticaret Kanunu m 5/A, Türk Ticaret Hukukunda Zorunlu Arabuluculuğun İlkeleri ve Uygulamalar

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Principles of Mandatory Mediation in Commercial Disputes in Turkish Law with Determinations and Comments on its Applications

Mediation in legal disputes was introduced into Turkish law with the acceptance of the Code of Mediation in Legal Disputes (CMLD)[1] in 2012 and came into force a year later. Mediation is a worldwide practice and the mediation procedure of the CMLD (Art. 3/1) is similarly based on the referral of parties in an ongoing dispute arbitrarily. In other words, the starting point and the acceptance of mediation in Turkish law is built on the foundation of voluntary mediation.[2]

While the development and the prevalence of the voluntary model of mediation continue to grow worldwide, mandatory mediation has become an exceptional model of arbitration, eliminating the basis of voluntariness upon which voluntary mediation is based to constitute a solution to the new and different requirements arising as a result of the increased workloads of courts and the problem of delayed justice.[3] Mandatory mediation was accepted first in European countries and in US and Australian law and then continued to spread in prevalence.[4]

In parallel to these developments, in Turkey, a first step was made in cases filed with claims for reinstatement as well as employee or employer receivables based on individual or collective bargaining contracts in the field of labour law through the regulation of the Law on Labour Courts[5] in Turkish law, with acceptance of referral to a mediator in advance of applying to a court in order to take legal action as a cause of action.[6] Mandatory mediation took its place in the Turkish legal system as a cause of action in the Turkish Commercial Code (TCC) with the addition of the provision of Art. 5/A of the TCC[7] No. 6102 within the framework of Art. 20 of the Law on Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts.[8] It was the result of both success in labour disputes and doctrinal discussions on the issue. It is emphasized in theory that the inclination towards expanding on this step, which is presently limited to only labour law and commercial law, started to progress in a gradual manner to encompass the fields of consumer law and family law.[9]

1 No. 6325, Date: 22.06.2012 (OJ, 07.06.2012/28331).

2 Seda Özmumcu, "Karşılaştırmalı Hukuk ve Türk Hukuku Açısından Zorunlu Arabuluculuk Sistemine Genel Bir Bakış", *İÜHFD*, Vol. 74, Iss. 2, 2016, pp. 807-808; Süha Tanrıver, "Dava Şartı Arabuluculuk Üzerine Bazı Düşünceler," *TBBD*, Vol. 14, Iss. 1, 2020, pp. 111-113.

3 Özmumcu (n2), 807-808.

4 Özmumcu (n2), 818-825.

5 No. 7036, Date: 12.10.2017 (OJ, 15.10.2017/302).

6 Tanrıver (n2), 114.

7 No. 6102, Date: 13.01.2011 (OJ, 14.02.2011/27846).

8 No. 7155, Date 06.12.2018 (OJ, 19.12.2018/30630).

9 Tanrıver (n2), 115, 119. Tanrıver concludes as follows: "By this means, extension of the scope of mediation as a cause of action and trying to bring it into a general cause of action will spread over a very wide scope in practice upon addition of especially consumer and family disputes to commercial and labour disputes; thus, the mediation that is in the position of a special cause of action will have been converted into a general cause of action and this will lead to the addition of a new condition to the general causes of action in Art. 114 of the [Legal Procedural Law]; as a consequence, in consideration of the foregoing grounds, it will not constitute a sound approach". Tanrıver (n2), 119.

The speed, trust, and economical usage of financial resources are indispensable conditions for the existence and functionality of commercial activities regulated by commercial law. The rules to regulate commercial law reflect these aspects. Otherwise, important disruptions in the functioning and existence of commercial activities would be inevitable.[10] In this context, the problem of delayed justice has special importance in the field of commercial law. It is obligatory and inevitable that mandatory arbitration makes contributions to both these principles of commercial law and the solution of delayed justice to some extent.

The objective of this study is to determine the principles and evaluate the practice of mandatory mediation over the course of one and a half years. Furthermore, we will consider whether mandatory mediation in commercial disputes satisfies expectations or not.

This subject is addressed within five primary sections apart from this introduction and the conclusion. In the first four sections, relevant legal theoretical explanations are made regarding the relevant principles. In the fifth section, we analyse the effectiveness of mandatory mediation and comment on its application.

I. Legislation History of Mandatory Mediation in the Turkish Commercial Code

A. History of Mandatory Mediation in the Turkish Commercial Code

Mandatory mediation in Turkish law came into being and developed considerably late in comparison with other countries.[11]

10 It is possible to clarify such disruptions from the point of view of a businessperson or trader as follows: "It is important for a businessman [to consider] what to do for the sustainable future of his workplace. It is important from the point of view of a businessman to think optimistically when he initiates a new business activity…for the determination of things to be done for the economic use of resources in hand in terms of sustainable business development and the increasing of such resources. In this context, there is positive motivation for the future. When a (legal or economic) problem comes forth and the solution process is extended, this circumstance becomes fully reversed… When mediation is preferred, or, that is to say, when it is ensured that the businessman (or trader) is included in the mode of mediation without referral to the court, the cost that will be incurred as a result of such dispute may fall and it may generate profit. Furthermore, the projections conducted with relation to the future of business relationships may contain mistakes. The scenario may be better or worse (in comparison with realities). It is possible in mediation to intervene in the scenario and repair the results of erroneous scenarios even if only partially. When a problem has arisen, the businessman or trader at issue concentrating on the subject matter thereof will lose time and will also be affected by this problem psychologically. In mediation, however, the problem will be dealt with in a short period of time and, as a consequence, he will focus on his other works". Constantin Gavrılla, "Ticari Uyuşmazlıkların Çözümünde Arabuluculuk", in T.C. Adalet Bakanlığı Arabuluculuk Daire Başkanlığı, *Ticari Uyuşmazlıkların Çözümünde Arabuluculuk ve Arabuluculukta Avukatın Rolü Sempozyumu*, Mine Demirezen (Ed.), Deniz Ofset Press, 2017, pp. 17-18. Also see Muammer Erol, *Türk Hukukunda Arabuluculuk ve Teşkilatlanması*, Adalet Press, 2018, pp. 84-91.

11 Notwithstanding that mediation in the modern sense in Turkish law was enacted considerably late, there were some legal arrangements that included mediation and other available alternative methods of settlement in previous periods. For example: I) settlement was included in Arts. 5 and 53 of the Village Law (No. 44, Date: 03.18.1924 (OJ, 07 04, 1924/668); II) mediation was included in Art. 213/I of the Legal Procedural Law (No. 1086, Date: 18.06.1927 (OJ, 18, 1927/624); III) reconciliation and negotiation were included in Articles 26 and 27 of the Turkish Petrol Law (No. 6326, Date: 07.1954 (OJ, 16, 03, 1954/8659); IV) settlement was included in Art. 32 of the Property Ownership Law (No. 634, Date: 23.06.1965 (OJ, 02, 07,1965/12038); and V) reconciliation was included in Art. 7'I of Law No. 5521 on the Code of Labour Courts dated 30.01.1954/7424). For explanations of the contents of these legal arrangements, see Erol (n10), 84-91.

Mediation in the modern sense entered Turkish law for the first time through the Mediation Code of Civil Disputes (MCoCD).[12] Upon the entry into force of the MCoCD, an institutional substructure was developed based on it (Art. 37/1-a, b),[13] and the law acquired a wide range of application fields, developing rapidly in the first 6 years following the enforcement of the MCoCD. The method of voluntary mediation was accepted and arranged on the basis of the voluntariness principle of Art. 2/I, b.[14]

Mandatory mediation subsequently entered Turkish law because commercial activities require a certain speed and the workload of the courts made it necessary. However, voluntary mediation has been effective and successful in labour disputes[15] (Art. 3-5).

In the general preamble of that law, the requirement for the mandatory mediation method regarding labour law disputes was based on the "requirement for alternative reconciliation methods, change, experience in the execution of the work, caseload rising in the labour courts, extraordinary development being experienced in technology, expansion of the field of social security law, and diversification of employee-employer relationships…"

After this development, along with special provisions pertaining to both the mandatory mediation model to be applied to labour disputes regulated by the lawmaker according to this law and the mandatory mediation model that might possibly be regulated in other fields of private law in the future, it was deemed necessary to prepare a detailed legal regulation that would constitute general provisions with relation to the mandatory mediation model in Turkish law. To this end, the aforementioned basic principles were prepared in detail and added to Mediation Law No. 6325 on Legal Disputes by the nature of the related general law with additional Article 18/A, dated 06.12.2018.[16] Furthermore, a detailed regulation in parallel to Article 18/A

12 No. 6325, Date: 22.06.2012 (OJ, 02.06.2012, 28331).

13 Muhammed Özekes, Murat Atalı, Ömer Ekmekçi, and Vural Seven, *Hukuk Uyuşmazlıklarında Arabuluculuk*, Vol. XII Levha Press, 2019, p. 42.

14 Erol (n10), 81.

15 No. 7036, Date: 12.10.2017 (OJ, 15.10.2017/30206).

16 The requirement of this arrangement is explained in the preamble of Article 23 of the Law on Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts as follows: "The institution of mediation has entered our legal system as a cause of action for the first time through Law No. 7036 of the Code on Labour Courts. Following the entry into force of the provisions of Law No. 7036 pertaining to mediation and in consideration of the success that mediation has achieved in the settlement of labour disputes, it has been proclaimed in application and doctrine that the practice of this method in other disputes would be useful and beneficial. Within this scope, in the event of the acceptance of mediation as a cause of action in the laws pertaining thereto, it is deemed convenient to arrange the basic provisions to be applied to the mediation process in Law No. 6325. As a natural consequence of such an arrangement related thereto, an arrangement in the related law pertaining to the fact that only the dispute will be subject to the mediation as a cause of action will be sufficient. In the event that the law brings forth special arrangements with relation to mediation as a cause of action, the application of these special arrangements is unquestionable as well".
"While Article 18/A, added to Law No. 6325, is regulated, the arrangement contained by Article 3 of Law No. 7036, applied successfully for an approximate period of one year, is taken as the basis. However, in consideration of the fact that the scope will be extended, a circumstance wherein an interim injunction and cautionary attachment, and state of availability of necessity to resort to arbitration in private laws or another alternative way of settlement before the action at issue is filed, is arranged in a special manner…"

was included with relation to the mandatory mediation method in Articles 22-28 of the Regulation on the Mediation Code of Civil Disputes (MCoCD Reg.).[17] and Art. 18/A of the MCoCD, enacted by the Ministry of Justice and entering into force as of 02.06.2018.

Thus, after a relatively short period of 1.5 years, the extension of the scope of mandatory mediation began to be discussed pursuant to the successful results of mandatory mediation obtained in the field of labour disputes. The necessity of passing the mediation method into cause of action accordingly entered the agenda in the field of commercial law, which was exposed to roughly similar problems.[18] In this context, for commercial cases, referral to a mediator in advance of filing a case in disputes on compensation and pecuniary claims of which the subject matter is the payment of a certain amount of money was made a cause of action through Art. 5/A, added to Turkish Commercial Code No. 6102, and Law No. 7155 on the Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts,[19] dated 06.12.2018, and entered into force on 01.01.2019. Thus, Art. 5/A of the TCC was the first special and fundamental provision by which mandatory mediation was regulated in the TCC.

B. Applicable Legal Provisions with Relation to Mandatory Mediation in the Turkish Commercial Code

As was previously explained,[20] within the scope of the historical development process, the main legal regulations within the framework of both private and general norms with relation to mandatory mediation in the field of the TCC consist of Law No. 7155 on Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts",[21] dated 06.12.2012; Article 5/A added to TCC No. 6102; the MCoCD, bearing the number of 6325 and date of 07.06.2012; MCoCD Additional Article No. 18/A dated 02.06.2018; Additional Article No. 18/A of the MCoCD containing general provisions with relation to mandatory mediation; Article 18/A of the MCoCD dated 02.06.2018; and Articles 22-28 of the MCoCD Reg.

17 OJ (02.06.2018/30439).

18 See Kırca for explanations regarding the suitability of commercial disputes to mediation as a cause of action and the requirement of mediation as a cause of action. İsmail Kırca, "Ticari Uyuşmazlıkların Çözümünde Arabuluculuk", in T.C. Adalet Bakanlığı Arabuluculuk Daire Başkanlığı, *Ticari Uyuşmazlıkların Çözümünde Arabuluculuk ve Arabuluculukta Avukatın Rolü Sempozyumu*, Mine Demirezen (Ed.), Deniz Ofset Press, 2017, p. 21.

19 OJ (19.12.2019/30630). This law has been criticized from the point of view of its form on the grounds that it contains contradictions with law-making techniques. See Çiğdem Yazıcı-Tıktık, "Assessment of the Mediation Application as a Cause of Action in Commercial Cases in Respect of Basic Principles", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, pp. 113-114.

20 See Section I, A.

21 OJ (19.12.2019/30630). This law has been criticized from the point of view of its form on the grounds that it contains contradictions with law-making techniques. See Çiğdem Yazıcı-Tıktık, "Assessment of the Mediation Application as a Cause of Action in Commercial Cases in Respect of Basic Principles", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, pp. 113-114.

Within the framework of these regulations, the provisions found in private laws such as the TCC and Law on Labour Courts pertaining to mandatory mediation are special provisions and, in such cases, the first principle to be applied for the determination of the order of the provisions to be applicable thereunder will be the principle of the priority of the special norm. The general provisions to be applied thereto for filling the gaps in the provisions in the context of the special norm, however, are the provisions found in Art. 18/A of Mediation Law No. 6325. If there is no provision in Art. 18/A, then the other provisions of MCoCD No. 6325 will be applied as general provisions at a degree of inconvenience to the nature of the mandatory mediation. Within this framework, it may be possible to refer to Art. 22-28 of the MCoCD for the gaps pertaining to the application of Art. 18/A. These principles with relation to the order of the application of all these legal regulations pertaining to the mandatory mediation model in Turkish law are clearly indicated in Art. 18/A as follows:

> "In the event that the mediator applied thereto in related laws is regarded as a cause of action, then the following provisions will be applicable to the mediation process" (Art. 18/A-1).
>
> "The special provisions accepted with relation to the cause of action of mediation in the related laws are reserved" (Art. 18/A-19).
>
> "Under circumstances where no applicable provision exists, the other provisions of this law will be applied at a degree to be convenient for the nature of it" (Art. 18/A-20).

II. Legal Nature, Objectives, and Functions of Mandatory Mediation in Turkish Law

A. Legal Nature

As indicated in the doctrine, the mandatory mediation method has three different models.

In the first model, certain legislation prescribes mediation as a mandatory and automatic procedure. In this case, mediation is qualified as a cause of action.[22] This approach to mandatory mediation is described as categorical by Sander in the US doctrine.[23]

22 Özmumcu (n2), 808. Key examples of this type of mediation include the settlement of disputes with relation to agricultural debts in New South Wales, Australia, through the application of the mediation method; in 2013, the mandatory arbitration applications that began being applied in Italy for certain disputes; and the mandatory arbitration applications pertaining to pilot projects in the United Kingdom. Özmumcu (n2), 808-809; Melissa Hanks, "Perspectives and Mandatory Mediation", *UNSW Law Journal*, Vol. 35, Iss. 1, 2012, pp. 829, 931. For mandatory mediation applications in Italian law, see Özmumcu (n2), Mandatory Mediation, 812-815; Kürşad Karacabey, "Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığına ve Uygulanabilirliğine Dair Sorunlar", *ABD*, Vol. 61, Iss. 1, 2016, pp. 456, 461.

23 Frank Sander, "Another View of Mandatory Mediation", *Dispute Resolution Magazine*, Vol. 13, Iss. 2, 2007, pp. 15-16.

In the second model, the court refers the relevant parties to mediation.[24] This model is known as "mediation, referred by the court".[25] In this model,[26] the judge is authorized to refer the parties to mediation based on the merits of the case either with or without the consent of the parties.[27]

The third model is known as a "quasi-compulsory mediation". In this model, it is not obligatory to proceed with alternative dispute resolution methods and the court expenses shall be borne as a sanction by the party that has acted unreasonably in attempts to resolve the dispute.[28] In this context, if this method is not attempted before the action is filed, then the negative effects of the court expenses constitute an effective compulsion mechanism.[29]

Mandatory mediation in Turkish law constitutes an explicit example of the first model explained above because it is stipulated as a cause of action (Art. 5/A-I of the TCC).

In civil procedure law, the courts have the authority to check certain conditions to be able to proceed with a case. Such conditions are referred to as "causes of action".[30] In this sense, the conditions necessary for the court to be able to proceed with a case are "positive causes of action" and those conditions not existing are "negative causes of action". A cause of action is not a condition that must be present for the court to be able to proceed with the case but not for the lawsuit to be filed. These are also referred to as conditions for hearing a case[31] (Art. 114 of the Civil Procedure Law (CPL)).

The cause of action matter is clearly prescribed by Art. 114 of the CPL. There are also other causes of action stipulated in other laws. Causes of action are divided into three categories as causes of action pertaining to the "court", to "parties", and to the "subject of the case". The CPL (CCP) reflects this difference[32] (Art. 114).

24 Sander (n23), 15-16.

25 Sander (n23), 15-16.

26 Although this model has been prevalently applied in Australia, it has found a considerably limited field of applications; for instance, a party that fails to act reasonably must honour the expenses of the (court) proceedings for the settlement of the dispute in the British Civil Procedure Rules and in Australia by the Civil Dispute Resolution Act, dated 2011. Hanks (n21), 931-932; Özmumcu (n2), 809.

27 Sander emphasizes that this model is applied by the court mostly on a discretionary basis subject to the request of the parties thereunder. Sander (n22), 16; see also Özmumcu (n2), 809.

28 For instance, the expenses of the proceeding are to be honoured by the party that fails to act reasonably according to both the British Civil Procedure Rules and the Australian Civil Dispute Resolution Act, dated 2011. Hanks (n22), 931-932; Özmumcu (n2), 809.

29 Hanks (n22), 931.

30 Saim Üstündağ, *Medeni Yargılama Hukuku*, C. I-II, Sulhi Garan Press, 2000, pp. 279-281; Yavuz Alangoya, Kamil Yıldırım, and Nevhis Deren-Yıldırım, *Medeni Usul Hukuku Esasları*, Beta Press, 2011, p. 190; Timuçin Muşul, *Medeni Usul Hukuku*, Yetkin Press, 2012, 100; Abdürrahim Karslı, *Medeni Muhakeme Hukuku*, Alternatif Press, 2014, pp. 393-394; Baki Kuru, *Medeni Usul Hukuku*, Legal Press, 2015, pp. 41-43; Hakan Pekcanıtez, *Medeni Usul Hukuku*, C. II, Vedat Press, 2017, p. 926; Süha Tanrıver, *Medeni Usul Hukuku*, C. I, II, Yetkin Press, 2018, p. 636.

31 Kuru (n30), 41-44.

32 Özekes, Ekmekçi, Atalı, and Seven (n13), 153.

The court must decide whether it can proceed with a case regarding cause of action on an ex officio basis or not. If it determines that there is a lack of cause of action, then the court may not proceed with the merits of the case. In such an event, the court is obliged to dismiss the case on its merits[33] (Art. 115/2 of CPL).

The regulations regarding the cause of action for mediation in the MCoCD are parallel to these general principles of the CPL (Art. 18/A-II of the MCoCD; Art. 22/I of the MCoCD Reg.; Art. 114-115 of the MCoCD).[34]

B. Legislation on Mandatory Mediation in the Turkish Commercial Code and Its Practice

The conditions for and the need to have mandatory mediation are explained in the preamble of the MCoCD in Art. 3. It is indicated in the general preamble of the Law on the Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts containing the additional provision of Art. 5/A to the TCC that: "It is necessary to make arrangements in the direction of extension of this application to commercial disputes in consideration of the benefit and success that the institution of mediation has achieved in practice, having been applied from the date of 1 January 2018 onward and with respect to labour disputes through Law No. 7036 on Labour Courts".

The cause and the objective of this requirement are indicated in the preamble of Art. 20, which contains the provision for the addition of the specified regulation as follows: "An obligation was brought forth to refer to a mediator before filing any action with regard to any pecuniary and compensation claims among the commercial actions indicated in Article 4 of the TCC and the subject matter of which consists of the payment of a certain amount of money, and, by doing so, it is aimed to settle these disputes thoroughly in a manner conforming to the willpowers of the parties and with less expense and in a shorter period of time, as well".

The sustainability and continuity of commercial activities depend on their speed and security. Mandatory mediation serves these purposes. At the same time, commercial law is one of the first areas affected by technological developments and innovation. Thus, the number of commercial disputes and the burden on commercial courts increase steadily. Mandatory mediation would help to decrease the number of cases and thus ease the workload of commercial courts.[35] In brief, one of the

33 See Section IV, E for explanations regarding the legal consequences of filing an action before referral to mandatory mediation.

34 See Section IV, E for explanations regarding the parallelism between the provisions of Art. 22/I of the MCoCD and Art. 18/A-II of the MCoCD.

35 See Section V, A, B for statistical data on the effects of mandatory mediation applications in Turkish commercial law in decreasing the caseloads of the courts.

major goals of mandatory mediation in commercial law is to ease the workload of commercial courts.[36]

C. Positive and Negative Effects of Mandatory Mediation

The principles and the practice of mandatory mediation in comparison with voluntary mediation have been the subjects of some analyses. The present analysis considers not only mandatory commercial mediation but general mandatory mediation as well. We shall comment on mandatory mediation in general and indicate the specific results of mandatory mediation in commercial law.

1. Positive Effects

It is often believed that a party applying for voluntary mediation is perceived as weak in his or her case. This perception is one of the biggest handicaps of voluntary mediation, and mandatory mediation successfully avoids it. In mandatory mediation, parties have no reason to think that other parties are weak in their cases because participation is obligatory.[37] At the same time, mandatory mediation is relatively cheaper than litigation and can contribute to the faster and more trusted resolution of disputes.

It is clear that these positive aspects of mandatory mediation can also meet the requirements of commercial law.

2. Negative Effects

The only point considered as a negative effect of mandatory mediation is the idea that the mandatory aspect of this mediation is in contradiction with the principle of voluntariness. To force people into something considered to be voluntary by nature is considered illogical.

The principle of voluntariness is considered as one of the pillars and justifications of mediation.[38] It is the result of seeking a peaceful solution.[39]

In this respect, mediation has been subject to laws as a voluntary process both globally and in Turkey.[40] The principle of voluntariness accordingly became the

36 It is emphasized in the doctrine that the definition of the cause of action of mediation as an objective contributing to the decrease of the caseloads of the courts constitutes a logical inconsistency and contradiction within itself as a result of the grounds that compulsion for the referral of a dispute to mediation in the period before the case is filed would be contrary to the nature of mediation if there is a general reluctance of the parties to resolve the dispute by reconciliation. See Tanrıver (n2), 119, 121-122.

37 Campbell Hutchinson, "The Case for Mandatory Mediation", *Loyola Law Review*, Vol. 42, Iss. 4, 1996, pp. 85-90; Özmumcu (n2), 825-826.

38 Karacabey (n22), 488-499; Özmumcu (n2), 837-838.

39 Özmumcu (n2), 837; Karacabey (n22), 499; Tanrıver (n2), 121.

40 Tanrıver (n2), 121.

characteristic aspect of mediation.[41] Over time, the exception of mandatory mediation arose to challenge that principle.[42]

Thus, in light of the aforementioned contradiction, it is discussed whether mandatory mediation is in conformity with law de lege ferenda or not.[43]

Some authors indicate that there are justified reasons for having mandatory mediation to protect legal interests in spite of the noted contradiction.[44] In contrast, some other authors argue that it is necessary to reject it due to that contradiction.[45] These authors state that this contradiction is a breach of judicial rights and judicial ethics.[46]

Mandatory mediation must also be taken into consideration regarding constitutional rights and freedoms.[47] Namely, according to an opinion, the principle of voluntariness

41 A definition is provided in Art. 2 of Law No. 6325 on Mediation in Legal Disputes. According to this arrangement, mediation is "a dispute solution method that is conducted voluntarily and [with the] participation of an impartial and independent person, who has a [relevant] education and brings the parties together through the application of systematic techniques in order to meet and conduct negotiations, and who realizes the establishment of the communication process by and between them in order to ensure that they produce their own solutions in this way, and brings forth relevant solution(s) in the event that it is understood that the parties thereunder have failed to produce any solution".
A parallel definition is provided in Art. 4/1-c of the MCoCD Reg. as follows: "Mediation: 'a voluntary dispute solution method that is conducted as a public service and by the participation of an impartial and independent person, who has a [relevant] education and brings the parties together through the application of systematic techniques in order to meet and conduct negotiations, and realizes the establishment of the communication process by and between them in order to ensure that they produce their own solutions in this way'". Official Gazette, Date: 02.06.2018, Issue No. 30439.

42 For instance, it is accepted within the framework of Law No. 7036 on Labour Courts, dated 12.10.2017, in order to meet the requirements of "the need for alternative reconciliation methods, variation that is experienced in caseloads and the mode of execution of the work, population increase, extraordinary development being experienced in technology, expansion of the field of the social security law, and diversification of labour relationships…" See the General Preamble of Law No. 7036 on Labour Courts.

43 See Özmumcu (n2), 827-930; for detailed explanations related to this discussion, see also Karacabey (n22), 457.

44 Sander ((n23), 16) is one of the authors defending the conformance and acceptability of mandatory mediation in relation to the applicable law. Other authors assessing the legal problem in question pragmatically include: Dorcas Quek Anderson, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program", *Cardozo Journal of Conflict Resolution*, Vol. 10, Iss. 1, 2010, pp. 479-485; Frank Sander, William Allen, and Deborah Hensler, "Judicial (Mis)use of ADR? A Debate", *University of Toledo Law Review*, Vol. 27, Iss. 4, 1996, p. 886; Stephan Bullock, Noel Gallagher, and Linda Rose, "Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation", *Louisiana Law Review*, Vol. 67, Iss. 3, Spring 1997, pp. 885, 940.
According to this opinion, there is a clear and explicit difference between compulsion to mediation and compulsion within the mediation process. The latter, namely compulsion within the mediation process, will not be accepted as mediation. The former, however, is acceptable. However, even this is in the nature of a temporary measure, designed for solutions of problems arising in circumstances where mandatory mediation is required. Sander (n22), 16; Quek Anderson, (n44), 485-486; Sander, Allen, and Hensler (n44), 886.

45 Tanrıver (n2), 121.

46 Rosella Wissler, "The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts", *Willamette Law Review*, Vol. 33, Iss. 1, 1997, p. 565; Queck Anderson (n44), 484; Victoria J. Hanemann, "The Inappropriate Imposition of Court-Ordered Mediation in Will Contents", *Cleveland Law Review*, Vol. 60, Iss. 4, 2012, pp. 755-756; Özmumcu (n2), 755, 837; Karacabey (n21), 489; Özmumcu (n2), 807, 826. These authors allege that the mediation process's division into three stages represents a formal and artificial differentiation; it is neither possible nor realistic to separate those stages from each other with definite boundaries within the scope of realities and, therefore, the fundamental ground of those defending the opinion explained heretofore cannot be accepted. As a consequence, mandatory mediation contradicts the principles of legal ethics and legal rights. Within this framework, it has been emphasized that there would be no difference of content by and between the compulsion to mediation and compulsion within the mediation process, with the compulsion to mediation then converted into compulsion within the mediation process. Wissler (n46), 566; Hanemann (n46), 552; Quek Anderson (n44), 485. In this context, the compulsion to mediation is emphasized as a factor for the parties to be directed to negotiation under the least possible pressure created by that compulsion. Wissler (n46), 566; Quek Anderson (n44), 485.

47 Özmumcu (n2), 837-839; Demir (n43), 1-2; Karacabey (n22), 464.

is the key element of mediation, and in the event that one or both of the parties are reluctant to participate in the process, the chance of successful mediation will be diminished. Mandatory mediation, it is suggested, will bring a temporary solution to the requirements pertaining thereto, and the opinion concludes a summarized assessment[48] of the subject matter with the well-known Turkish proverb of "No good can be achieved by force".[49]

Some other authors, however,[50] have assessed this subject matter from the point of view of its conformance to the Constitution, alleging that compulsion exists only at the application stage, which is the first of three stages of mediation, and that since the principle of voluntariness again forms the basis of the subsequent stages for the parties to continue and finalize the process, mandatory mediation does not constitute a contradiction from the point of view of the principle.

Another author assesses mandatory mediation with a critical approach from three different points of view. From the first point of view, in the assessment made by this author regarding mandatory mediation's contradiction with the principle of voluntariness, the natural aspect of the institution was observed in terms of the possibility of solving legal disputes by negotiation and for reconciliation methods that can only and solely be materialized on the basis of the voluntary acts and free wills of the parties. Thus, it is stated, it is impossible to describe an agreement approved with the compulsion of one or multiple parties as a real settlement and, in this context, the success of mediation is subject to the process being performed voluntarily. Compulsion is contrary to the essence of mediation; otherwise, it would not be possible for mediation applications to be efficient. Based on these points, the author concludes that mandatory mediation does not contain any contradiction.[51]

From the second point of view, this author makes an assessment regarding a person's rights to directly apply to an independent and impartial judiciary and asserts that compelling persons to refer to mediation on a mandatory basis and in advance of the initiation of an action constitutes a barrier and an obstacle, which must be overcome on an absolute basis, in light of the right to access to an independent judiciary, which is one of the fundamental functions of the state.[52]

On the other hand, the author emphasizes the assessments of some jurists related to the fact that parties in mandatory mediation are compelled only at the application

48 Özmumcu (n2), 837.

49 Özmumcu (n2), 838. The same opinion is summarized in British law with emphasis on a British proverb that may be assessed as synonymous with the aforementioned Turkish proverb: "You can lead a horse to water but you can't make it drink". Wissler (n46), 565-566.

50 Demir (n42), 1.1; Karacabey (n22), 466.

51 Karacabey (n22), 456-466.

52 İbid 467.

stage and are not obliged with respect to the completion of the process, and that they may initiate legal action after the completion of a certain procedure and, as a consequence, the elimination of access to the judiciary would not be in question.[53] The author argues against these assessments, stating that access to the court is not totally eliminated but direct access is eliminated, and that access to an independent and impartial judiciary is delayed and made subject to various costs. Thus, he concludes: "Justice delayed is justice denied".[54]

Third, he assesses mandatory mediation with respect to its conformance to the Constitution.[55] More specifically, he assesses mandatory mediation within the framework of the provisions of Articles 6, 9, 11, 14/2, 36, and 37 of the Constitution of the Republic of Turkey.[56] In this assessment, it is emphasized that any application that would compel persons to refer to mediation would be in contradiction with Article 36 of the Constitution "where the right to a fair trial is regulated" and with Article 37[57] containing provisions indicating that individuals cannot be brought before any other judicial authority/jurisdiction apart from the court present within their legal jurisdictions and that no authorities that may have extraordinary judicial power resulting in such a consequence may be established thereunder. By Article 3, he states, the foregoing is a sufficiently clear contradiction in a clear and basic manner beyond any question and he further concludes that "it is not possible to change the arrangements of Articles 36 and 37 in a manner to provide an opportunity for mandatory mediation as long as the provisions of Article 6, 'where the right of independence is regulated', exist".[58] The author emphasizes in parallel to his conclusion that "mandatory mediation would constitute a contradiction to the indicated provisions of the Constitution and also the spirit in general, and that no practical contemplation based on a concern for solving the problems rapidly and in an easy manner would be an excuse for disregarding the Constitutional principles or making concessions".[59]

The problem pertaining to the conformance of mandatory mediation to the Constitution in Turkish law has been assessed by the Constitutional Court in various decisions. For instance, the Constitutional Court determined a criterion in Decision No. 2013/89[60] about the effect of proceeding with alternative dispute resolutions on the freedom to seek legal remedies. According to the Court: "The obligation for

53 İbid 468.

54 İbid 456, 468.

55 İbid 474.

56 İbid 471-474.

57 İbid 471-474.

58 İbid 473.

59 İbid 472-373.

60 The Constitutional Court's Decision of 10.07.2013, Basis No. 201/94, Decision No. 2013/89, published in the Official Gazette bearing the date of 25.01.2014 and No. 288893.

applying to alternative ways of dispute resolution will not be regarded as contrary to the right to legal remedies as long as these ways are not ineffective and inconclusive methods that have been presented in order to make it impossible for the individuals/persons to obtain their rights to legal remedies". The Court took this criterion into consideration and decided on the dismissal of the action of nullity.

In another of its decisions,[61] however, the Constitutional Court determined a criterion with relation to the limits of access to jurisdiction that has again been one of the rights subject to assessment with respect to the obligation to apply to alternative ways of dispute resolution in advance of the action. According to the Court: "The restrictions that hinder individuals from applying to courts or make decisions of the courts lack meaning, or, to put it another way, that disable the decisions of the courts to a substantial degree may violate the right of access to the courts". The Constitutional Court took this criterion into consideration and adjudged in its decision that mandatory mediation is not contrary to the Constitution.

In Decision No. 2018/82,[62] however, the Constitutional Court assessed the problem in a case filed with a request for the cancellation of mandatory mediation, as regulated in the Law on Labour Courts, with respect to equality, justice, public interest, and principles contrary to the rule in the direction of the fact that judicial authority would be exercised by independent and impartial courts. The Court indicated the following in this assessment:

> "[At the cause of action of mediation,] the mediator, who has a reliable and objective identity, might ensure the conclusion of the process through the observation of equality between the parties in all stages of the dispute resolution process, and when the employee and employer are enabled to resolve the disputes reciprocally in a manner where they can express themselves comfortably at equal levels in circumstances where equality is prioritized, it would not be claimed that the employee would be in a weaker position in the face of the employer and put under pressure… And the resolution of the dispute in a shorter period and at lesser cost while ensuring the satisfaction of both parties and without referring [the dispute] to a judicial authority might prevent the exhaustion of the parties in judgment processes that might take a long period of time, and might decrease the caseloads of the courts and help the judiciary work more effectively and efficiently… However, the institution of mediation has not been regulated in the [MCoCD] as a way of dispute resolution to replace the courts, and it was different from the dispute resolution power held by the courts, and it was not possible to describe mediation, an amicable way of dispute resolution, as a method referring to a judicial activity or competing with the judiciary, and mediation was regulated as a specific dispute resolution method taking place alongside the judicial channels and becoming functional without intervening in the judicial authority…"

61 The Constitutional Court's Decision of 21.01.2014, Basis No. 2014/46, Decision No. 2014/83, published in the Official Gazette bearing the date of 03.06.2015 and No. 29375.

62 The Constitutional Court's Decision of 11.07.2018, Basis No. 2018/178, Decision No. 2018/82, published in the Official Gazette bearing the date of 11.12.2018 and No. 30622.

The court then decided on the dismissal of the request on grounds of the following fact: "The cause of action of mediation was designed to ensure the public interest and there was not any aspect of it contrary to justice, equity criteria, and rule indicating that the judicial authority would be exercised by independent and impartial courts".

III. Basic Substantial Principles of Mandatory Mediation in Turkish Commercial Law

In this study, the basic principles of mandatory mediation in Turkish law shall be analysed within the two categories of "substantial principles" and "procedural principles".

Substantial principles are set out in Article 5/A of the TCC in the nature of special norms:

> "(1) For those commercial disputes whose objective is the payment of a certain amount of money or compensation that are indicated in Article 4 of this Code or in other laws, application to a mediator before proceeding is a cause of action.
>
> (2) The mediator shall finalize the application within six months of his or her assignment date. This period may be extended by a maximum of two weeks by the mediator under unavoidable circumstances".

According to this article, there are two fundamental principles related to the substantial part of mandatory mediation in the field of commercial law. The first of these principles is the principle of "the existence of a commercial case, regulated in Art. 4 of the TCC and other laws", pertaining to the determination of the scope of the cases for which mandatory mediation will be applied. The second one is the principle that limits the actions with respect to the subject of the request included in the scope of mandatory mediation. This second principle is based on the fact that the "legal actions involving compensation and pecuniary claims of which the subject matter is the payment of a certain amount of money, only in commercial cases regulated in Article 4 of the TCC and other laws, will be subject to mandatory mediation".

The principle of "the existence of a commercial case, regulated in Art. 4 of the TCC and other laws" with relation to the determination of the scope of the actions where mandatory mediation will be applied will be explained in the course of this paper. Subsequently, the other principle that limits the commercial cases included within this scope with respect to the subject of the request will be explained.

On the other hand, there is no lex specialis in the TCC specifying principles in relation to the procedure of mandatory mediation. As a consequence, the principles pertaining to the procedure in Article 18/A of the MCoCD and Articles 22-25 of the MCoCD Reg. are characterized as general provisions. The principles pertaining to

the procedure will be explained in forthcoming sections of this study in consideration of Article 18/A of the MCoCD and Articles 22-25 of the MCoCD Reg. bearing the general provisions[63] that are also applicable for mandatory mediation in the field of commercial law.[64]

A. The Principle of the Existence of a Commercial Case Regulated in Art. 4 of the TCC and Other Laws

The provision of the cause of action of mediation in Art. 5/A of the TCC obliges application to mediation in advance of an action in the technical sense. In this context, there is no requirement to apply to mediation obligatorily in advance of this procedure if there is not an action. In other words, there are no requirements to apply to mediation as a cause of action in advance of procedures such as precautionary attachment, interim injunction, or execution for debt because those are not legal actions in the technical sense. Furthermore, non-contentious processes such as these are not among the processes that parties will freely reject at will.[65] For these reasons, the cause of action is not subject to mediation.

In Art. 5/A of the TCC, two separate groups of commercial actions were identified by making a differentiation between commercial actions indicated in Art. 5/A of the TCC arrangement and other laws on the scope of the actions where the mandatory mediation method will be applied as a cause of action in the field of commercial law.

There is legal certainty in Turkish law regarding the kinds of commercial actions taking place within the scope of these groups and there are no important related problems or discussions thereunder. However, there are some controversial matters in relation to the nature of actions subject to mandatory mediation with respect to the quiddity of the subject of the request.[66] In this context, the commercial actions regulated in Art. 4 of the TCC and other laws will primarily be explained in the following text.[67] Subsequently, some explanations will be made regarding actions and discussions related to controversial matters.[68]

63 See Section IV for detailed explanations with regard to the fundamental principles of the procedure.

64 See Section IV.

65 Mehmet Ertan Yardım, "Usul Hukuku Bakımından Ticari Uyuşmazlıklarda Zorunlu Arabuluculuk", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, pp. 89, 96.

66 Ali Paslı, "Ticari İşletme ve Ticaret Şirketleri Bakımından Zorunlu Arabuluculuğun Değerlendirilmesi", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press 2019, p. 24.

67 Paslı (n66), 24.

68 See Section III, C.

1. Art. 4 of the TCC and Commercial Cases Within the Framework of This Article

The system wherein commercial cases are regulated according to Articles 4 and 5 of the TCC does not encompass cases filed in relation to all disputes that are deemed to be commercial in nature. Rather, it is based on the principle of the descriptions of cases requiring the special expertise of only the judge based on the character and subject of the case and the hearing of that same case in a commercial court. This principle was explained under the heading of "Commercial Cases" in Preamble No. III.1.1 of the previous Turkish Commercial Code (PTCC) with the following wording: "Not the matters included in the concept of 'commercial works' from the point of view of the application of the material law but rather only the matters requiring the special expertise of the judge due to their nature and structure have been described as commercial cases…" This preamble sustained its validity with respect to the currently effective TCC.[69]

In consideration of this principle, the cases indicated in Art. 4 of the TCC and other lex specialis cases are absolutely regarded as commercial cases as a requirement of the applicable law irrespective of the identities of the parties and the nature of the work with Art. 4/a-f of the TCC, Art. 154/3 of the Enforcement and Bankruptcy Law (EBL), and Art. 22 of the Law on Commercial Enterprise Pledge (LCEP). Besides this, in order to describe certain disputes as commercial cases, the condition of pertaining to at least one commercial enterprise should be fulfilled (Art. 4/1-c.2 of the TCC). Additionally, in order for a dispute to be considered as a commercial case, there are some circumstances wherein both parties are required to be traders and the dispute to be related to the commercial operations of both parties (Art. 4/1 of the TCC).

It is necessary to indicate within the framework of these explanations where it appears that the concepts of traders and commercial enterprises play a role thereunder rather than the basic concept of commercial work in the description of commercial cases accepted in this regulation of the TCC.[70]

As a requirement of Art. 5 on "courts where commercial cases and ex parte proceedings are heard" and the cases deemed to be commercial cases within the framework of Art. 4 of the TCC, the cases that necessitate being heard in commercial courts are the civil actions to be heard according to the contested judicial (adversarial) provisions. However, ex parte proceedings that are commercial in nature pursuant to the new regulation of the TCC will be heard in commercial courts from then on. It is specifically the civil courts of peace that are competent in ex parte proceedings by Art. 383 of the Legal Procedural Law (LPL). However, since Art. 4 of the TCC

69 Hüseyin Ülgen, Mehmet Helvacı, Abuzer Kendigelen, Arslan Kaya, and Füsun Nomer-Ertan, *Ticari İşletme Hukuku XII*, Levha Press, 2015, p. 116.

70 İbid 116-117.

contains the provision envisaging that ex parte proceedings of a commercial nature will be handled by commercial courts, it will be the Commercial Courts of First Instance that are, from then on, authorized in the event of ex parte proceedings bearing a commercial nature.[71]

The commercial cases regulated in Art. 4 of the TCC are divided into two groups as absolute commercial cases and relative commercial cases according to their basic characteristics. In this context, the commercial cases regulated in Art. 5/A-1 will be systematically divided in the following subsections into the three groups of absolute commercial cases, relative commercial cases, and cases that are regarded as commercial cases providing a relation to any commercial enterprise.

a) Absolute Commercial Cases

The absolute commercial cases in Art. 4 of the TCC are regulated in a numerus clausus manner, being listed one by one in Art. 4/1-a-f. The absolute nature of these cases arises from the fact that they are deemed commercial disputes irrespective of whether or not they are related to a commercial enterprise, whether the parties are merchants or not, and the subject of the dispute. Correspondingly, they are accepted as a requirement of the law. According to the general legal reasoning of the PTCC, absolute commercial cases "are specific to the essence of commercial life and indicate a separate expertise status…" Apart from the acceptance of disputes regulated in the TCC as absolute commercial cases from a legal point of view, as a result of the relation of the selected examples with the economic order and credit system as well as their close connection with competition law and relevant systems, entrepreneurship being an indispensable factor of commerce, it is understood more or less that they have probably been selected due to their connections with the essence of commerce.[72]

There are a total of seven types of absolute commercial cases regulated in Art. 4/1-a-f of the TCC as described below.

i) Civil Cases Arising from the Matters Stipulated in the TCC

All civil cases regulated in the TCC have been regarded as absolute commercial cases. From the point of view of these cases, it is not taken into consideration whether the parties are traders, the dispute is related to a commercial enterprise, or the source of the receivable or debt has arisen from a contract, a tortious act, or unjust enrichment. In other words, these cases are accepted as commercial cases as a requirement of the applicable law in terms of their characteristics without taking any other criterion into consideration. For instance, a dispute pertaining to a promissory note issued by

71 İbid 117.

72 İbid 118.

an officer will constitute the subject of a commercial case. Again, since the subject matter referring to the responsibility of the board of directors, managers, and directors of a joint stock company is regulated in Art. 553 of the TCC, cases pertaining to such matters will directly constitute commercial cases without requiring any other criterion or assessment such as the relationship to and between the partnership and managers with reference to a service or a proxy agreement.[73]

ii) Civil Cases Arising from the Matters Regulated in Articles 962-969 of the Civil Code on Those Who Engage in Lending on Pawn

Civil actions arising from the matters regulated in Articles 962-969 of the Civil Code in relation to lending on pawn are regarded as commercial cases without the requirement of taking into consideration other criteria such as the status of the parties (whether they are traders or not) in the event that the dispute is related to a commercial company. The acceptance of these types of disputes as absolute commercial cases is based on consideration of the fact that the activity can only be conducted by a commercial company and resolution of the disputes arising from lending relationships requires expertise.[74]

iii) Lawsuits Indicated in Art. 4/1-c of the TCC in Relation to Certain Matters Regulated in the Code of Obligations

Certain circumstances indicated in Art. 4/1-c of the TCC and the Code of Obligations are regarded as absolute commercial cases without seeking any conditions of the status of the parties (whether they are traders or not) or their connections with a commercial company. There are six of these circumstances regulated in the Code of Obligations:

1) Civil Cases Arising from the Matters Regulated in Articles 202-203 of the Code of Obligations on the Takeover of an Asset or an Enterprise and Mergers and Conversions of Enterprises:

> Principles in relation to the takeover of an asset or an enterprise and mergers and conversions of commercial enterprises are regulated in Articles 202-203 of the Code of Obligations. The principles pertaining to mergers and conversions of commercial companies, however, are regulated in Article 136 of the TCC and in the subsequent section. In light of this, disputes pertaining to mergers, takeovers, and conversions within the scope of Articles 202-203 of the Code of Obligations are regarded as absolute commercial cases as a requirement of the provision of Art. 4/1-c of the TCC. Disputes pertaining to merger and takeover procedures taking place within the scope of Art 136 of the TCC and the subsequent section, however, are requirements of the provision of Art 4/1-a of the TCC.

73 Supreme Court Assembly of Civil Chambers, 1004/774, 07.11.2001, http://www.lexpera.com.tr (01.04.2020).

74 Hayri Domaniç and Erol Ulusoy, *Ticaret Hukukunun Genel Esasları*, Yetkin Press, 2007, p. 22.

2) Civil Cases Arising from the Matters Regulated in Articles 444 and 447 of the Code of Obligations Pertaining to Non-Competition:

The principles pertaining to non-competition in the period after the expiration of a service contract are regulated in Articles 444 and 447 of the Code of Obligations. With these regulations, the lawmaker regards disputes pertaining to post-contract non-competition agreements as absolute commercial cases in an accurate manner in accordance with the main theme of the regulation pertaining to commercial cases, having deemed it subject matter specific to the essence of commercial life, the economic freedom of the individual, and his or her involvement in the trade system.[75] The Court of Cassation regarded disputes pertaining to the non-competition in the period following the expiration of a service or employment contract pertaining thereto as absolute commercial cases and resolved that the commercial courts were the legal competent bodies for them.[76] This decision is related to non-competition after the expiration of a service contract. Disputes arising from the violation of the right of monopoly and non-competition pertaining to the post-contract period are heard in labour courts.[77] On the other hand, it is necessary to emphasize that Articles 444 and 447 pertaining to service contracts will be applied for the sub-types of service contracts.[78] For instance, non-competition after the expiration of a marketer's contract is subject to these regulations based on the references of Art. 469 of the Code of Obligations.[79] .

3) Civil Actions Arising from the Matters Regulated in Articles 487-501 of the Code of Obligations Pertaining to Publishing Contracts:

A publishing contract, in the most general sense, refers to the introduction of a work by way of reproduction and putting the same on the market. The opinion that publishing is a commercial enterprise activity constitutes the basis for the acceptance of cases regarding disputes pertaining to publishing contracts as absolute commercial cases.[80]

According to Art. 4/1-c of the TCC, cases arising from rights regarding literary and artistic works can only be accepted as absolute commercial cases provided that they are related to a commercial enterprise. For instance, a full or a simple license for the exercise of the right of reproduction and/or dissemination by the author can only be the subject of an absolute commercial case provided that it is related to a commercial enterprise. On the other hand, the case of a publishing contract by and between the author and publisher will be regarded as an absolute commercial case even if it does not have any connection with a commercial enterprise. To clarify this matter with an example, the case or action arising from a contract regarding only the reproduction of a work and executed by and between a trader that operates for the relevant printing

75 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 119-120.

76 The 11th Civil Chamber of the Supreme Court of Appeals: 12067/3392, 07.03.2013, *BATİDER*, Vol. 28, Iss. 2, 2013, pp. 326-327; Erdoğan Moroğlu and Abuzer Kendigelen, *İçtihatlı Notlu Türk Ticaret Kanunu ve İlgili Mevzuat*, Vedat Press, 2014, p. 20.

77 Yarg. HGK, 9-517/566, 22.09.2008, *Journal of Supreme Court's [Yargıtay] Decisions*, *YKD*, Vol. 35, Iss. 8, 2009, pp. 1481-1482.

78 Yarg. HGK, 9-854/202, 27.02.2013; Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 120.

79 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 120.

80 Sabih Arkan, *Ticari İşletme Hukuku AÜBTİHE*, İş Bankası Vakfı Press, 2020, p. 99.

house and the author will be regarded as a commercial case. However, since actions for the prevention of (ref davası), for actio negatoria, or for damages are not related to any commercial enterprise, they will not be accepted as commercial cases.[81]

4) Civil Actions Arising from the Matters Regulated in Articles 515-519 of the Code of Obligations Regulating Letters of Credit and Orders of Credit:

Letters of credit and orders of credit entail the granting of a certain amount of money or an order for the provision of the same as a loan (or credit), being, in a broad sense, however, a remittance. A letter of credit is a document that contains the letter of authorization of its sender on granting/lending money or any other similar items and it makes a request of a certain person (i.e. the holder of the letter) who will benefit from the letter of credit with or without determining an upper limit for the addressee upon issuance of such a letter. A letter of credit is subject to the provisions of the proxy agreement and the transfer of money. In an order of credit, however, there is a person giving the credit order (superior), a person who is given the order (officer), and a third party to whom the payment will be made. In this case, while the officer grants the loan for the third party and on account of him, the superior becomes responsible for this credit, like a guarantor.[82] Cases involving disputes in relation to these procedures are regarded as commercial cases due to the fact that said procedures are specific to commercial activities and related to the essence of commercial life.[83]

5) Civil Actions Arising from the Matters Regulated in Articles 532-545 of the Code of Obligations in Relation to Commission Agreements:

Cases regarding movable assets and negotiable instruments (securities) within the framework of Articles 532-545 of the Code of Obligations and arising from the brokerage of commercial activities have been regarded as commercial cases on the grounds that they are related to commercial life. On the other hand, disputes within the scope of Art. 546 wherein principles pertaining to other commission works are regulated were not deemed as commercial actions.

On the contrary, another activity accepted within the scope of other commission works apart from brokerage in commercial occupations or activities is transportation brokerage. Transportation brokerage is regulated in Article 917 and the subsequent articles of the TCC and it is regarded as a commercial case as a requirement of the provision of Art. 4/1-a. Furthermore, a referral has already been made to this article as follows: "The special provisions on transportation brokerage in Art. 546/3 of the Code of Obligations are reserved".[84]

6) Civil Actions Arising from the Matters Regulated in Articles 547-554 of the Code of Obligations Envisaged for Commercial Representatives, Commercial Proxies, and Other Assistant Traders:

81 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 120-121.

82 İbid 121.

83 İbid 121.

84 İbid 121

> Civil actions arising from the matters regulated in Articles 547-554 of the Code of Obligations involving commercial representatives and other commercial agents are also regarded as absolute commercial cases. However, notwithstanding that the principles pertaining to marketing contracts are regulated in Articles 460-466, cases pertaining to marketing contracts are not regarded as absolute commercial case.[85]

iv) Civil Actions Arising from the Matters Legislated in the Regulation Related to the Law on Intellectual and Industrial Property Rights

It was stated in Art. 4/d of the TCC that actions pertaining to disputes arising from the regulation regarding intellectual property are commercial cases. However, the acceptance of cases arising from disputes pertaining to artistic and intellectual works within the framework of this regulation as absolute commercial cases is stipulated on the condition that they must be related to at least one commercial enterprise (Art. 4/1, Sentence 2 of the TCC). There are two main laws in Turkish law within the scope of the regulation wherein intellectual and industrial property rights are legislated.

The first of these two laws is the Law on Intellectual and Artistic Works (LIAW).[86] Within the scope of this law, the following is indicated in the Annex, 21.02.2001 - 4630/2, Art. 1/A: "The tangible and intangible rights to the products of authors who produce intellectual and artistic works and artists who perform or read these works, the phonogram producers making the first fixation of a voice activity, and producers who make the first fixations of films as well as the radio and television organizations and the principles and procedures of disposition pertaining to such rights, judicial remedies, and measures are under the authorization and responsibility of the Ministry of Culture".

The second of these laws, dated 22.12.2016, is the Industrial Property Law (IPL). It pertains to the following: "Applications for traditional product names, trademarks, geographical indications, industrial designs, patents, utility models, registrations and post-registration procedures, and legal and penal measures for the violation of rights" (Art. 1/2 of the IPL[87]).

Cases pertaining to disputes included in the scope of the LIAW can only be regarded as commercial cases provided that they are related to a commercial enterprise (Art. 4/1, c-2 of the TCC). Cases related to disputes included in the scope of the IPL, however, are directly regarded as commercial cases without the need of any condition as a requirement of the provision of Art. 4/1, c-1 of the TCC.

It is necessary to indicate that the courts having competency with respect to disputes included in the scope of these laws are the penal courts or civil courts for

85 İbid 122.

86 5846, 05.12.1951 (OJ, 13.12.1951/7981).

87 6769, 22.12.2016 (OJ, 10.01.2017/29944).

intellectual and industrial rights established as specialized courts within the scope of these fields. In the event that no Court on Intellectual and Industrial Property Rights is established, the cases that fall under the competence of these courts will be handled by the Civil Courts of First Instance on duty at that place (Art. 156/1 of the IPL; Art. 76/1 of the LIAW).

In the face of this circumstance, parallelism is required between Art. 4 of the TCC and Art. 156/1 of the IPL and also Art. 76/1 of the LIAW with respect to the courts having competency to handle the disputes included in the scope of Art. 4 of the TCC. However, notwithstanding that the existing regulations are regarded to be worthy of criticism, an assessment is made in the doctrine indicating that the handling of disputes related to intellectual and property rights in Courts of Intellectual and Industrial Rights will not eliminate the nature of these cases as commercial cases.[88]

v) Civil Actions Arising from the Matters Stipulated in Lex Specialis Pertaining to Stock Exchanges, Exhibitions, Fairs, and Markets As Well As Warehouses and Other Places Specific to Trade

Civil actions arising from lex specialis in relation to stock exchanges, exhibitions, fairs, and markets as well as warehouses and other places specific to trade are regarded as absolute commercial cases in Art. 4/1-e of the TCC. For instance, liability cases that may be filed in disfavour of general store operators that may involve places specific to trade and authorized to issue warehouse receipts and warehouse warrants against goods granted upon them are also in the nature of absolute commercial cases. Likewise, cases arising from the provisions regulating the stock exchange are commercial cases and commercial courts have competency in the resolution of the disputes therein.[89]

vi) Civil Actions Stipulated in the Regulations Pertaining to Banks, Other Credit Institutions, Financial Institutions, and Lending Procedures

The scope of Art. 4/1-f of the TCC containing the provision indicating that civil actions envisaged in the regulations pertaining to banks, other credit institutions, financial institutions, and lending procedures were absolute commercial cases was extended in comparison with the regulation with the corresponding provision in the previous commercial code. It is indicated in the preamble of the article regarding the reasoning for this extension that under the current circumstances, institutions in the finance sector did not consist only of banks and establishments that engaged in lending money. Therefore, the phrase "…to other loan organizations, financial institutions…"

88 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 122.

89 İbid 123.

was added to the regulation in accordance with the realities and developments of the finance sector. Various financial institutions, mainly including financial leasing, factoring and finance institutions, forfaiting companies, and so on, were thus included in the scope of the regulation. In Turkish law, financial leasing, factoring, and finance institutions are regulated within the scope of Law No. 6361 on Financial Leasing, Factoring, and Finance Companies, bearing the date of 21.12.2012. In this context, cases involving disputes pertaining to establishments regulated within the scope of this law are subject thereto in the nature of commercial cases.[90]

The following provision is indicated in Art. 142/1 of Banking Law No. 5411 in parallel to Law No. 6361: "Any civil action that may be instituted by a fund, fund banks, and the bankruptcy and liquidation offices of the banks whose operating permission has been revoked shall be heard by the Commercial Courts of First Instance" (Art. 142/1 of the Banking Law). In the event that there is more than one Commercial Court of First Instance in a locality where these actions are heard, these actions shall be heard by the No. 1 or 2 Commercial Courts of First Instance. Again, the civil actions to be filed by banks, savings deposits insurance funds, and bankruptcy divisions of the banks in disfavour of the persons and bankruptcy cases in disfavour of the debtors shall be heard by the No. 1 or 2 Commercial Courts of First Instance (Art. 142/2 of the Banking Law).[91]

It is particularly necessary to indicate here that disputes in relation to the withdrawal of deposit moneys deposited in banks pursuant to this regulation will also be heard by Commercial Courts of First Instance as absolute commercial cases irrespective of whether the depositor related thereto bears the status of a trader or not.[92]

It has been adjudged by the Supreme Court of Appeals that cases related to disputes regarding consumer credits will be handled by Commercial Courts of First Instance.[93] It is asserted in the doctrine[94] that it is also possible to accept the precedent judgment belonging to the period of the previous Law on the Protection of Consumers from the point of view of the Law on the Protection of Consumers currently in force.

vii) Actions Regarded As Absolute Commercial Cases Due To Requirements of Lex Specialis in Other Laws Apart from the LLC

Absolute commercial cases (actions) are not limited only by the cases listed and indicated in Art. 4/I, a-f of the TCC. All or some of the disputes arising from

90 İbid 123.

91 Yarg. 13.HD, 04.07.2013,8530/10378; Moroğlu and Kendigelen (n76), 19; *YKD*, Vol. 1, Iss. 1, 2009, pp. 167, 148, 149.

92 Yarg. 13.HD, 04.07.2013, S. 18042/18586. For more on this decision, see Moroğlu and Kendigelen (n76), 17.

93 Yarg. 11.HD, 02.04.2002, S. 10784/3037, *BATİDER*, Vol. 22, Iss. 3, 2004, pp. 235-237; Moroğlu and Kendigelen (n76), 17.

94 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 123.

laws with special provisions not included in the scope of the TCC are regarded as commercial disputes.[95] In these regulations, a description was made in some, stating that commercial disputes are subject to commercial cases. At other points, however, it was indicated that along with the aforementioned point the commercial courts have jurisdiction for the resolution of these disputes. Explicit provisions are indicated without any descriptions regarding the dispute being the subject of a commercial case in relation to the fact that the commercial courts have absolute jurisdiction for the resolution of the dispute.[96] For instance, the commercial courts serving the location at which the procedure centre of the debtor is located have jurisdiction for bankruptcy cases (Art. 154/3 of the EBL). Likewise, it is explicitly indicated in Art. 22 of the LCEP that commercial courts serving the location at which the trade registry exists shall have the jurisdiction to handle disputes arising from the enforcement or upholding of this law. On the other hand, in some other laws, it is directly stated without additionally indicating that commercial courts have jurisdiction for the case in question that it is a commercial case. For instance, the provision indicated in Art. 99 of the Cooperatives Law states that civil actions arising from the matters regulated in that law would be deemed commercial cases without consideration of whether the parties are traders or not. It is clear in all of these examples that the mentioned disputes are regarded as commercial disputes. In this context, the Commercial Courts of First Instance are authorized and have jurisdiction for handling all commercial cases pursuant to the provision of Art. 5/1 of the TCC irrespective of consideration of the value and number of case subjects unless there is any provision otherwise.[97]

In the face of these explanations, it is clear that the nature of commercial cases as absolute commercial cases regulated by laws apart from the TCC remain within the scope of these examples and theoretical explanations pertaining to such examples are arising.

b) Actions Regarded as Commercial Cases Provided a Connection with a Commercial Enterprise

The acceptance of disputes arising from remittance in Art. 4/f-c2 of the TCC remittance procedure regulated in Articles 555-560 of the Law of Obligations and also from safekeeping contracts as regulated in Articles 561-580 of the Law of Obligations has been stipulated as dependent on their relations to commercial enterprises, as well as disputes arising from rights pertaining to intellectual and artistic works (LIAW) as commercial cases.[98]

95 İbid 124.

96 İbid 124.

97 İbid 124.

98 İbid 125.

In Turkish law, the rights regarding intellectual and artistic works are regulated in the LIAW, No. 5846. For the acceptance of disputes arising from this law as commercial disputes, it is necessary for the dispute to be related to a commercial enterprise. At this point, it is necessary to recall Art. 4/1-c of the TCC in relation to publishing contracts. Namely, disputes arising from publishing contracts will be regarded as absolute commercial cases as a requirement of Art. 4/1-c irrespective of the statuses of the parties and whether they are related to a commercial enterprise or not. The cases in which disputes pertaining to rights in relation to publishing contracts may be subject thereto, however, will directly be deemed absolute commercial cases as a requirement of Art. 4/1-c irrespective of the statuses of the parties and whether they are related to a commercial enterprise.[99]

c) Relative Commercial Cases

For the acceptance of the commercial cases indicated above, with an explicit indication, absolute commercial cases and cases remaining outside the scope of cases for which disputes included in the LIAW and remittance and contract of mandate (actio depositi) are subject thereto and included in the LIAW, provided that they are related to a commercial enterprise as commercial cases, it is necessary for both sides of the dispute in question to be traders and for the dispute to be related to the commercial enterprises of both parties. Cases within this scope are referred to as relative commercial cases.[100]

This matter had been regulated with the following wording in the preamble of the TCC: "Civil actions arising from the matters deemed as commercial for both sides" will be regarded as commercial cases as a requirement of the first paragraph of Article 21 in a manner that shall create confusion in the provision of Art. 4/I of the PTCC".[101] The attribution that was made in Art. 21 of the PTCC and subsequently criticized in the doctrine in unanimity is not included in Art. 4 of the TCC. By this means, a more explicit regulation was included. Thus, the criteria used in determining relative commercial cases are terms of the fact that "the parties will have trader statuses" and "disputes will be related to their commercial enterprises". In this context, following the entry of the TCC into force, it is explicitly clear that any disputes arising from various contracts such as sales, borrowing, services, exceptions, and so on being related to the commercial enterprise of only one of the parties will not be regarded as commercial cases even if both sides are traders. Thus, in determining relative commercial cases, the point that has to be taken into consideration as a criterion is not the commercial affairs but rather the status of the trader(s) and its connection with the commercial enterprises of the parties.[102]

99 İbid 125.

100 İbid 125.

101 Preamble of Art. 4 of the TCC, No. 6102.

102 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126.

However, it is necessary to indicate that this case is specific to real person traders. This is because it is essential that the debts of the trader are commercial in nature. To prove the contrary of this presumption is only possible from the point of view of real person traders.[103] That is to say, while the real person trader makes a legal transaction, if the opposite party indicates that the transaction has nothing to do with the trader's commercial enterprise or the subject matter is not relevant for the transaction to be regarded as commercial, then the opposite of the aforementioned presumption will be proved and the legal transaction will not be commercial in nature. However, this opportunity, namely the opportunity to prove the contrary of the presumption, is not available with respect to legal person traders. In this context, all debts made by legal person traders are regarded as commercial in nature. Therefore, if any of the parties of the transaction are legal person traders, then it will be sufficient to make an assessment only for the other party of the transaction.[104]

This principle for acceptance in relation to the stipulation of the fact that both parties are traders and the dispute subject to the case is related to the commercial enterprises of both parties as a commercial case is not specific to disputes arising only from contractual relationships. In disputes arising from any tortious act, relevant cases are regarded as commercial cases, provided that both parties are traders and the dispute is related to the commercial enterprises of both parties. For instance, the action for damages filed as a result of the crashing of a vehicle allocated to the commercial enterprise of A and belonging to A into a property where glassware products are sold and belonging to B, a trader, is a commercial case.[105]

On the other hand, for unfair competition based on a tortious act, according to the TCC, disputes arising from some circumstances such as collusion are commercial cases by nature as a requirement of the applicable law. Under these circumstances, for the assessment of whether the action is a commercial case or not, it is furthermore necessary to seek relative criteria pertaining to relative commercial cases.[106]

Reference is made not only to the commercial cases regulated by the TCC but additionally to other commercial cases regulated by other laws beyond the TCC for the requirement of the method of mediation as a cause of action in Art. 5/A-1 of the TCC. In this context, it is necessary to apply to the method of mediation as a cause of action with respect to commercial cases as regulated in both the TCC and other laws apart from the TCC.

103 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126.

104 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126; Bahtiyar (n102), 53-54.

105 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 126.

106 Yarg. 11. H.D., 12834/5560 06.04.2012; Moroğlu and Kendigelen (n76), 20.

d) As a Requirement of Special Provisions in Commercial Cases by the TCC Considering the Problem of Whether Cases For Which Courts Other Than Commercial Courts of First Instance Have Jurisdiction Are Subject to Mandatory Mediation, and Evaluations Made with Relation to This Problem

In Turkish law, one of the main legal problems pertaining to the determination of cases subject to mandatory mediation within the framework of Art. 5/A of the TCC is as follows: at the basis of the principle containing the provision in Art. 5/I of the TCC stating that "unless there is any provision on the contrary, the Commercial Court of First Instance has the jurisdiction to handle all commercial cases and any non-contentious procedures of commercial nature without consideration of the value or amount of the matter subject to the legal action thereunder", the courts having jurisdiction in all cases determined as commercial cases by Art. 4 of the TCC or other laws are not only the Commercial Courts of First Instance. Some of these cases may be heard in specially designated courts such as consumer courts, courts for intellectual and industrial rights, and so on, within the framework of special provisions as contained in Art. 5/I of the TCC.

For instance, according to Art. 83 of Law No. 6502 on the Protection of the Consumer, the existence of regulations in other laws pertaining to transactions where one of the parties is a consumer will not preclude this transaction from being regarded as a consumer transaction or the application of the provisions of the law pertaining to the duty and authorization therein. Actions where disputes are subject to credit card contracts falling within the framework of this regulation are heard in consumer courts although they are regarded as absolute commercial cases within the framework of Art. 4 of the TCC. More explicitly, it must be asked whether the cases heard in courts with special authority or jurisdiction under such circumstances will lose or not lose their nature as commercial cases on the grounds that they were not heard by a Commercial Court of First Instance.[107] In this context, will these cases that are heard in courts with special authority be subject to mandatory mediation or not as a cause of action within the framework of Art. 5/A?

Some authors asserted within the doctrine of Turkish law that the mentioned cases handled in these courts with special authority do not lose their nature as commercial cases, and in this context, there is a condition to apply to mandatory mediation in advance of filing the case within the framework of Art. 5/A.[108] The main reasons constituting the basis of this opinion are as follows.[109] First, the essential condition for the application of Art. 5/A of the TCC is the existence of a commercial case. In this context, all absolute and relative commercial cases indicated in Art. 5/A of the

107 Yarg. 11. HD, 12871/735 13.02.2017; Yarg. 11. HD, 4399/2911.15.05.2017; Kazancı İçtihat Automation System, htttp://www.kazanci.com.tr (01.08.2020).

108 Paslı (n66), 15-17; İlker Koçyiğit and Alper Bulur, *Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk*, ARCS Press, 2019, p. 126.

109 Koçyiğit and Bulur (n109), 126.

TCC are included in this scope. For this, there is no absolute condition thereunder for handling cases in a Commercial Court of First Instance. The handling of the same case in a different court with special authority will not change the commercial nature of the case. One of the results of said case being a commercial case is that the Commercial Court of First Instance has jurisdiction over it. However, this result is not absolute. As indicated above, it is also possible for such a case to be tried in courts with special authority such as consumer courts or civil courts of intellectual and industrial rights. Under these circumstances, the application to mandatory mediation as a cause of action, which is another possible result of a case being a commercial case, will not disappear. Thus, when the results of regarding the case as a commercial case in advance of mandatory mediation are that the Commercial Court of First Instance has jurisdiction over it and that the conditions of special courts are applied, an additional result is application to mandatory mediation. For these reasons, it is sufficient in Turkish law for a case to bear the nature of a commercial case for application to mandatory mediation; the condition for the Commercial Court of First Instance having jurisdiction over the foregoing will not additionally be sought. In the same context, the TCC will continue to be applied as general provisions in the settlement of disputes under these circumstances. For instance, commercial books will be used as evidence if relevant conditions exist (Art. 222 of the LPL). In conclusion, mandatory mediation will be applied as a cause of action as well (Art. 5/A of the TCC; Art. 18/A of the Law on Mediation in Legal Disputes).[110]

On the other hand, as a requirement of special provisions, it is asserted in the doctrine as a contrary opinion that in circumstances where a court other than Commercial Courts of First Instance, such as a consumer court or civil court on intellectual and industrial rights, has jurisdiction in commercial disputes, the nature of actions as commercial cases would disappear and, in this context, the regulation on mediation as a cause of action in Art. 5/A of the TCC could not be applied.[111]

The opposite view is explained by taking the result of a case qualifying as a commercial case into consideration before all else. Namely, the basic conclusion of a case qualifying as a commercial case is that the case be included in the field of the authorization of the Commercial Court of First Instance. It is clearly regulated in Art. 5/I of the TCC that Civil Courts of First Instance have authorization for commercial cases. The provisions pertaining to the field of authorization of consumer courts and intellectual and industrial civil courts bear the nature of special provisions according to Art. 5/I of the TCC.[112]

110 Koçyiğit and Bulur (n109), 126.

111 Mehmet Ertan Yardım, "Ticari Uyuşmazlıklarda Zorunlu Arabuluculuğa Başvuru", in Faculty of Law of Kadir Has University, Ceyda Süral-Efeçınar and Ertan Yardım (Eds.), *Ticari Uyuşmazlıklarda Arabuluculuk Sempozyumu*, Seçkin Press, 2019, p. 98; Tanrıver (n2), 119.

112 Yardım (n112), 98; Mehmet Bahtiyar and Levent Biçer, "Adi İş/Ticari İş/Tüketici İşlemi Ayrımı ve Bu Ayrımın Önemi", in *Prof. Dr. Cevdet Yavuz'a Armağan*, Legal Press, 2012, p. 424.

In light of these explanations, it is concluded that the basic consequence of a case being deemed a commercial case is that the said case is heard by a commercial court, and on the grounds that this result has not occurred in cases handled in consumer courts or courts with special authority, it is not possible to describe the cases handled in courts with special authority as commercial cases.[113] With respect to these cases, it is concluded that the stipulation to apply to mediation as a cause of action is not available within the framework of Art. 5/A.

In practice, however, it was mentioned in a decision of a regional court of justice in parallel to this opinion that it is not correct to describe a case heard by a consumer court as a commercial case with relation to the dispute arising from the failure to make a credit card payment. Furthermore, it is not necessary to apply to mediation as a cause of action.[114]

In our opinion, to put it explicitly, under circumstances where the court of duty for commercial cases may be a court other than the Commercial Court of First Instance, such as a consumer court or court of intellectual and industrial rights, as a requirement of special provisions, it will be more accurate with relation to the mentioned legal problem to commence a search for the objective that the lawmaker wants to protect with an arrangement according to the commercial case concept, not from the point of view of legal consequences related to the commercial case concept within the TCC for the resolution of the problem of whether the condition for mandatory mediation is present as a requirement of the provision of Art. 5/A in this

113 Yarg. 11 HD, 12871/735 13.02.2017; Yarg. 11 HD, 4399/2911.15.05.2017; Kazancı İçtihat Automation System, htttp://www.kazanci.com.tr (01.08.2020).

114 "It is erroneous for the Court to assess Articles 4 and 5 of the TCC and define the fact that it was necessary to apply Art. 18/A-2 of MCoCD No. 6325 on the grounds that the case was a commercial case. This is because after it has been determined in Art. 4 of TCC No. 6102 which works will be defined as commercial cases in Art. 4 of TCC No. 6102, it is indicated that the relationship between the Commercial Court of First Instance and the Civil Court of First Instance and other civil courts is a relationship of duty after having determined which courts would handle such matters in the capacity of a commercial court and also the establishment of commercial courts in Article 5 of said law. It is possible to gather commercial cases within three groups of absolute commercial cases, relative commercial cases, and cases of a commercial nature although related to only one commercial enterprise… Unless these conditions are all present together, the subject matter of the dispute being of the nature of a commercial work or regarded as a commercial work for the other party as a result of a commercial work presumption would not be sufficient to consider the case as a commercial case. Pursuant to the provision of Art. 19/2 of TCC No. 6102, considering a work that is regarded as a commercial work for one of the parties as a commercial work for the other party will not make the nature of the case commercial. This is because the TCC has determined commercial cases according to the commercial enterprise basis, not according to a commercial basis apart from cases regarded as commercial cases as a requirement of the applicable law. Under these circumstances, the commercial nature of the case does not bring the case the nature of a commercial case… In the concrete event it has been understood from the entire scope of the file that the case filed by the plaintiff bank in disfavour of the defendant's side for the collection of its unpaid receivable having arisen from a loan contract pertaining thereto was a consumer procedure and not a commercial case. To put it another way, the assessment of the case between the parties by the court as a commercial case pursuant to the provision of Art. 4/f of the TCC is erroneous… While it was necessary to make a decision of dismissal on a procedural basis as a result of the absence of the cause of action as a requirement of the provision of Art. 18/A-2 of the MCoCD only in action for damages and commercial disputes and since it has been understood that a party of the pending case is a consumer and that the law to be applicable in consumer disputes is Law No. 6502 and it will not be accurate to define this dispute as a commercial dispute, and while it was necessary for the court to examine the basis of the work and then resolve upon its conclusion, the decision made in the direction of the dismissal of the case on a procedural basis as a result of the unavailability of the cause of action in adverse opinions has been found contrary to the procedure and the applicable law". Istanbul BAM; 19 HD, 11.04.2019, Basis No. 2019/1062, Decision No. 2020/937. For the decision text, see http:/https:///www.lexpera.com.tr (08.01. 2020).

context and whether the commercial case nature of these cases will disappear. This is because the opinion within the framework of the logic presented with respect to the possibility of not being a criterion with regard to the determination of the commercial case concept of the principle containing the provision of Art. 5/I with regard to the fact that the Commercial Courts of First Instance have authorization will lead to an erroneous conclusion with the elimination of the criteria determining the concept. It is possible to clarify our opinion, which depends on the resolution of the problem, by taking the commencement of the point of the objective of the regulation regarding the Commercial Courts of First Instance having authorization as a basis in Art. 5/I and determining the criteria of the commercial case concept as follows: It has been specified in Articles 4-5 of the TCC according to the principle not for the cases filed in relation to all disputes arising from the matters regarded as commercial affairs but rather cases requiring the expertise of the judge due to their nature and subject matter and the handling of the these cases in commercial courts. This principle is explicitly indicated in the preamble of the PTCC with the following expression: "…under the title of 'Commercial Cases' … not all subject matters included in the concept of 'commercial affairs' from the point of view of the application of substantive law but rather only the subject matters that require the personal expertise of the judge due to their nature and structure have been classified as commercial cases…" This preamble maintains its validity with respect to the TCC that is in force.[115]

Again starting from this principle, the cases stated in Art. 4 of the TCC and indicated in some private laws are regarded as commercial cases on an absolute basis as a requirement of the applicable law irrespective of the identities of the parties and the nature of the matter. This includes Art. 4/I, a-f of the TCC, Art. 154/3 of the EBL, and Art. 2 of the LCEP. Apart from this, to qualify the cases pertaining to certain disputes as commercial cases, the condition to entail a commercial enterprise has been sought with the final sentence of Art 4/I-f of the TCC. There are also circumstances therein whereby the conditions for the dispute to be related to the commercial enterprise of each party for the handling of a dispute within the scope of a commercial case are sought.[116]

In Art. 5/A of the TCC, however, the application to mediation as a cause of action is stipulated only in terms of being a commercial case; for this, no stipulation for the Commercial Court of First Instance to have jurisdiction is sought on an additional basis.

Within the framework of all of these points, it is possible to make two main inferences, one negative and the other positive in nature, by taking the explanation regarding the objective in the preamble and in Articles 4-5 of the TCC in relation

115 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 116.

116 Ülgen, Helvacı, Kendigelen, Kaya, and Nomer-Ertan (n69), 116.

to the determining criterion or criteria of the concept of commercial cases within the TCC. With respect to the negative inference, from the aforementioned points, it is understood on an explicit basis that the concepts of traders and commercial enterprises play a role rather than "commercial affairs" in the "commercial case" description (Art. 4/I, f, final sentence). However, this inference does not offer a clear determining criterion with respect to the description of a commercial case. More explicitly, the wording of Art. 4 of the TCC does not have any clarification regarding the relationship present for this matter with a commercial enterprise in any manner or for the description of commercial cases according to the trader status of the parties. On the other hand, the statement in the LREC's preamble regarding "not all matters being included in 'commercial affairs' with respect to the application of the substantive law" offers clear data regarding the fact that the concept of commercial affairs does not constitute a determining criterion in the description of commercial cases. In this context, the circumstances wherein the affair constituting the subject matter of the dispute is not a commercial affair but rather a consumer affair will not constitute an obstacle for the determination of the case as a commercial case.

Turning to the positive inference, the statement in the preamble that "the subject matters requiring the special expertise of the judge only as of their nature and structure are categorized as commercial cases" offers a very clear and explicit fundamental criterion regarding the willpower of the lawmaker in the description of commercial cases. Pursuant to this, the question of how to determine the issues that require the special expertise of the judge arise. In this context, it may be asserted that the said criterion is not explicit or clear. For this determination, the expression in Art. 5/I of the TCC that "unless there is a provision otherwise" will make a helpful contribution in this respect. Circumstances such as consumer procedures or intellectual and industrial rights requiring more special expertise of the judge in comparison to general commercial cases will be indicated as a matter of fact in the legal regulations pertaining thereto. In other words, it is necessary for the lawmaker to give an answer to the aforementioned question in such a legal regulation as a contrary provision.

The regulation of the fact that commercial cases may be handled in the Commercial Court of First Instance, however, comes forth as a natural result of being connected to the concept of commercial cases in the direction of the objective again in the preamble (Art. 5/I of the TCC). More explicitly, the court in which the judge having expertise to handle commercial cases is present is stated in Art. 5/I. However, the wording of "unless there is any provision otherwise" found in the introductory part of the same regulation means that this result is not absolute and the authorization of the Commercial Court of First Instance in the description of commercial cases is not a determining criterion. There may be some circumstances wherein judges who

have more expertise in comparison to the Commercial Court of First Instance may be required in parallel to the same main objective. Consequently, the lawmaker here has envisaged disputes pertaining to more special fields in comparison to the expertise that the judge of the Commercial Court of First Instance may have according to the following principle: "…the description of the subject matters that require the special expertise of the judge due to their nature and structure as commercial cases…unless there is any provision otherwise…"

In the face of this circumstance, the designation of the courts other than the Commercial Court of First Instance where judges who have special expertise thereon are available in the said field as a requirement of special provisions for some commercial cases with respect to the resolution of the legal matter in question will not eliminate the commercial case nature of the cases. On the contrary, it will consolidate it further. As a consequence, it will not constitute any contradiction with the will put forth by the lawmaker within the context of the TCC. On the contrary, it is in conformity with that will.

In response to criticism indicating that not all legal results related to commercial cases put forth by the authors[117] defending the opposite opinion were valid in cases where special courts have authorization and that, for this reason, the said cases would not be described as commercial cases, it is necessary to emphasize that the lawmaker has never taken a principle in the description of commercial cases indicating that the Commercial Court of First Instance has authorization under any circumstances whatsoever related to commercial cases, or the legal result as a criterion, and it is not possible to make any inferences from the wording or from the objective of the TCC. For the application of the mediation method as a cause of action in Art. 5/A-1 of the TCC, relevant reference is made not only to the commercial cases regulated in the TCC but also to other commercial cases regulated in other laws. In this context, it is necessary to apply to the method of mediation as a cause of action with respect to the commercial cases regulated in both the TCC and in other laws.

On the other hand, in the event that the legal question is assessed with respect to the objective of the regulation of mandatory mediation in Turkish law, the caseloads of courts for intellectual and industrial rights are as intensive as those of Commercial Courts of First Instance and the elimination of uncertainties while not neglecting the principles of speed and trust as well as legal circumstances in doubt are important requirements. Therefore, the objective toward which the mandatory mediation regulation is oriented in Turkish law necessitates the application of mandatory mediation with respect to cases handled by specialized courts with regard to related disputes corresponding to special fields.

117 Yardım (n112), 97.

In conclusion, an action described as a commercial case in the TCC will not lose its nature as a commercial case in the event that it is handled in a specialized court where the judge has more expertise, rather than the Commercial Court of First Instance, and the cause of action will be subject to the cause (condition) of mediation as a requirement of the provision of Art. 5/A. Hence, the condition sought for this in Art. 5/A of the TCC is that the case be a commercial case.

2. Commercial Cases Regulated in Laws Other Than the TCC

It is indicated in Art. 5/A of the TCC that two groups of commercial cases, namely commercial cases regulated in the TCC and commercial cases regulated in laws other than the TCC, are subject to mandatory mediation. The commercial cases regulated in the TCC are specified in Art. 4. The commercial cases included in the scope of that regulation have been explained above in detail. The group of commercial cases regulated in laws other than the TCC, with cases[118] regarded as absolute commercial cases as a requirement of special provisions in laws other than the TCC[119] and examined within the scope of our explanations with relation to Article 4 and cases within the scope of the cases regarded as commercial cases provided a relation to a commercial enterprise,[120] constitute the commercial cases in laws other than the TCC. Main examples of these cases are the absolute commercial cases specified in Art. 99 of the Cooperatives Law, Art. 22 of the LCEP, and Art. 154/3 of the EBL regulations and the cases deemed commercial cases provided that they relate to any commercial enterprise and filed against the violation of relevant intellectual and industrial rights within the scope of the LIAW. These examples are not limited and it is possible to add new ones by legal regulations that are either currently in force or possibly enacted in the future.

B. The Principle Containing Claims for Damages and Receivables Where the Subject of the Claim of the Plaintiff Is the Payment of a Certain Amount of Money

For application to mediation as a cause of action within the framework of Art. 5/A of the TCC, the existence of a commercial case regulated in other laws and within the framework of Art. 4 is not sufficient per se. Furthermore, there is a stipulation for such a commercial case to include claims for damages and receivables, the subject of which involves the payment of a certain amount of money.

This matter is explained in Art. 5/A as follows: "It is a stipulation of the legal action to have applied to the mediator in advance of the initiation of a legal action

118 Section III E, 1, a, xiii.

119 Section III E, 1, 2.

120 Section III E, 1, b.

with regard to the claims for damages and receivables, the subject matter of which refers to the payment of a certain amount of money, among the commercial cases indicated in Art. 4 of the TCC and other laws". This expression is criticized in the doctrine on grounds of the fact that it is written out inconveniently and has thus brought forth various legal questions and problems. The most important problem is related to whether some cases are included in the scope of Art. 5/A of the TCC with respect to the aforementioned principle or not.[121]

3. Assessments Pertaining to Commercial Cases That Are Controversial Regarding Whether the Plaintiff's Claim Is Included in the Scope of Art. 5/A of the TCC with Respect to the Principle of Containing Claims for Damages and Receivables, the Subject Matter of Which Is the Payment of a Certain Amount of Money

It is controversial in Turkish law whether some commercial cases are included in Art. 5 of the TCC and consequently subject to mandatory mediation with respect to the principle of covering claims for damages and receivables, the subject matter of which is the payment of a certain amount of money.[122] Here only the legal actions among these cases[123] such as negative declaratory actions, intellectual and industrial property law actions, and actions involving cumulative claims (objective mergers of cases) will be handled and assessments will address whether these legal actions are within the scope of Art. 5/A.

A. Negative Declaratory Actions

Two different opinions have been put forth in Turkish law regarding the solution of the problem of whether negative declaratory actions occupying an important place in the applications of Turkish commercial law with respect to the "principle of containing claims for damages and receivables, the subject matter of which is the payment of a certain amount of money", are included in the scope of Art. 5/A of the TCC.

In one of these opinions, an interpretation is made only according to the wording of Art. 5/A and it is indicated that negative declaratory actions are not within the scope of Art. 5/A.[124] As a consequence, it is concluded that there is no stipulation in these cases to apply to mediation as a cause of action.[125] The main grounds of

121 See Section III, 3 for assessments and explanations regarding cases that appear to be controversial with respect to this principle.

122 For other cases and assessments subject to the matter in question, see Yardım (n112), 99-100; Koçyiğit and Bulur (n109), 139-144; Nesibe Kurt Konca, "Ticari Uyuşmazlıklarda Dava Şartı (Zorunlu) Arabuluculuk", *SETA Perspektif*, Vol. 2, Iss. 2, 2016, pp. 221, 225, 5; Paslı (n66), 18-25.

123 See Özekes, Ekmekçi, Atalı, and Vural (n12), 185-194 for explanations regarding other cases in question from the point of view of a legal question and also pertaining to such legal questions within the framework of these cases. Yardım (n112), 99-100.

124 Yardım (n112), 99-100.

125 See Yardım (n112), 99-100; see Paslı (n66), 18-20 for explanations of this opinion and its preambles in the doctrine.

the authors[126] defending this opinions are as follows: One of the authors defending this opinion makes a point based on two fundamental principles. One of them is the principle that the literal interpretation has to be taken as a basis in the interpretation on the grounds that there is a procedural provision mentioning Art. 5/A of the TCC with actions for damages and receivables.[127] The other is the principle that the objective of mandatory mediation to reduce disputes to a minimum degree is taken into consideration and its application cannot be extended.[128] Taking these principles into consideration, the author reaches the conclusion that negative declaratory actions are not included in the scope of Art. 5/A on the grounds that the subject matter of the claim in negative declaratory actions is not the payment of a certain amount of money and, therefore, they are not included in the scope of mandatory mediation.[129]

Another author defending the same point of view, however, accepts, in principle, the interpretation that no conclusion could be reached contrary to the wording of the law. More explicitly, the wording of the law could not be eliminated by way of interpretation; however, it is possible to reach different results that the wording of the law has not regulated. On the basis of this principle, the author reaches the conclusion that particularly actions for performance are indicated with the provision of entailing claims for damages and receivables whereby the subject matter is the payment of a certain amount of money, as in Art. 5/A of the TCC. It is stated that it is not conditional in relation to these actions for performance to be related to only the payment of a certain amount of money, and in a wider sense, it is necessary to cover other lending debts as well. On these grounds, both positive and negative declaratory actions are not included in the scope of Art. 5/A and, as a consequence, are not included in the scope of mandatory mediation.[130] On these grounds, the author

126 Paslı (n66), 18-20; Yardım (n112), 99-100.

127 Paslı (n66), 18.

128 Paslı (n66), 19.

129 The author explains this opinion as follows: "In the event that a bill (bond) is not paid and a negative declaratory action is filed according to Art. 72 of the EBL, and in the event that the holder who keeps the bill in hand filed a direct action of debt, then the condition to resort to mediation as a cause of action will be valid and acceptable. This is because there is a demand in this circumstance both for a commercial action and payment of a certain amount of money. However, since the demand in a negative declaratory action where the dispute to be discussed actually refers to the payment of money and the regulation at issue is an arrangement pertaining to the procedure, this, as a declaratory action, will not be subject to mediation as a cause of action". Paslı (n66), 19-20.

130 The assertion of the author in revealing this opinion is as follows: "The claim for the payment of a certain amount of money in Art. 5/A of the TCC refers to an action for performance where the defendant is required to perform his/her payment obligation. In this arrangement, not all types of actions for performance [are considered] but only the actions for performance pertaining to the payment of a certain amount of money without comprising the obligations of performance apart from money and execution or non-execution. Again, the expression of 'receivables and compensation' mentioned in the letter of the arrangement is exactly in the same direction as the wording of 'about the payment of an amount of money'. In this way, the lawmaker has given place to the same wordings, one after the other. The wording at the beginning saying 'subject of commercial cases' refers to the relief sought, as well… The wording 'subject of the case' in procedural law does not correspond to the subject or event in the sense of the word, but rather to the relief sought. As is seen, the wording of 'payment of a certain amount of money' is included in the letter of the article and, at the same time, the arrangement regarding the case has also been emphasized with the wording of 'actions of debt and actions for damages' in the same direction". Yardım (n63), 99-100.

concludes that an application condition is available only for mediation as a cause of action in cases where a claim is brought forth in relation to the payment of a sum of money and, in this context, it is necessary for both positive and negative declaratory actions to not be included in the scope of Art. 5/A of the TCC.[131]

The opposite view of this opinion is also defended in the doctrine, stating that it is necessary for negative declaratory actions to not be included in the scope of Art. 5/A of the TCC and, as a consequence, to be subject to mandatory mediation.[132] The grounds for this opinion are explained as follows: It is accepted in relation to the said legal question that it is necessary to comprehend and take into consideration which interests the lawmaker wants to protect through this regulation and what is targeted again with the same as a basis in the interpretation of Art. 5/A of the TCC. However, along with this, it would not be correct to make an interpretation by the elimination of the wording of the regulation, and the wording is a factor to be taken into consideration thereunder. In other words, it is further accepted that it would be necessary to take the wording and the equity, or namely the spirit of the law, in the activity of interpretation (Art. 2 of the CL);[133] and on the basis of this principle, it is emphasized that Art. 5/A of the TCC is a regulation pertaining to procedural law, and, in this context, the literal interpretation was essential in the interpretation of the procedural provisions. However, in the event that it is not possible to infer an express and clear meaning only from the wording of the law for the resolution of the legal question requiring interpretation, it might be possible to reach a resolution by taking the objective into consideration. In light of this circumstance, there was no clarification from the point of view of the lawmaker regarding the general preamble of Law No. 7155 or the preamble of Art. 5/A to include actions for performance, the subject of which was the payment of a certain amount of money, in the scope of mediation as cause of action, and all other types of cases are considered to be outside of the scope; however, it is indicated that the lawmaker aimed to regulate mediation as cause of action through a similar regulation in all commercial cases by taking the success in cause of action mediation applications into consideration in any labour disputes based on individual and collective bargaining contracts commenced to be applied on the date of 01.01.2018.[134]

131 The author consolidates this opinion by making a comparison and assessment according to the provision of Art. 3 of the LLC. According to this assessment, for "application to the mediator in the actions filed for the employee and employer and compensation and also for reinstatement claims, similar wordings from a partial point of view are regulated as a cause of action. This clause, which entered into force as of 01.01.2018, has not been subject to fundamental discussions with respect to declaratory actions. The most important cause of this is probably that negative declaratory actions are hardly seen in the labour courts. As it is asserted that the arrangement covers not only the action for performance in this period but, at the same time, the negative declaratory action, as well", on the contrary, it is defended that this arrangement is specific only to claims for monetary receivables along with reinstatement action(s) or, in other words, to actions for performance regarding the payment of an amount of money. Çil Şahin, *İş Uyuşmazlıklarında Arabuluculuk*, Yetkin Press, 2018, p. 20.

132 Koçyiğit and Bulur (n109), 140-142.

133 Koçyiğit and Bulur (n109), 140; Kurt (n124), 5.

134 Koçyiğit and Bulur (n109), 145.

It can be concluded that, for the inclusion of both the action for performance and the declaratory action in the scope of the cause of action of mediation without any questions in the doctrine or relevant applications,[135] the following is stated: "It is the condition of the action to refer to the mediator in the cases filed with the claim of reinstatement and any claims for damages as well as employee or employer receivables based on individual or collective bargaining contracts" in Art. 3/1 of the LLC where the cause of action of mediation is regulated and the application continues in this way. Additionally, on the grounds that the declaratory judgment takes place within the context of the provision made at the end of the action for performance, and that the declaratory action was the processor of the declaratory action, as a consequence, negative declaratory actions were included in the scope of the Art. 5/A regulation of the TCC and, therefore, subject to the cause of action of mediation.[136]

Taking the explained preambles into consideration, it is concluded that declaratory actions along with cases on claims for damages and receivables, the subject matter of which is the payment of a certain amount of money pursuant to Art. 5/A of the TCC, are subject to mandatory mediation or namely to the mediation cause of action condition.[137] Furthermore, in addition to the foregoing, it is emphasized that in the event of the acceptance of the matter otherwise, a conclusion contrary to the objective of the lawmaker would be reached, and, in the meantime, substantial confusion would be experienced in practice.[138]

In practice, however, the 14th Civil Chamber of the Regional Courts of Justice of Istanbul did not share the same opinion. The 7th Commercial Court of First Instance of Istanbul accepted a request in an appeal decision in relation to the decision wherein it evaluated a negative declaratory action within the scope of the cause of action of mediation, and, as a consequence, concluded that negative declaratory actions are not included in the scope of Art. 5/A of the TCC and not subject to mandatory mediation.[139]

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135 In our opinion, the inference obtained by taking the LLC wherein mandatory mediation is regulated in the field of labour is related to the scope of Art. 5/A of the TCC and not convenient with respect to the rules of commenting. This is because the TCC is not a legal field that bears a striking resemblance to labour law. On the other hand, such regulations of the LLC are not general provisions that may be taken into consideration in the interpretation of Art. 5/A of the TCC. Therefore, it is necessary to take the particulars and objectives of the commercial code into consideration in the interpretation of Art. 5/A of the TCC.

136 Koçyiğit and Bulur (n109), 142; for example, also see Koçyiğit and Bulur (n109), 142-145; Kurt (n124), 5.

137 Yarg. 11, HD. 13.02.2017, Basis No. 2017/1287, Decision No. 2018/135; Yarg. 11, HD 15.05.2017, Basis No. 2017/4399, Decision No. 2018/2911, Kazancı İçtihat Automation System, htttp://www.kazanci.com.tr (01.08.2020).

138 See Section III.

139 In its preambles and conclusion the court used the following wording: "…returning to the concrete event, the claim of the plaintiff in this case is related to the negative declaratory claim. According to Art. 5/A of the TCC, application to the mediator before filing an action on claims for debts and damages, the subject of which consists of the payment of a certain amount of money according to Art. 5/A of the TCC, is a cause of action. The subject of the action will be determined by taking the petition for relief at the bill of petition, or the relief sought, as a basis. The application to a mediator is a cause of action under circumstances where the relief sought involves the collection of a pecuniary claim or a claim for damages. Negative declaratory actions cannot be evaluated within this scope. This is because there is no claim for the collection of a certain amount of receivable(s) in negative declaratory actions. That is to say, there is no obligation to apply to the mediator

In our opinion, a limitation arose within the scope of the commercial cases in Turkish commercial law in the text of Art. 5/A of the TCC on the basis of the principle that interpretation pertaining to the literal interpretation of regulations pertaining to procedural law forms a basis thereunder, with boundaries of commercial cases requiring application to the cause of action of mediation. In this regulation, it is stated that "the application to a mediator in advance of the initiation of a case regarding the claims for damages and receivables, the subject matter of which has been the payment of a certain amount of money, is a cause of action". As is clearly understood here, it is stated that mediation would be referred thereto in advance of the initiation of cases containing only claims for damages and receivables, the subject matter of which is the payment of a certain amount of money, in commercial cases. This clarification and the certainty in the expression of the regulation are obstacles to making a comprehensive interpretation. It is clearly understood from this wording that only the actions for performances covering claims for damages and receivables, the subject matter of which is the payment of a certain amount of money, are pointed out. With this wording, the lawmaker has put explicit and particular emphasis on the point that it is necessary to not leave disputes in doubt pertaining to any monetary payments where the requirement of trust has been the most certain in the field of commercial cases from the point of view of the application of mandatory mediation.

Another principle constituting an obstacle to a comprehensive interpretation in the face of the fact that voluntary mediation is the exception of mandatory mediation is related to the fact that the scope of the exception cannot be broadened by way of interpretation.

It is also necessary to emphasize that, taking the literal interpretation of the legal regulation as a basis, it is necessary not to violate the essence or objective of the law upon the entire elimination of it. In the assessment of whether or not Art. 5/A of the TCC is violated by the literal interpretation in this manner, it cannot be said that the interpretation pertaining to the wording would not create a contradiction to its objective. This is because the lawmaker brought a restriction like this to the scope of the commercial cases included in the scope of the boundaries of the regulation from the point of view having indicated that the objective would be achieved with expected sufficiency with respect to commercial cases included in the scope of the boundaries. Otherwise, either a restriction of that kind would not be brought in or it would be

for filing any negative declaratory actions with the nature of commercial cases. The justification (preamble) of the first degree court is, therefore, contrary to the procedure and the applicable law. On the other hand, it has been understood in the concrete event that the plaintiff applied to the mediator arbitrarily before filing this action and the report pertaining to the fact that an agreement having been issued with the participation of the mediator could not be reached has been added to the case petition, and the decision subject to appeal has been contrary to the procedure and applicable laws from this point of view, as well. Upon understanding that the first degree court made a decision contrary to the causes of action under the preambles thus revealed, it has been decided to dismiss the decision of the first degree court subject to appeal hereunder pursuant to the provision of Art. 353/1.a.4 of the LPL and to return the same to the said first degree court that made the decision for rehearing…" Istanbul BAM 14 HD, 21.03.2019, Basis No. 2018/52, Decision No. 2019/493 (see http://www.lexpera.com.tr for the full text of the decision (08.03.2020).

preferred to refer clearly to the commercial cases containing relevant requests for expressions or determinations that would enable an extensive interpretation without determining the boundaries of the scope clearly to this extent.

On these grounds, we are in favour of the opinion that negative declaratory actions are not included in the scope of the provision of Art. 5/A of the TCC and, consequently, it is not necessary to apply to the cause of action of mediation for negative declaratory actions.

B. Civil Actions of the Law on Intellectual and Industrial Property

In the doctrine, civil actions of the law on intellectual and industrial property, occupying a significant place among commercial cases with respect to the scope of Art. 5/A of the TCC, have been a topic of discussion.[140]

It is necessary to make an assessment according to whether the subject matter of the case contains any claim for damages and receivables with relation to the payment of a certain amount of money. In this context, if the subject of the legal action contains the claim at issue, then the action or case will be included in the scope of Art. 5/A and be subject to the cause of action of mediation. If it does not contain that, the case will not be included in the scope of Art. 5/A and consequently will not be subject to the cause of action of mediation. For instance, tangible and intangible claims for damages pertaining to disputes with relation to the field of intellectual and industrial law will be subject to the cause of action of mediation. On the other hand, actions of nullity (nullity of a trademark, etc.)[141] and cases covering requests for the determination of an act of violation will not be included in the scope of Art. 5/A on the grounds that they do not comprise claims for damages and receivables with regard to the payment of a certain amount of money. Consequently, they will not be subject to the cause of action of mediation.[142]

C. Objective Case Accumulation (Merger of Cases)

As a requirement of the nature of some disputes, the circumstances arising in cases where a plaintiff may come up with more than one claim against the defendant through the same statement of claim are called "accumulation of cases or objective case merger".[143] This matter is regulated in Art. 110 of the CCP under the heading of "Merger of Cases".

140 For explanations and assessments related to these discussions, see Osman Umut Karaca, "Dava Şartı Olan Arabuluculuk Kapsamındaki Sınai Mülkiyet Uyuşmazlıkları", *FMR*, Vol. 1, Iss. 2019, 2019, pp. 48-50.

141 Paslı (n66), 21.

142 Paslı (n66), 20-21.

143 Yardım (n112), 101; see Section III, B, 3, C for explanations on the circumstances wherein cases referring to the objective joinder of action (or piling up of cases) occur by making these claims with claims for tangible and intangible damages.

The following wording is seen in this provision: "A plaintiff party may come up with more than one principal claim in disfavour of the same defendant and independent of each other in his statement of claim. To this end, it is necessary for the claims forming the subject matters of the cases to take place within the same type of jurisdiction and have a common competent court with respect to all of the claims pertaining thereto".

As is understood from this provision, the four conditions indicated below are necessary for the occurrence of the legal status described as the merger of cases or objective case accumulation:

1) There must be more than one claim that the plaintiff may bring against the same defendant.

2) There must not be the states of essentialness or accessoriness among the claims brought forth thereunder.

3) All of the claims must be included in the scope of the same type of jurisdiction.

4) The court where the action will be filed and claims to be brought forth must have a common jurisdiction with respect to all claims.

In this case, notwithstanding that there is only one statement of claim formally available, there are various cases that are separate and independent from each other, as many as the number of claims principally. In the judicial process, every claim is separately preceded on an independent basis from the others and concluded according to the provision of Art. 297 of the Code of Civil Procedure.[144]

For instance, in the case of a legal action filed with the claim of trademark infringement and, furthermore, in the event that the determination, prevention of infringement, reinstatement, and bringing of claims for tangible and intangible damages are brought forth with the same statement of claim in the same case, then there will be an objective merger of cases. These types of cases are frequently seen in the field of commercial law.[145] This circumstance arises in cases filed against acts of unfair competition-based infringements and also infringements of intellectual and industrial property rights, especially as indicated in the previous example. In this context, it is possible to explain the legal question arising hereunder with respect to the determination of the scope of Art. 5/A under these kinds of circumstances: In the event that there is a claim for damages together with claims such as determination, prevention, reinstatement, and so on, then the legal action will be subject to mediation

144 Yılmaz Ejder, *Hukuk Muhakemeleri Kanunu Şerhi C 3*, Yetkin Press, 2017, p. 1689; Pekcanıtez (n29), 1092; Süha Tanrıver, *Medeni Usul Hukuku, C. I*, Yetkin Press, 2018, p. 629; Uğur Bulut, *Medeni Usul Hukukunda Davaların Yığılması: Objektif Dava Birleşmesi* (Adalet Press, 2017), pp. 23-27.

145 See Füsun Nomer Ertan, *Haksız Rekabet Hukuku: 6102 Sayılı Türk Ticaret Kanunu'na Göre*, XII (Levha Press, 2016), pp. 393-429 for detailed explanations related to various claims that may be asserted in cases that will be filed against any unfair competition acts.

as a cause of action with respect to the claim for damages. In the event that the action has been filed without fulfilment of the cause of action of application to a mediator, will it be dismissed inclusively of claims that are not subject to the cause of action of mediation? There is no doubt that, in such a case, the dismissal of the action in its entirety will constitute a contradiction with the procedural economy, the resolution process will be lengthened, and the dispute will maintain its uncertainty for a longer period of time. This circumstance will constitute a contradiction to the principle of trust that has been the main principle of commercial law and commercial activities. There have been different views put forth in the doctrine with relation to the resolution of this legal question. From the point of view of one of these opinions, it is necessary to separate the part of the action containing the claim for damages and to keep handling the case from the point of view of the other claims.[146]

The opinion indicating that the provision of Art. 5/A pertaining to the cause of action of mediation would be applied with respect to the principal request containing the claim for damages and receivables, the subject of which refers to only the payment of a certain amount of money under circumstances where an objective merger of case(s) is available and the opinion that the other principle claim(s) would not be applied, has been explained in an electronic publication of the Head Office of the Division for Mediation of the Directorate General for Legal Affairs of the Ministry of Justice.[147]

The 11th Civil Chamber of the Supreme Court of Appeals concluded in a recent decision[148] adjudging that a claim for damages and receivables, the subject matter of which is related to the payment of a certain amount of money, brought forth together with a claim not subject to mediation as a cause of action would not be subject to mediation in its decision for the resolution of the aforementioned problem.[149]

146 Paslı (n66), 25.

147 Koçyiğit and Bulur (n109), 69.

148 Yarg. 11. HD, 17.02.2020, Basis No. 2029/197, Decision No. 2020/1578. In an event subject to this decision, the plaintiff claimed that the person in charge of the defendant company collected money with the commitment that such money might be collected back at any time within the discretion of the payer of said money and a high proportion of profit would be distributed/given for the said money, and that this individual relied on that commitment and deposited money of the defendant company in Euro against a partnership status document. However, it was not possible to say that a valid partnership relationship was set up by and between the partners thereunder and it was alleged that the defendant company and the persons in charge of it were responsible for the return of the foregoing money. As a consequence, determination was requested regarding the fact that this individual was not a partner of the defendant company and had asked for the collection of the amount of money deposited in Euro from the defendants. The Commercial Court of First Instance dismissed the case on procedural grounds as "mediation was not resorted thereto as a cause of action in advance of the initiation of the case as a requirement of the provision of Art. 5/A of the TCC". The Regional Court of Justice (or Circuit Court of Appeal) decided to dismiss the case on a procedural basis on the same grounds (for the relevant text, see https://www.lexpera.com.tr/yargitay-kararlari (15.05.2020)).

149 The Supreme Court of Appeals reversed the decision of the Regional Court of Justice: "Notwithstanding that the action for collection, the subject of which refers to the payment of a certain amount of money, is subject to mediation, as the action pertaining to the determination of the fact that a valid partnership relationship has not been set up, is not an action of debt or action for damages, the subject of which refers to the payment of a certain amount of money, and it will not be subject to mediation. In this case, since an action for collection filed with a case not subject to mediation will not be subject to the cause of action, the grounds of the court in the reverse direction have not been found as right or convenient" (https://www.lexpera.com.tr/yargitay-kararlari (15.05.2020).

IV. Fundamental Principles of Mandatory Mediation in the Turkish Commercial Code Pertaining to the Procedure

The principles with relation to procedure among the principles pertaining to mandatory mediation in the TCC are regulated in Art. 18/A of the MCoCD and the MCoCD Reg. in the nature of a general norm different from the principles related to the merits. In other words, there is no legal regulation in the nature of a special norm regulating the principles related to the procedure.[150]

In our following explanations, five principles pertaining to the procedure of mediation taking place within the framework of these regulations in the TCC are presented. These principles are as follows: "The Procedure of Filing an Action in a Case Where No Settlement Is Achieved at the End of Mandatory Mediation Activities", "Place and Mode of Application to Mandatory Mediation", "Durations or Terms Pertaining to the Conclusion of Mandatory Mediation Activity", "Effects of Mandatory Mediation Application on Durations", and "Legal Consequences of Filing a Legal Action Without Resorting to Mandatory Mediation". Discussions regarding the content of these principles and basic legal questions occurring within this context and resolutions to these questions will be examined in the following subsections.

A. The Procedure of Filing an Action in the Event That No Settlement Is Achieved at the End of a Mandatory Mediation Process

It is obligatory for the plaintiff to attach the original copy of the final report that indicates that no settlement was achieved at the end of the due mediation process or a copy of the same, certified by the mediator, to his statement of claim (Art. 18/A-II of the MCoCD and Art. 22-I). In the event that conformity with the said necessity is not achieved, the court shall send a letter of invitation containing a warning to the plaintiff indicating that the final report has to be submitted to the court within a peremptory term of one week or else the legal action or case related thereto will be dismissed on a procedural basis (Art. 18/A-II of the MCoCD and Art. 22-II of the MCoCD Reg.). In the event that the requirement of this letter of warning is not satisfied, it may be decided to dismiss the case on a procedural basis without sending the statement of claim to the counter-party (Art. 18/A-II of the MCoCD and Art. 22-II of the MCoCD Reg.).

B. Principles Pertaining to the Place and Mode of Application to Mandatory Mediation

An application for mediation is submitted to the Bureau of Mediation of the place where the competent court is located according to the subject matter of the dispute

150 See Section IIV, A.

and to the designated registry of the court in places where no Bureau of Mediation is established (Art. 18/A-IV of the MCoCD). The same matter is arranged in a more detailed manner and with some small differences in Art. 18/A-IV of the MCoCD regulation in response to this principle in Art. 23/I-IV of the MCoCD Reg. Namely, the arrangement considers the location of application at the MCoCD arrangement, saying that the application shall be made for the location of the opposing party and that if the opposing party is more than one then to the Bureau of Mediation at the place of settlement of any of them or the courthouse mediation bureau at the place where the work was carried out, and in case of places where no courthouse mediation bureau is established, then to the registry of the designated civil court of peace (Art. 23/I).

In the MCoCD Reg., however, the form of application that might be made by petition or upon filling with the forms available in bureaus or via electronic media is explained. The mode of application seen more frequently in practice is application to mediation by filling in a form at a Bureau of Mediation without a requirement to the statement of claim (Art. 23/III of the regulation).

Again, it is regulated in the MCoCD Reg. that during the application for mediation, the applicant shall be required to explain the matters in question subject to the dispute (Art. 23-IV of the MCoCD Reg.). In practice, despite this regulation, it appears that mediation bureaus do not require any definite or detailed explanations on the subject matter of the dispute and that it is possible to submit a mediation application with substantially general and uncertain expressions. However, when it is taken into consideration that the mandatory mediation activity is a pre-action procedure, it is inevitable that this matter may cause uncertainty and problems.[151]

C. Principles for the Durations or Terms Pertaining To the Conclusion of a Mandatory Mediation Activity (Process)

The provision in the field of the TCC in Art. 5/A-II states that in the case of an application to mandatory mediation it shall be necessary for the mediator to finalize the application within a period of six weeks from the date when the relevant assignment was made and the said period of time might be extended for at most a further period of two weeks. On the other hand, in Art. 18/A of the MCoCD wherein the general principles of mandatory mediation are thereto regulated, in the case of application to mandatory mediation, it is necessary for the mediator to conclude the application within a period of three weeks from the date upon which he/she was appointed and this duration can be extended by one week at maximum due to necessary circumstances (Art. 18/IX, Art. 25/V of the MCoCD Reg.).

151 Yardım (n62), 105.

In the field of the TCC, it is beyond doubt that Art. 5/A-II of the TCC as a requirement of the priority principle of the special norm of Art. 18/A of the MCoCD in the nature of a general norm and Art. 5/A-II of the TCC as special norm have different contents with respect to mandatory mediation. However, the field of commercial activities requires trust and speed to ensure the protection and maintenance of the existence of commercial activities. In this context, while legal arrangements are made with relation to the field of commercial activities, various periods of time are arranged in a shorter manner in comparison to the general provisions in order to fulfil the legal regulations.

When the periods of time are determined with relation to mandatory mediation in the field of commercial law, the opposite is determined. Explicitly, the period of time in the case of the special norm is six weeks for the termination of the mediation activity and, while it may be extended by at most two weeks to become eight weeks all in all, the period of time for the general norm with relation to the same subject matter is three weeks and may be extended for a maximum term of one week, reaching, in total, a full period of four weeks. Thus, the main objective for the existence and maintenance of commercial activities is violated by the extension of the resolution process of commercial disputes.

D. Principles on the Effects of Mandatory Mediation Application on Durations

To ensure the negotiations of the parties without being subject to the pressure of the termination of periods for foreclosure or lapse of time to enable the mediation activity to function properly, the provision in Art. 18/A-XV of the MCoCD specifies that the periods for the lapse of time suspended and terms for foreclosure will not function beyond the duration elapsed from the date of application to the mediation bureau to the date of issuance of the final report (Art. 27/I of the MCoCD Reg).

It is necessary to clarify under which circumstances the final report is issued for this arrangement. According to Art. 18/A-X of the MCoCD, the final report will be issued by the mediator upon termination of the mediation activity and the subject matter will immediately be reported to the mediation bureau. There are four circumstances that necessitate the termination of the mediation activity. These are cases involving impossibility from the point of view of the mediator to get in touch with the related parties, inability to conduct meetings/negotiations since the parties related thereto did not attend the first meeting, agreement of the parties, and disagreement of the same (Art. 18/A-X of the MCoCD).

In Art. 18/A-XVI of the MCoCD, however, the hesitations[152] that may arise with respect to the mentioned arrangements are eliminated through the indication of the

152 See Yardım (n112), 107 for relevant explanations.

fact that this provision has been valid and applicable with respect to the term of litigation as well, regulated in Art. 264/I of the EBL and with issuance of a cautionary attachment decision pursuant to Art. 397/I of LPL No. 6100.

E. Legal Consequences of Filing a Legal Action Without Applying to Mandatory Mediation

The regulations pertaining to mandatory mediation in the nature of a cause of action in the MCoCD are parallel in content to these general principles in the civil procedural law, as well. Namely, according to the regulation in the MCoCD: "It is obligatory for the plaintiff to attach the original copy of the final report that indicates that no settlement has been achieved at the end of the mediation activity or a copy of the same, certified by the mediator, to his statement of claim. In the event that conformity with the said necessity is not achieved, the court will send a letter of invitation containing a warning to the plaintiff indicating that the final report must be submitted to the court within a peremptory term of one week; otherwise, the legal action/case will be dismissed on a procedural basis. In the event that the requirement of this letter of warning is not fulfilled, then it may be decided to dismiss the case on a procedural basis without sending the statement of claim to the counter-party. In the event that it is understood that the legal action was filed without referring to the mediator, it will be decided to dismiss the action on a procedural basis as a result of the lack of the cause of action without undertaking any procedure" (Art. 18/A-II of the MCoCD; Art. 22/I of the MCoCD Reg.). This regulation contains a few possibilities that must be assessed here.[153]

It is clearly understood from this regulation, as in the general provisions, that it is necessary for the plaintiff to refer to the mode of mediation before filing any action and, without doing the latter, not to file any action directly. If he files any action, it will be dismissed on a procedural basis. The plaintiff will only be able to file an action in the event that no agreement is reached at the end of the mediation activity. To ensure the functionality of this system practically, the regulation has been brought forth indicating that it is obligatory for the plaintiff to attach the original copy of the final report that indicates that no settlement was achieved at the end of the mediation activity related thereto or a copy of the same certified by the mediator to his statement of claim.

Notwithstanding that it is noted here that the final report is not added to the statement of claim (apart from a case where it is understood that mediation is not referred thereto), a letter of invitation containing a warning will be sent by the court to the plaintiff indicating that it is necessary for the final report to be submitted to the attention of the court within a weekly peremptory term; otherwise, the action

153 Yardım (n112), 109.

will be dismissed on a procedural basis. In the event that the requirement of the letter of warning is not fulfilled, a decision will be made for the dismissal of the case on a procedural basis without sending the statement of claim for notification to the counter-party.[154]

In practice, the statement of claim is examined for the first time with the preliminary proceedings report. The judge will examine before all else whether it has been referred to mediation as a cause of action before the action was filed. If it is understood in this examination that no referral was made to mediation before the action was filed, dismissal of the case on a procedural basis will be decided without taking any further action as a consequence of the lack of the cause of action (Art. 18/A-II of the MCoCD, final sentence). As can be comprehended from this arrangement, the action will be dismissed on a procedural basis without taking any further action, not under the circumstances wherein the plaintiff fails to attach the final report, but in the event of understanding that the matter was not referred to mediation only.[155] In the event that it is understood long after the fact that the action was filed without referring the matter to mediation either within the period elapsed when the judge examines the statement of claim or fails to notice it and a report of disagreement is possibly issued and the court is applied thereafter, what kind of a decision should be made by the judge? According to the opinion on this matter, notwithstanding that it is not possible to apply Art. 115/II of the LPL with relation to the assignment of a period of time, it is possible to apply Art. 115/III. According to this regulation, if the judge did not notice the lack of the cause of action without getting into the merits of the case and the same was not asserted by the parties related thereto, if that lack or deficiency was eliminated at the moment of decision, then it is necessary to not dismiss the case on a procedural basis as a result of the lack of the cause of action at the beginning.[156]

According to another opinion on the contrary, however,[157] no matter the stage at which the judge notices the fact that mediation was not applied thereto before the legal action was filed (either before or after, without getting into the merits of the case), it is necessary for the judge to dismiss the case on a procedural basis without taking any further action. Under this circumstance, Art. 115/III of the LPL cannot be applied. This is because Art. 18/A-II has brought a more stringent regulation in comparison to the general provisions pertaining to the actions of cause. Notwithstanding that the author asserts that within the framework of the current arrangements or regulations the correct solution is the one he claimed, again, he further adds that it is necessary to make a clear arrangement with respect to what had to be done.[158]

154 Koçyiğit and Bulur (n109), 48.

155 Yardım (n112), 108.

156 Yardım (n112), 109

157 Yardım (n112), 108-109.

158 Yardım (n112), 110.

From our point of view, if an assessment is made in consideration of the objective of the arrangements regarding mandatory mediation to reduce caseloads of the courts related thereto, no matter the stage of action at which the judge notices that mediation was not applied thereto in advance when the action was filed, the case does not have to be dismissed on a procedural basis on the grounds of the lack of the cause of action. Thus, referral to mediation will be achieved without the engagement of the courts. The opposite resolution, however, will create ease in the system, thus encouraging the parties to abstain from applying to mediation. This is because a generalization has been made with a clear and definite expression through the provision in Art. 18/A-II of the MCoCD as follows: "In case it is understood that an action is filed before referral to mediation, it will be decided to dismiss the case on a procedural basis as a result of the lack of cause of action without undertaking any further procedures". This generalization encompasses the current possibility, as well. Apart from this, it is necessary to give a place to a clear arrangement such as the arrangement of sending a letter of invitation containing a warning for granting a weekly peremptory term for a resolution that may create ease in the system. The lawmaker did not want to give any exception that would cause ease in the system apart from this circumstance, arranged explicitly. Along with all possibilities, in the event that it has been understood that mediation has been resorted thereto but the final report was not available as a cause of continuation of the process, what kind of decision should be made by the court has not been regulated on an explicit basis, either. According to an opinion,[159] in light of this possibility, when it is understood that mediation was applied, it should not be possible to dismiss the case without undertaking any further procedures. It is necessary for the judge to grant a reasonable period of time for the submission of the final report.

In our opinion, since the stipulation to refer the matter to mediation has been fulfilled before the case is filed from the point of view of this possibility, the best solution is to grant a reasonable period of time and make a request for the submission of the final report. This is because the parties filed the legal action while the mediation process continued. This circumstance clearly demonstrates that the parties, as a matter of fact, do not have any intention of reaching an agreement.

V. Mandatory Mediation Applications in Turkish Commercial Law

Mandatory mediation has been applied in the field of Turkish commercial law for approximately 1.5 years. Although this duration is considerably short for making any assessment regarding the application of a legal regulation, the applications to date within the field of Turkish commercial law do contain data that offer an opportunity to make an assessment even if it is restrictive.

159 Yardım (n112), 109-110.

A. Determinations Pertaining to Mandatory Mediation Applications in the TCC

Mandatory mediation has been applied for approximately 1.5 years at the time of writing upon the entry into force of Law No. 7155, dated as 06.12.2018, on the Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contracts as of 01.01.2019 and also the regulation of Art. 5/A added to TCC No. 6102. Statistical data pertaining to the determination of mandatory mediation applications in the field of commercial law for the period between 02.01.2019 and 02.12.2019 were published by the Head Office of the Division for Mediation of the Ministry of Justice[160] in 2020. According to these data, the number of files wherein a mediator assignment was made in the field of commercial law within that one-year period was 146,413. Of those, the number of files finalized with agreement was 73,046, or 57%; on the other hand, the number of files not finalized with agreement and referred to the related commercial courts was 55,773, or 43%.

However, it has been determined within the scope of another scientific study[161] related to mandatory mediation applications in the field of Turkish commercial law that various actions were filed directly by lawyers without referral to mediation at all for various disputes that appeared to be included within the scope of this regulation after the entry into force of the regulations of Art. 5/A of the TCC and that those actions were dismissed on a procedural basis on the grounds that the foregoing actions were not referred to mandatory mediation. These cases considered within the scope of Art. 5/A of the TCC were carried over by the lawyers directly to the commercial courts knowing that they would be dismissed without referring to mandatory mediation,[162] or, in other words, in a deliberate manner, in consideration of the fact that the attorney fees for the latter choice would probably be lower.

B. Assessments Pertaining to Mandatory Mediation Applications in Turkish Commercial Law

Statistical data[163] on the applications of Turkish commercial law and in light of the elimination of the principle of voluntariness from mandatory mediation rebuts the

160 http//www.adb.adalet.gov.tr (05.03.2020).

161 Ümit Erdem, *Ticaret Mahkemesi Kararlarında Dava Şartı Zorunlu Arabuluculuk*, Seçkin Press, 2019.

162 The 7th Commercial Court of First Instance of Istanbul indicated in its decision of 40/5331.01.2019 that "it has been decided to dismiss the case on a procedural basis as a result of unavailability of the cause of action upon the fact that the plaintiff directly filed an action without referral to mediation as per his case petition and that mandatory mediation was at issue with respect to the claim for debt subject to the action in this respect…" Furthermore, the 2nd Commercial Court of First Instance of Istanbul indicated in its decision of 540/353 31.01.2019 that "since the fact that no action with relation to the payment of a certain amount of money could be filed without referral to a mediator as a requirement of Subparagraph No. 5/A-1 of TCC No. 6102 entered into force on the date of 01.012019, and it is a proven fact that the action has been filed without referral to a mediator, it has been decided to dismiss the case on a procedural basis without undertaking any further procedure…" See Erdem (n161), 29-304 for various decision models of this type.

163 See Section V, A.

thesis of the supporters of the opinion[164] arguing that the principle of voluntariness is an indispensable condition of mediation with a strict approach indicating that the possibility of mediation processes commencing with compulsion is very difficult or of little likelihood.

Furthermore, the acts of lawyers appear to be another point of determination with relation to said applications and the preference for filing an action directly for various disputes subject to mandatory mediation, giving rise to the possibility of lawyers faced with these disputes having a conscious preference on the grounds of their own interests, such as receiving slightly higher attorney fees to be paid to them in this respect.

Conclusion

We may outline the outcomes of this work as follows:

The lawmaker has shown the will to limit the scope of mandatory mediation in Art. 5/A of the TCC. This is partly because mandatory mediation is exceptional and partly because the goals can be achieved even under these limits. Thus, only those commercial actions containing claims for damages and receivables are made subject to mandatory mediation. The need for speed and security in commercial activities is felt especially for these proceedings. Therefore, uncertainties in relation to the payments may be eliminated through the application of mandatory mediation.

In our opinion, the limitations regarding mandatory mediation that the lawmaker determined in Art. 5/A of the TCC and other laws are in conformity with the nature and requirements of commercial law.

The most fundamental criticism of mandatory mediation is that this model is against the principle of voluntariness. According to this criticism, it is a low possibility that mandatory mediation will result in the agreement of the parties and so it is not practical.

In our opinion, the most accurate reply to this criticism is given by the statistical results on mandatory mediation applications in Turkish commercial law. The number of disputes resolved by the mandatory mediation process is 14% higher than the number of disputes that were not resolved by mandatory mediation and passed on to the courts. This shows that the criticism about mandatory mediation applications in Turkish commercial law is incorrect and that mandatory mediation reached the expected goals in this area.

Finally, with regard to mandatory mediation in Turkish commercial law, since attorneys may tend to take cases to court to receive more fees and some lawsuits are

164 See Section III, C, 2 for explanations regarding the supporters of this opinion and its content.

rejected on the basis of the cause of action of mandatory mediation, the lawmaker must have prescribed strict rules to solve this problem.

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