

- Mike, F., & Laleh, M. M. (2016). Bilgi ve İletişim Teknolojilerinin İstihdam Üzerine Etkisi: Seçili Ülkeler Üzerine Bir Uygulama. *Atatürk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi*, 20(2).
- Sarıçoban, K., Kösekahyaoglu, L., & Erkan, B. G20 Ülkelerinin Teknoloji Yoğunluklarına Göre İhracat Rekabet Güçlerinin Belirlenmesi, SOBİDER Sosyal Bilimler Dergisi / The Journal of Social Science / Yıl: 4, Sayı:11, Haziran 2017, s. 594-609
- Selim, S., Purtaş, Y., & Uysal, D. (2014). G-20 Ülkelerinde Eğitim Harcamalarının Ekonomik Büyüme Üzerindeki Etkisi. *Optimum Ekonomi ve Yönetim Bilimleri Dergisi*, 1(2).
- Yalçinkaya, Ö., & Aydın, H. İ. (2017). Makroekonomik İstikrarın ve İstikrarsızlığın Ekonomik Büyüme Üzerindeki Etkileri: G-20 Ülkeleri İçin Bir Panel Veri Analizi (1994-2015). *Siyaset, Ekonomi ve Yönetim Araştırmaları Dergisi*, 5(4).
- Yalçinkaya, Ö., & Vedat, K. (2016). Ekonomik Büyümenin Sürdürülebilirliği, Eğitim ve Verimlilik İlişkisi: G-20 Ülkeleri Üzerinde Bir Uygulama (1992-2014). *Siyaset, Ekonomi ve Yönetim Araştırmaları Dergisi*, 4(4).
- Yalçinkaya, Ö., & Yazgan, S. (2016). Kurumsal Yapının Ekonomik Büyüme Üzerindeki Etkileri: G-20 Ülkeleri Üzerinde Bir Uygulama (1996-2014)/The Effects of Institutional Structure on Economic Growth: An Application on G-20 Countries (1996-2014). *Business and Economics Research Journal*, 7(4), 31.

The Principle of Confidentiality In Mediation and the Role of Confidentiality In Commercial Mediation

Att. Dursun Al

Abstract

Mediation alternative dispute resolution method, which is considered as one of the ADR (Alternative Dispute Resolution) methods primarily in foreign countries and in Turkey along with the adoption of the LMCD (Law on Mediation in Civil Disputes), has begun to be implemented, and it still rapidly continues to improve. In this method, parties want to settle their disputes with the resolutions they created on a voluntary basis with the participation of a registered mediator. The most important principle of commercial mediation is the principle of confidentiality because the parties do not want their trade secrets to become public, and lose out their advantages at the end of this process due to the explicitly confessed interests. Accordingly, it is required to comprehend the concept of trade secret and specialize in the commercial mediation field.

Keywords: *Alternative Dispute Resolution (ADR), Mediation, Basic Principles of Mediation, Confidentiality, Commercial Mediation.*

1. Introduction

Social and commercial relations developed with globalization have become multi-dimensional and complex. As a result of this developed relations, the number of disputes has increased and still continues to inc-

rease. Resolving the disputes only with the adjudication take a long time lasting for years. Besides, the costs have been increasing, personal secrets have been becoming known, and commercial and technological secrets have been public. At the end of the procedure, the parties need to accept the decision reached.

Mediation dispute resolution method, which is considered as one of the ADR (Alternative Dispute Resolution) methods primarily in foreign countries and then in Turkey along with the adoption of the LMCD (Law on Mediation in Civil Disputes), has begun to be implemented, and it still rapidly continues to improve. In this method, parties determine a voluntary resolution method, in which they may offer their creative solutions, with the participation of a registered mediator.

Voluntariness, mediator's impartiality and independence, and the fact that the parties have the command of the process, and confidentiality may be enumerated as the basic principles of mediation. However, the most important one of such principles is the principle of confidentiality, because the parties do not want to be in a disadvantaged position at the end of this process as their personal and commercial secrets become public and their interests are revealed. Therefore, the fields of family and commercial dispute may be considered as the fields, where the principle of confidentiality has the utmost importance. In this study; after giving general information about mediation, the principle of confidentiality in mediation dispute resolution method will be explained, and the role of the principle of confidentiality in commercial mediation will be discussed.

2. Mediation Concept in General

In our world, which has globalized with the rapidly growing technology and communication, our economic and social lives have changed, and some changes and developments have been experienced in trial as the inevitable result of this change. The non-judicial (amicable) dispute resolution methods were developed in order to relieve the heavy burden on jurisdiction and enable individuals to access justice fast and more efficiently. According to the CAPETELLI and GARTH, access to justice and methods have started to occur in three dimensions in terms of time. First

of all, the institution of legal aid was regulated in the 1960s in order for poor persons' right to access justice not to be restricted, and for economic obstacles to be removed. Secondly, the class actions were recognized with the purpose of removing the organizational obstacles in the 1970s. Regarding the class actions, some legislation has been adopted with the Trade Union Act, the Consumer Protection Law, and the Environment Law. Finally, the non-judicial dispute resolution methods have been developed and implemented.

Dispute resolution methods may be categorized into two groups, as judicial and non-judicial. The judicial dispute resolution methods are adjudication and arbitration. The non-judicial dispute resolution methods are direct meeting (negotiation) and mediation methods. This distinction can be obviously seen in the authentic table below.

Mediation is a non-judicial dispute resolution method. It may also be named as amicable dispute resolution method. The parties of the dispute may resort to the mediation when they have a private law dispute, which they may utilize freely. With the definition of the ADR, meaning Alternative Dispute Resolution method, in foreign countries, and the entrance of the LMCD into force in our country, the mediation dispute resolution method gradually becomes prevalent.

Different definitions are made due to the continuous development of the process related to the mediation and the differences among the cultures and local practices of those countries, on which it was applied. When the characteristics and the purpose of mediation are taken into consideration, it may be defined as follows. Mediation is a kind of special dispute resolution method that an impartial person assists the parties for reaching an agreement through negotiation, and that is voluntary and nonbinding, and that becomes binding on the parties with a document of understanding signed at the end of the process.

Mediation is defined in the article 2 of the LMCD as "a dispute resolution method carried out voluntarily, by employing systematic techniques, with the participation of an impartial and independent third person who brings the parties together to discuss and negotiate, and who establishes a communication process between the parties in order to ensure that they understand each other and find their own solutions by this means, and

in case it becomes evident that the parties cannot produce a solution, who is able to offer solutions, and who are specially trained”. With the sentence “who is able to offer solutions in case it becomes evident that the parties cannot produce a solution”, which was added by Article 17 of the Law no 7036, mediators are enabled to offer solutions for making mediation more effective, and for strengthening the possibility to conclude the process with an agreement.

Mediation is a more advantageous dispute resolution method compared to the arbitration due to the facts that settling a dispute takes shorter time, and that it is based on the principle of voluntariness, and that it is more economical for the parties. However, even though mediation method is a voluntary dispute resolution method, in some cases it confronts us as a mandatory dispute resolution method in the form of the cause of action. The most concrete sample of this in our country manifests itself in the Labor Courts Law no 7036.

It is accepted that the mediation method will provide many benefits in many respects by making it widespread and operational. Because disputes are resolved in a shorter period with less cost and labor. Since the workload of courts will decrease thereupon, the access to justice in litigation files will be provided in a shorter period and more effectively. Moreover, the parties have the command of the process as the parties may express their interests more freely in accordance with the principle of confidentiality. Starting from this point, the information and documents that are used in the mediation process cannot be alleged later on in case of non-agreement. On the other hand, communication is enhanced within the society with mediation method, and it provides a contribution to the social peace since the disputes are resolved without resorting to jurisdiction.

3. Basic Principles of Mediation

We can enumerate the basic principles that have to be taken into consideration from the beginning of the mediation process to the end as follows; voluntariness (willingness), mediator’s impartiality and independence, the fact that the parties’ having the command of the process, and the principle of confidentiality.

The principle of voluntariness contains the characteristics of resorting to the mediation method and participating in the process, and of the fact that the parties are able to freely express their own interests and accept or decline the offers, and of concluding the process. Thus, the parties make their own decisions in the mediation process totally free in resorting to this process, in maintaining the process, and in positively or negatively finalizing the process. The principle of voluntariness is expressed as, “The parties shall be free to resort to a mediator, to continue or finalize the process, or to renounce such a process.” in Article 3/1 of the LMCD.

The mediator’s impartiality and independence mean the performance of the mediation process by an independent and impartial third person. According to this principle, the mediator shall equally treat the parties, and shall not have an interest in the agreement to be made at the end of this process. As a natural consequence of this principle, disqualification of the mediator by the parties, and the mediator’s obligation to immediately inform the parties in the occurrence of such a situation that is contrary to this principle will make a provision of law. This principle is emphasized many times in our country in Article 9 of the LMCD no 6325 and in Articles 8 and 12 of the LMCD Regulation. As a result of impartiality, it is explicitly indicated in Article 9 of the LMCD that the mediator shall not assume a duty at the end of the process as an attorney-at-law of one of the parties. In addition, this principle is emphasized in detail in the Code of Conduct approved by the Ministry of Justice Mediation Board.

The principle that the parties have the command of the process means that the parties have the complete authority to decide and determine the rules regarding the management and continuance of the process.

Since the principle of confidentiality creates the foundation of our study, it will be examined in detail under an individual title.

4. Principle of Confidentiality in Mediation

Principle of confidentiality is one of the most basic principles in mediation, which is one of the non-judicial dispute resolution methods. As a matter of fact, mediation is a specifically preferred method in accordance with the principle of confidentiality since the parties aim at keeping some

issues as secret. For that reason, the principle of confidentiality is regulated in the legislation of those countries, where the mediation dispute resolution method is implemented. The principle of confidentiality is stated as follows in Article 7 of the European Union Directive.

“Given that mediation is intended to take place in a manner which respects confidentiality, the Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

- (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
- (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.”

As a word, confidentiality means a situation that almost nobody knows and carries no risk causing harm to the personal rights, trade and social life of its owner if it is known. Thinking that the information, which the disputant parties declared within the process, and the documents they submitted, bears legal consequences against themselves in the future will cause the process to be negatively concluded. Therefore, getting in contact with the parties and getting free from reservations will be possible by building the principle of confidentiality on a solid ground.

4.1. Confidentiality in Mediation in the Turkish Legislation

The legislative regulations in our country concerning the principle of confidentiality are included in Articles 4 and 5 of the LMCD no 6325, and in Articles 6 and 7 of the LMCD Regulation, and in Articles 3 and 10 of the Turkey Mediation Board Mediation System and Code of Conducts and Code of Practice for Mediators. The Constitutional Court decided to

dismiss the request for repeal in the case, which was filed for the repeal of confidentiality article and some other articles of the LMCD by emphasizing the principle of confidentiality.

According to Article 4 of the LMCD; “Unless agreed otherwise by the parties, the mediator shall be liable to keep confidential the information and documents which are submitted to him/her within the framework of the mediation activity or which he/she obtains otherwise, and other records.

Unless agreed otherwise, the parties shall also be obliged to abide by the principle of confidentiality on this matter.”

Accordingly, the mediator is responsible for keeping the information and records as confidential, which are provided to him/her during the mediation process or he/she acquired in another way. In the second paragraph of the law, those under the confidentiality obligation are separately mentioned by saying “the parties and the other persons participating in the meetings”. The expression of “also the parties” in the old version of the article text is amended as “the parties and the other persons participating in the meetings”, and the persons under the confidentiality obligation are extended. The principle of confidentiality is consolidated with this amendment.

In Article 6 of the LMCD Regulation, after the text of the Law is repeated, a number of different rules are added related to the principle of confidentiality. Accordingly, taking photos and making sound and imagery recording during the practice of mediation shall not be made. It may be decided that the entry of a mediator breaching the principle of confidentiality may be erased from the registry, as his/her civil and criminal liability is reserved. It is also mentioned in the Regulation that the principle of confidentiality shall also include those persons working with the mediator and those ones serving as an apprenticeship. It is regulated unless otherwise agreed, that the parties and their attorneys also have to comply with the principle of confidentiality and that likewise, the officers of the Ministry and the Board are also subject to the principle of confidentiality.

The exception to the confidentiality is further mentioned by saying “unless otherwise agreed”. Accordingly, the parties may introduce exemptions as to that some or all of the information and documents in the process may be disclosed. It should be also accepted that the breach of the principle of confidentiality will not occur at the time when the mediation

agreement is enforced, and in cases where claims of defective wills, such as fault, deception, and intimidation are asserted. Even so, mediators indirectly assisting the adjudicatory activities should report a crime, which is being committed or has been committed but the consequences of which are still limited, to the competent authorities.

4.2. Confidentiality in Mediation from the Aspect of Procedural Law

When a legal action is filed or an arbitration proceeding is started, mediator or third persons including those participating in mediation shall not testify, and the mediation invitation or the request of a party to participate in the mediation activities, opinions and proposals submitted by the parties, suggestions made by the parties or acceptance of an event or claim, and the documents prepared only for the mediation activity shall not be asserted as evidence pursuant to Article 5/1 of the LMCD.

For instance: in the case of *E.J. Wilson v. Sheriff Roland Attaway*, the plaintiff party was arrested as a result of the occurred discussion. The mediator indicated the event that occurred in front of him/her in his/her report, and this report was accepted as the main evidence for punishing the plaintiff party. The plaintiff party filed a lawsuit because of this arrest, as his constitutional rights were violated. The court decided that using the mediation report against one of the parties is going to sabotage the mediation process, after the mediation institution had been applied with the principle of confidentiality.

Pursuant to Article 5/2, it is mentioned that disclosure of the information specified in the first paragraph shall not be asked by the court, arbitrator or any legal or administrative authority (including courts and arbitration), and even though these statements and documents are submitted as evidence despite the prohibition, they shall not be predicated on. However, an exception is introduced to this, and it is mentioned that the said information might be disclosed as much as it is required, in the case that it is ordered by a provision of law, or in the case that it is required for the implementation and enforcement of the agreement that was made at the end of the mediation process. Pursuant to Article 5/3 of the LMCD, in case the mediation is negatively concluded, evidences do not become non-

acceptable evidences because they are only submitted in mediation, even though they may be asserted in litigation and arbitration by the parties.

In Article 5 of the LMCD, it is regulated in detail that the mediator shall not testify concerning the mediation process. Despite that, if the parties agree that the mediator may testify, the mediator may testify. It is also regulated in the law that the third persons participating in the mediation process shall not testify. In this regard, it is controversial in the doctrine whether the legal representative in the position of a third person or legal representative of a legal person may act as a witness. According to the widely accepted opinion, these persons shall not testify as well, but they may be listened through arraignment.

4.3. Consequences of Confidentiality Breach in Mediation

There are several consequences arising from the violation of the above-mentioned principle of confidentiality in mediation. In case the principle of confidentiality is breached by the mediator, parties, persons participating in the meeting, employees and interns working with the mediator, the officers of the Ministry and the Board, meaning all the persons enumerated by the laws and regulations, the compensation obligation shall arise pursuant to the rules of tort liability, non-compliance with the contractual liability and monetary liability. Moreover, it may be decided to erase the mediator from the registry pursuant to Article 21 of the LMCD and Article 6 of the LMCD Regulation. Additionally, the person causing harm to another person's legally protected interests through violating the principle of confidentiality shall be punished with imprisonment up to six months, but investigation and prosecution of this crime shall be subject to the complaint pursuant to Article 33 of the LMCD.

4.4. Confidentiality in Mediation in Terms of Advocacy and Notary

The requirement of being a graduate of a faculty of law with at least five years of seniority in the profession is looked for. Therefore, the principle of confidentiality has a particular importance for Attorneys and Notaries. According to Article 36 of the Attorneys' Act, attorneys are prohibited from disclosing the matters they learned either by reason of advocacy duty entrusted to them or by reason of their duties in the Union of Turkish Bar

Association and in the departments of bar associations. Moreover, consent of the client is required for the attorney to testify in that regard.

With regard to notaries, notary and the notary clerks cannot disclose the secrets they learned by reason of their duties except the situations ordered by the laws pursuant to Article 54 of the Notary Law. We should also mention that no service and duty shall be combined with notary pursuant to Article 50 of the Notary Law. With the letter of the Ministry of Justice, Directorate General for Legal Affairs dated 22.07.2013, there is no legal barrier for the notaries to participate in the mediation training, and also participating in the written and practical examination with the certificate given at the end of training, but due to the above-mentioned article, notaries shall not be registered in the mediation registry, and shall not perform this duty pursuant to the mentioned legislation, even though they receive the mediation certificate in a specified manner.

5. Role of the Confidentiality in Commercial Mediation

No matter how meticulously parties act in making the commercial agreements and in carrying out the commercial relations, the arising of disputes are may not be prevented. When it is considered that the litigation process that is applied for the settlement of commercial disputes takes long years and all the trade secrets become public, it may be said that the non-judicial dispute resolution methods become preferable. Even though it is controversial, the legal remedy of appeal is predicted to extend the litigation process further. In that case, mediation method, in which the parties may comfortably reveal their interests and requests, becomes preferable since it is subject to fewer rules and is less costly, and the dispute reaches a solution in a shorter time compared to the litigation and arbitration. However, mediators specialized in commercial disputes are needed since this is an extremely broad and complex field.

As a rule, litigation is public and cannot be made confidential. This is called as the principle of publicity. Inspecting the litigation and providing the objectivity and trust in justice are aimed with this principle. This principle is expressed with the provisions of “Hearings are open to everybody in courts.” and “Hearing and notification of the decisions are public.”

in Article 141 of the Constitution. Moreover, Article 6/2 of the European Courts of Human Rights “Judgment is rendered publicly.” and Article 11 of the Universal Declaration of Human Rights “Everyone charged with a penal offence has the right to be presumed innocent until 33 proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.” emphasize that the principle of publicity is the inalienable factor of the fair hearing. According to the Constitution and Code of Civil Procedure, when it is certainly required for the reasons of public morality or public safety, the principle of publicity in hearing is not implemented.

Accordingly, it is very clear that the principle of publicity, which is the rule for litigation, has some inconveniences in terms of protecting trade secrets. On the other hand, the whole process is carried out in confidentiality in the mediation dispute resolution method, and the violation of this principle of confidentiality is also protected with various penal provisions. Moreover, the parties may request a special meeting from the mediator for the secrets that they do not want the other party to learn, and the mediator cannot make explanations to the other party regarding the special meeting unless an express consent is given. In this respect, making the mediation meetings and negotiations as confidential enables the mediation dispute resolution method to be more advantageous compared to the litigation.

5.1. Commercial Mediation

First of all, it is required to put in a nutshell what commercial disputes may be in order to discuss the commercial mediation. To begin with, the disputes mentioned in the Commercial Code are within the scope of commercial disputes. In that context, 6 books will enable us to determine the criteria of commercial disputes, comprising “Commercial Enterprise”, “Trading Companies”, “Commercial Papers”, “Transportation Dealings”, “Maritime Commerce”, and “Insurance Law”. Moreover, the following is mentioned in Article 4 of the TCC, which regulates the distinction of commercial litigation; “(1) Civil actions resulting from the business organizations of both parties, non-contentious transactions and regardless of the status of relevant parties as being trader or not, all legal cases related to and arising from the issues partaking in;

- a) This Law,
- b) Articles 962 through 969 of Turkish Civil Code on pawnbrokers, who are lending upon pawn,
- c) Of the Turkish Code of Obligations dated 11/1/2001 and no 6098; Articles 202 and 203 concerning the take-over of the assets and business and the merger and transformation of businesses, Articles 444 and 447 regarding the prohibition of competition, Articles from 487 to 501 regarding the publishing contracts, Articles from 515 to 519 regulating the letter of credit and order of credit, Articles from 532 to 545 concerning the commission contract, Articles from 547 to 554 setting up the rules for commercial representatives, commercial agents and other trader assistants, Articles from 555 to 560 regarding the money order, and Articles from 561 to 580 regarding the safekeeping contracts,
- d) Legislation concerning intellectual property,
- e) In special provisions related to the exchange market, exhibition, fair, markets, warehouse and other places that are peculiar to trade,
- f) In regulations regarding the banks, other credit agencies, financial institutions and money lending transactions are considered as commercial case and commercial non-contentious jurisdictional transactions.”The issues mentioned in this article will be considered in the determination of the commercial disputes. In fact, it is required to mention the disputes arising from this law in the determination of the commercial disputes, as it is in Article 99 of the Cooperatives Law.

With the determination of commercial disputes, it is required to determine which commercial disputes are eligible for mediation. In accordance with the article 1/2 of the LMCD, private law disputes, arising solely from the acts or proceedings, which the parties may freely utilize, including those possessing the element of foreignness, are included in the scope of the mediation.

5.2. Trade Secret

Regulations are made, and sanctions are established in various laws for trade secrets, banking secrets, and customer secrets. In this regard, breaches of trade secrets, banking secrets or customer secrets are considered a crime in Article 239 of the Turkish Criminal Code in order to secure the confidentiality of both real persons and legal persons in commercial life. Likewise, the disclosure of banking secrets and customer secrets by bank employees or third persons are prohibited in article 159/1 of the Banking Law no 5411, and similar rules are established in Article 35 of the Law on the Central Bank of Republic of Turkey no 1211.

The definitions of trade secret, customer secret, and banking secret were made in the “Draft Law on Trade Secret, Banking Secret and Customer Secret”, which was prepared by the Ministry of Justice and presented to the TGNA on 01.02.2008. Despite the fact that this draft law was not enacted yet, such detailed definitions may be used in practice. Trade secret, banking secret and customer secret are defined as follows in that draft:

- a) Trade secret: When the text of Article is looked at, certain characteristics have to exist for determining the scope of the trade secret. These characteristics may be listed as follows:
 - Being known and acquired only by a certain number of people and other officers, and being related to the field of activity of a commercial enterprise or company,
 - The existence of the possibility for sustaining a harm in case it is learned by the competitors of the tradesman, and being among the information and documents that are required not to be disclosed to third persons and the public,
 - Having particular importance for the success and productivity of the enterprise and company in the economic life.

After the characteristics of the trade secret are enumerated in the text of Article, some trade secrets are counted as not limited. Trade secrets enumerated in the text of Article are as follows:

“... information and documents related to the internal structure and organization, financial, economic, credit and cash situation, research

and development activities, operation strategy, raw material sources, technical specifications of the manufacturing, pricing policies, marketing tactics and costs, market shares, wholesale and retail customer potential and network, agreement connections that are subject to or not subject to permission or similar information and documents,”

- b) Banking secret: Information related to the financial, economic, credit and cash situation that are known by the members and other officers of the board of directors and supervisors, and all kinds of information and documents related to the customer potential, crediting, accepting deposit money, management principles, other banking services and activities, and risk positions of the bank,
- c) Customer secret: All kinds of information and documents that commercial enterprises and companies, banks, insurance companies, intermediary firms operating in the capital and financial markets learned in customer relations regarding their own field of activity, and they learned directly or indirectly regarding the personal, economic, financial, cash and credit situation of the customer.”

5.3. Principle of Confidentiality in Commercial Mediation

As it is mentioned in the reasoning of Article 4 of the LMCD as “Confidentiality may sometimes be the most important factor for the parties resorting to the non-judicial dispute resolution methods. If the third persons know that the two parties having important commercial relations are in dispute for exorbitant sums, this might affect their reputation in the market and their business relations, or both parties may not want some confidential matters to become public.”, the principle of confidentiality is sometimes seen as the purpose of preferring mediation.

Even though the mediation has many advantages in the settlement of commercial disputes such as time and cost, the principle of confidentiality has a distinct place as it is in the family mediation. Likewise, we have made detailed explanations above as the legal regulations including penal sanctions were made for providing assurance in this regard.

At the litigation stage, the parties submit their information and documents related to the litigation subject to the file, witnesses are heard in that regard, and some of the documents are occasionally ordered by the court to be submitted. All of these are publicly discussed in the hearings pursuant to Article 141 of the Constitution. Trade secrets are also made public in arbitration. Consequently, the parties may not decide the result of the dispute and what will be written in the decision. Therefore, confidentiality in commercial mediation constitutes the basis for preferring this method.

Aside from the mediation legislation, Istanbul Chamber of Commerce has determined its own mediation rules. The establishment of these special rules is the most concrete indicator of the importance attached to the mediation in commercial disputes. According to these rules, the principle of confidentiality is defined in Article 9 as: “Unless otherwise agreed, the parties and their attorneys, Council, Secretariat, mediator and expert are under the obligation of keeping the information, documents and other records as confidential, which are provided to them within the scope of the mediation activity or which they acquired in another way.

The compliance obligation to the confidentiality rule involves the persons working with the Council, Secretariat, mediator and expert, and the persons under their supervision and observance.”

6. Conclusion

With the definition of LMCD, mediation dispute resolution method is a dispute resolution method carried out voluntarily, by employing systematic techniques, with the participation of an impartial and independent third person who brings the parties together to discuss and negotiate, and who establishes a communication process between the parties in order to ensure that they understand each other and offer their creative solutions by this means, and in case it becomes evident that the parties cannot produce a solution, who is able to offer solutions, and who is specially trained. Having settled in a legal ground with the LMCD that is adopted in our country in 2012, mediation rapidly continues to develop. Some amendments made in the mediation cause of action, which was introduced with

the Labor Courts Law no 7036, and some amendments made in the Mediation Law, are the most concrete examples of the development of the mediation in our country.

One of the fields needing the implementation of mediation dispute resolution method at most is the trading field. In today's world, where the disputes have increased, parties of the commercial disputes, who do not want to wait for the long-lasting litigation process, have started to prefer mediation among the non-judicial dispute resolution methods. For it is possible to reach a solution with less cost by means of this method.

However, the principle that the parties are careful about in the settlement of disputes is the principle of confidentiality. Because it is aimed at precluding the publication of the matter in dispute with the information and documents used in this process that started based on trust. Thereby, both the trade secrets of the parties are not disclosed and their commercial reputations are not hurt. For this reason, the principle of confidentiality is regulated in detail in Article 4 of the LMCD, the LMCD Regulation, and the Mediation Ethical Rules. Moreover, the scope of the principle of confidentiality is widened through some amendments and additions to the confidentiality Article of the law no 7036. The principle of confidentiality does not only include the mediation process, but it is also clearly regulated with the law that the information and documents, which are acquired during the process, shall not be used at the end of the process. The principle of confidentiality is so important in the commercial life that there are various penal sanctions regarding trade secrets, banking secrets and consumer secrets in the Turkish Commercial Code, Banking Law and CBRT Law before the LMCD.

Although the principle of confidentiality, which has recently been settled on a legal ground, was tried to be ensured with penal sanctions, we believe that making the prosecution and investigation subject to complaint and arranging a short-term prison sentence pursuant to Article 33 of the LMCD are not deterrent. Moreover, laying down the condition of "causing a harm to legally protected interest", when the principle of confidentiality is breached, has weakened the sanction, and I would like to mention that proving this condition is considerably difficult.

On the other hand, the principle of confidentiality, which is aimed at preventing the publication of trade secrets and falling in to disrepute, has to be sufficiently assured in order to make the commercial mediation

applicable at a desired level. For this, a number of special regulations have to be made out of LMCD in those matters requiring expertise like commercial mediation. The "Mediation Rules", which were introduced by the Istanbul Chamber of Commerce Arbitration Center, may be considered the beginning of such regulations.

REFERENCES

- Ministry of Justice, Directorate General for Legal Affairs, The letter numbered 98192251.04.1-206/7285, and dated 22/07/2013
http://www.adb.adalet.gov.tr/Duyurular/2013/temmuz/noter_arabuluculuk_faaliyeti.html, (Access Date: 10.11.2017).
- Ministry of Justice, Ticari Sır Banka Sırrı ve Müşteri Sırrı Hakkında Kanun Tasarısı (In English: Draft Law on Trade Secret, Banking Secret and Customer Secret), <http://www.kgm.adalet.gov.tr/tasariasamalari/tbmmkms/tbmmkom/ticarisir.pdf>, (Access Date: 04.11.2017).
- Ministry of Justice, "Türkiye Arabuluculuk Kurulu Arabuluculuk Sistemi ve Arabulucular İçin Model Etik ve Uygulama Kuralları Mart-2013" (In English: "Turkey Mediation Board Mediation System and Code of Conducts and Code of Practice for Mediators March - 2013"), http://www.adb.adalet.gov.tr/Sayfalar/Teskilat/mevzuat/etik_kurallar.html, (Access Date: 04.11.2017).
- AKTEPE ARTIK, Sezin, Sinai Mülkiyet Mevzuatına Göre Marka Hukukunda Arabuluculuk (In English: Mediation in Trademark Law Pursuant to the Intellectual Property Law), *Güncel Hukuk Magazine*, S.164, August 2017.
- Constitutional Court, 2012/94 E., 2013/89 D., 10.07.2013 D., <http://www.resmigazete.gov.tr/eskiler/2014/01/20140125-16.htm> (Access Date: 01.11.2017).
- GOODMAN, Andrew, *Effective Mediation Advocacy* (In Turkish: Arabuluculukta Etkili Taraf Vekilliği), London: Mediation Publishing, July 2017.
- Istanbul Chamber of Commerce Arbitration Center (ITOTAM), Arabuluculuk, (In English: Mediation), <https://www.itotam.com/Arabuluculuk.aspx>, (Access Date: 04.11.2017).
- KGM, Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı ve Avrupa Birliği Komisyonu ile Adalet Komisyonu Raporları (1/486) (In English: Draft Law on Mediation in Civil Disputes and the Reports of the European Union Commission and Justice Commission 1/486), Legislative Period: 24, Legislative Year: 2, 2008 <http://www.kgm.adalet.gov.tr/Tasariasamalari/Kanunlasan/2012Yili/Kanmetni/6325ss.pdf>, (Access Date: 04.11.2017).
- KIRCA, Ismail, Ticari Uyuşmazlıklarda Arabuluculuk ve Arabuluculukta Avukatın Rolü Sempozyumu (In English: Mediation in Commercial Disputes and the Role of

- Attorney in Mediation Symposium), Izmir, Organized by Att. Arb. Mine Demirezen, April 2017, p. 8,
<http://www.adb.adalet.gov.tr/duyurular/2017/nisan/izmirsempozyumnotlari/izmirsempozyumnotlari.pdf>, (Access Date: 04.11.2017).
- PARKINSON, Lisa, Family Mediation (In Turkish: Aile Arabuluculuğu), England: Jordan Publishing Limited, 3th Ed. 2014, edit. Att. Mediator, Yonca Fatma Yücel, Republic of Turkey Ministry of Justice, 2017.
- PEKCANITEZ, Hakan and Oğuz Atalay, Muhammet Özekes, Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku, (In English: Civil Procedure Law Pursuant to the Provisions of the Code of Civil Procedure), 2011, Ankara: Yetkin Publications, 10th Ed., p.274.
- SEYMEN ÇEBİ, Sezgin, Arabuluculuk ve Gizlilik, (In English: Mediation and Confidentiality), Antalya International University Law School Magazine, June 2017, Issue: 9.
- YAZICI TIKTIK, Çiğdem, Arabuluculukta Gizliliğin Korunması (In English: Protection of Confidentiality in Mediation), 2010, Istanbul Culture University: Published Doctorate Dissertation.
- YAZICI TIKTIK, Çiğdem, "Arabuluculuk Sürecinin Temel İlkeleri", İçinde: Temel Arabuluculuk Eğitimi Katılımcı Kitabı (In English: "Basic Principles of the Mediation Process", Inside of: Basic Mediation Training Participant Book), September 2017.
- YEŞİLİRMAK, Ali, "Arabuluculuk Nedir?", İçinde: Temel Arabuluculuk Eğitimi Katılımcı Kitabı (In English: "What is Mediation?", Inside of: Basic Mediation Training Participant Book), September 2017.

Evaluation of The Ukrainian Crisis Within The Context of Regional Security Complex Theory

Burak Sarıkaya¹

Abstract

Ukraine is geographically located as a buffer zone between Russia and Europe. The peoples of Ukraine have shared common historical cultures and backgrounds with the Russians. Ukraine is a trans corridor for the European Union (EU) in terms of energy transmission lines and has a coast to the Black Sea. Due to these factors, its strategic significance has increased for Russian Federation (RF). These common values that Ukraine has shared with Russia and its own strategic position have consistently been in the centre of Russian Federation's near abroad doctrine. There have been two factors which have triggered the crisis in the region: the conflicting forms of perception of regional actors such as the EU and Russia Federation and the fact that the Ukrainian peoples have been continuously forced to choose one side. The main objective of this study is to assess the 2014 Crisis case within the framework of Russian Federation-Ukraine-Europe relations in line with the qualitative definition of the Regional Security Theory. First, the conceptual framework of the theory on which study is based will be drawn. Following this part, Ukraine will be assessed with considering historical, social and strategic vectors that it possesses and how these vectors affect its foreign policy making process and the effect of

¹ Marmara University, Institute of Social Sciences, Department of International Relations, International Political Economy, MSC student, burak.sk3475@hotmail.com